

U.S. DEPARTMENT OF EDUCATION

**Consultation and Coordination with American Indian and Alaska Native
Tribal Governments**

D-R-A-F-T

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I. PURPOSE AND SCOPE

The United States has a unique political and legal relationship with the federally recognized Indian tribes, as set forth in the Constitution of the United States, treaties, Executive Orders (EOs), and court decisions. For centuries, the Federal Government’s relationship with these tribes has been guided by a trust responsibility – a longstanding commitment of our Government to protect the unique rights and ensure the well-being of tribes, while respecting their tribal sovereignty. Education is an essential part of the Federal Government’s trust responsibility to Indian tribes.

The mission of the United States Department of Education (ED) is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access to a high-quality education for all students. ED administers many programs

that are directed toward, or have specific impacts on, American Indian and Alaska Native (AI/AN) students and other tribal members.

In recognition of the Federal Government's trust responsibility – and in fulfillment of the solemn obligations that it entails – ED will further strengthen the United States' government-to-government relationship with Indian tribes by implementing a process that ensures consultation and collaboration with Indian tribes when developing ED policies and actions that have tribal implications, pursuant to EO 13175, Consultation and Coordination With Indian Tribal Governments.

This policy applies to all ED programs that may impact American Indians and Alaska Natives. The implementation of the policy will be led by ED senior officials who are responsible for engaging in consultation and coordination with Indian tribes. This policy sets forth broad guidelines for enhancing ED's consultation and collaboration with Indian tribes and will be reviewed and updated, as necessary, to reflect ED's ongoing engagement and collaboration with Indian tribes.

II. GUIDING PRINCIPLES

ED recognizes the inherent power of Indian tribes to self-government and supports tribal sovereignty and self-determination.

ED will take this right into account in the development of Federal policies or programs that have tribal implications.

ED believes that regular, timely, and meaningful dialogue through tribal consultation is helpful in formulating effective ED policies and programs.

ED believes that the unique educational and culturally related academic needs of American Indians and Alaska Natives should be met.

III. BACKGROUND OF THE POLICY

In 2009, the Presidential Memorandum on Tribal Consultation (Memorandum) was issued to agency heads regarding consultation with Indian tribes pursuant to EO 13175. The Memorandum directed each agency to develop a plan of actions for implementing the directives of EO 13175. In response to the President's Memorandum and feedback from Indian tribes, ED developed its 2010 "Plan of Actions for Implementing Executive Order 13175: Consultation and Coordination With Indian Tribal Governments" (2010 Plan). The 2010 Plan details the steps that ED determined to be most appropriate for providing meaningful consultation to strengthen its government-to-government relationship with Indian tribes. This new ED Consultation Policy supersedes ED's 2010 Plan.

In 2011, ED Senior Officials consulted with Indian tribes on the development of more effective education policies for Indian students. As a result, President Obama issued Executive Order 13592 - Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities. EO 13592 directs Federal agencies to support activities that expand educational opportunities and improve educational outcomes for all Indian

students. It also established the White House Initiative on American Indian and Alaska Native Education (WHIAIANE) and directed the Executive Director of WHIAIANE to coordinate frequent consultations with Indian tribes.

IV. CONSULTATION PROCESS AND PROCEDURES

The Department will consult with tribes, subject to the time constraints for conducting agency business, and will diligently and seriously consider tribal views, information, and interests where significant changes or additions to the Department's programs would have a substantial direct effect on Indian opportunities under those programs. Consultation should be part of an effort to cooperate and collaborate in good faith. Tribal consultation involves regular consultation, and case-by-case consultation as the need arises. For ED, consultation consists of four phases: Identification, Notification, Tribal Input, and Follow-up.

- A. IDENTIFICATION.** Identification of an item for consultation may occur in two ways: (1) ED may identify a policy that is appropriate for consultation; or (2) an Indian tribe may request that ED consult on a specific policy. When an Indian tribe requests consultation with ED, the request should be made in writing to the Secretary of Education, or the Secretary's designated representative, and should describe the specific Departmental action and its possible tribal implications.

