

U.S. DEPARTMENT OF EDUCATION
Consultation and Coordination with American Indian and Alaska Native
Tribal Governments

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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 long-standing commitment of our Government to protect the unique rights and help ensure the well-being of tribes, while respecting their tribal sovereignty.

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. As part of its mission, ED is committed to helping to improve the educational outcomes of all American Indian and Alaska Native (AI/AN) students, including those attending public schools, who constitute over 90% of all Native students. ED also administers many programs that are directed toward, or have specific impacts on, AI/AN students and other tribal members. Pursuant to EO 13175, Consultation and Coordination with Indian Tribal Governments, and in recognition of the Federal Government’s trust responsibility, ED will further strengthen its relationship with Indian tribes by implementing a process that ensures meaningful consultation and collaboration with Indian tribes when developing ED policies and actions that have tribal implications.

II. GUIDING PRINCIPLES

The Guiding Principles for ED's processes of consultation are:

- ED recognizes the inherent power of Indian tribes to self-government.
- ED should respect tribal sovereignty and self-determination in the development and implementation of departmental policies and programs that have tribal implications.
- Regular, timely, and meaningful dialogue through tribal consultation is important in formulating effective ED policies and programs that have tribal implications.
- Consistent with its agency mission, ED should assist Indian tribes, states, and school districts in meeting the unique educational and culturally related academic needs of American Indian