1. DETERMINING IF CONSULTATION IS APPROPRIATE

- a. Under EO 13175, a "policy with tribal implications" is defined as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." The Department will implement this definition in accordance with the provisions of this document, including the guidelines set forth in the introductory paragraph of this section IV.
- b. ED administers a number of grant programs that serve Indian students or that have a specific impact on tribes. These include programs under Title VII, Parts A and C of the Elementary and Secondary Education Act of 1965 (ESEA) (Indian Education and Alaska Native Education, respectively), certain career and technical education programs for AI/AN students,¹ certain postsecondary programs that support institutions serving Indian students,² and others.³ Regulatory changes or other major

¹ These are career and technical education programs under the Carl D. Perkins Career and Technical Education Act of 2006 (Native American Career and Technical Education Program and Native Hawaiian Career and Technical Education Program).

² The Department's postsecondary programs for Indian students are authorized by the Carl D. Perkins Career and Technical Education Act of 2006 (Tribally Controlled Postsecondary Career and Technical Institutions Program); Title III of the Higher Education Act of 1965 (the American Indian Tribally Controlled Colleges and Universities program, the Alaska Native and Native

policy initiatives for these programs often have a substantial direct effect on Indian tribes.

- c. ED may also consult with Indian tribes on an action or policy that does not have tribal implications. When there are significant changes or additions proposed to the Department's programs that affect students as a whole, but are not focused solely on Indian students, ED should include Indian tribes in the outreach normally conducted with other stakeholders who are affected by the action.
- d. In accordance with EO 13175, ED must identify and consult with Indian tribes regarding any proposed regulation that has tribal implications. For regulations that would either impose on tribes substantial direct compliance costs not required by statute, or that would preempt tribal law, EO 13175 requires the agency to submit to the Office of Management and Budget (OMB) a tribal summary impact statement in the regulatory document, and take other steps set forth in the EO. Even in cases in which ED is not required to submit an impact statement because the proposed regulations do not impose substantial direct compliance costs or preempt tribal law, consultation may still be required.
- e. ED will consider the inclusion of representatives of Indian tribes in any negotiated rulemaking process that is used to develop significant regulations or other formal policies that have tribal implications.

2. POSSIBLE CONSULTATION MECHANISMS MAY INCLUDE ONE OR MORE OF THE FOLLOWING OR OTHER MEANS OF COMMUNICATION:

- a. Face-to-face meetings at the local, regional, and national levels
- b. Roundtables

Hawaiian-serving Institutions program, and the Native American-serving, Nontribal Institutions program); and ESEA Title VII, Part A, Subpart 2 (Indian Education Professional Development).³ Other programs include the Native American discretionary grant program for English learners under Title III, Part A of the ESEA, and the American Indian Vocational Rehabilitation Services program under Title I of the Rehabilitation Act of 1973. In addition to grants that are targeted to AI/AN students, parts of certain programs have a large impact on AI/AN students, e.g., Impact Aid to local educational agencies (LEAs) that have students residing on Indian lands (Title VIII of the ESEA) and set-asides for BIE-funded schools under various ESEA formula grant programs: Title I, Part A (Improving Basic Programs Operated by LEAs), Title II, Part A (Teacher Quality Improvement Formula Grants), ESEA, section 1003(g) (School Improvement Grants), Title IV, Part B (21st Century Community Learning Centers), and Title VI, Part B (Rural Education). ED also provides BIE set-asides under the McKinney-Vento Homeless Assistance Act, Title VII, Subtitle B (Education for Homeless Children and Youth); and under the Individuals with Disabilities Education Act (IDEA), Parts B and C (Children with Disabilities, and Infants and Toddlers with Disabilities, respectively).

- c. Teleconferences, video conferences, and webinars
- d. Mailings (either electronically, or by postal mail)
- e. Publication of a Tribal Consultation Opportunity in the Federal Register
- f. Tribal Official Task Force – A Tribal Official Task Force may be used for regional or issue-specific matters.
- g. Other regular or special consultation sessions that conform to the processes and procedures of this policy

B. NOTIFICATION OF TRIBAL CONSULTATION OPPORTUNITY. ED will notify potentially affected Indian tribe(s) in writing as soon as possible after determining that a policy has tribal implications.

ED will give the tribes at least 30 days in which to provide comments or prepare for a consultation activity, unless there are unique circumstances that preclude such a time period, in which case, ED will provide a written explanation for the shorter time period. The notification will include, to the extent feasible, the following information:

- a. A description of the proposed policy
- b. A description of the potential tribal impacts
- c. An expected timeline for departmental action
- d. Contact information for appropriate ED staff
- e. Instructions for providing feedback or asking questions about the consultation process, in accordance with this policy
- f. The tribes' ability to request additional information on consultation topics
- g. The date and location of the consultation opportunities

The means of written notification may include letters, mailings, listservs, Federal Register notices, notices in electronic or written publications, or other available means to communicate effectively with Indian tribes.

ED will make reasonable and periodic efforts to notify tribes of the invitation. These efforts of engagement will be appropriately documented.

C. TRIBAL INPUT. Indian tribes will have the opportunity to provide input and to discuss their questions and concerns with ED during a formal consultation opportunity. ED will keep a record of information and comments provided by the tribes during the consultation process. Participants will be informed of how the consultation will be documented. Documentation will include, at a minimum, a list of participants, a summary of the issues discussed, and a thorough description of the input received from the

participating Indian tribes. Examples of documentation include notes of the discussion taken by an ED employee, a video or voice recording, a professional transcript, and written comments submitted in response to a solicitation for tribal input. If ED takes notes at the consultation, it may be appropriate to make the notes available to all Indian tribes which participated in the consultation for review and comment to ensure that the views of the tribes are accurately reflected. If ED creates voice or video recordings of the meetings, the facilitator will notify all participants that the meeting will be recorded. The facilitator should make an announcement at the beginning of the meeting that the meeting will be recorded by a specific medium (such as voice or video). Documentation of the consultation process will be available to the public.

D. FOLLOW-UP. After ED consults with Indian tribes, ED officials will consider the input that was received. Once ED makes a decision about the policy at issue, ED will provide the tribal officials and Indian tribes a written explanation of the outcome of the consultation process. For regulatory actions, the outcomes of the consultation process will be addressed in the preamble to the regulatory document. The written explanation will include the reasons for accepting or rejecting tribal suggestions. The timing of this response may vary and will be determined based on the form of the proposed policy. For ongoing issues identified during regular and case-by-case consultation, Office of Planning, Evaluation, and Policy Development (OPEPD) will provide periodic status reports to the Indian tribe(s).

V. WAIVERS

In accordance with EO 13175, ED will:

- a) Review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.
- b) To the extent practicable and as permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for using flexible policy approaches at the Indian tribal level, in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.
- c) To the extent practicable and as permitted by law, make a decision on a complete application for a waiver within 120 days of receiving it, or as otherwise provided by law or regulation. If the application for a waiver is not granted, ED will provide the applicant with timely written notice of the decision and the reasons for it.
- d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by ED.

VI. OUTREACH AND ENGAGEMENT

The educational experience for AI/AN students often spans multiple jurisdictions including tribally controlled, public, and private schools. Coordination and collaboration between tribe,

state, and local governments is essential to improving the educational experience of AI/AN students. Additionally, outreach and engagement with other entities that also serve AI/AN students increase the likelihood of more effective and efficient delivery of services for these students.

A. ED

Indian tribes and the Federal government enjoy a government-to-government relationship. Outreach and engagement by ED on matters affecting AI/AN students and other tribal members may also be desirable with other entities, which will vary in different contexts. Thus, ED will take local contexts into account and be flexible about outreach and engagements.

These entities may include:

- i. Tribal officials (non-designated)
- ii. Tribal Educational Agencies
- iii. Tribal Organizations
- iv. Inter-tribal organizations
- v. Advisory councils and commissions
- vi. National, regional, urban, or other Indian organizations
- vii. State and local educational agencies, including those whose jurisdiction overlaps that of Indian lands or those serving high numbers of American Indian, Alaska Native, or Native Hawaiian students.
- viii. State Vocational Rehabilitation agencies and tribal vocational rehabilitation projects
- ix. Institutions of higher education, including:
 - x. Tribal Colleges and Universities
 - xi. Native American Serving Non-Tribal Institutions
 - xii. Alaska Native-Serving institutions
 - xiii. Native Hawaiian Serving Institutions
- xiv. State-recognized tribes and non-federally recognized tribal groups
- xv. Native American Pacific Islanders (including American Samoan Natives)
- xvi. Other Native American groups

xvii. Any other appropriate entities or individuals

B. STATE AND LOCAL GOVERNMENTS

To better serve AI/AN students it is essential that state and local governments collaborate with tribes as full partners during the design and implementation of all programs, especially those administered with federal funding. Where practical and appropriate, the Department will encourage state and local governments to consult with Indian tribes when states make decisions that affect Indian tribes and their citizens.

VII. CONFIDENTIALITY

When the matter under consultation involves confidential or culturally sensitive information, WHIAIANE will work with the appropriate Indian tribe to develop a consultation process that addresses the sensitivity and confidentiality of the information.

VIII. DISCLAIMER

This policy applies to all Principal Offices in ED and serves as a guide to enhance ED's consultation processes with Indian tribes and for Indian tribes to participate in ED's policy development to the greatest extent practicable and as permitted by law.

This policy complements, and, unless otherwise indicated in this document, does not supersede, any existing laws, rules, statutes, or regulations that govern consultation with Indian tribes and communities. This policy does not waive any tribal government rights, including treaty rights, sovereign immunities, or jurisdiction. This policy does not diminish any rights or protections afforded to Indian persons or entities under Federal law. This policy also does not diminish any rights or protections afforded the Federal Government or non-Indian citizens under Federal law. This policy does not apply to the Department's selection of grantees to receive awards under a particular program's competition or the specific substantive and procedural components of a particular grant competition that are within the Department's discretion.

This policy is not intended to create any right, and more specifically, does not create any right to administrative or judicial review or any right, benefit, trust responsibility -- substantive or procedural -- enforceable at law by a party against ED or any person. ED also does not, by adopting this policy, waive any applicable privilege it may hold.

DEFINITIONS

Alaska Native-serving Institution: An institution of higher education that at the time of application—(A) is an eligible institution under section 312(b) of the Higher Education Act of 1965 (HEA); (B) has an enrollment of undergraduate students that is at least 20 percent Alaska Native students; and (C) is not a Tribal College or University (as defined in section 316 of the HEA).

Indian Tribe: Any American Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a.

Inter-tribal Organization: Any organization or tribal consortium that represents more than one tribe, and is working collaboratively on national or regional inter-tribal governmental affairs.

Local Educational Agency: As defined in 9101 of the ESEA.

Native American-Serving, Nontribal institution: An institution of higher education that at the time of application—(A) is an eligible institution under section 312(b) of the HEA; (B) has an enrollment of undergraduate students that is not less than 10 percent Native American students; and (C) is not a Tribal College or University (as defined in section 316 of the HEA).

Native Hawaiian-serving Institution: An institution of higher education that at the time of application — (A) is an eligible institution under section 312(b) of the HEA; and (B) has an enrollment of undergraduate students that is at least 10 percent Native Hawaiian students.

State Educational Agency: As defined in section 9101 of the ESEA.

Tribal Colleges and Universities (TCUs): Institutions that qualify for assistance under the Tribally Controlled Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801 et seq.) or the Navajo Community College Act of 1978 (25 U.S.C. 640a note) or that are listed in section 532 of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. 301 note).

Tribal Educational Agencies (TEAs): The agency, department, or instrumentality of an Indian tribe that is primarily responsible for supporting the elementary and secondary education of tribal students.

Tribal Official: An elected or appointed tribal leader or official designated in writing by an Indian tribe to represent the tribe in government-to-government consultations.

Tribal organization: The recognized governing body of any Indian tribe or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities.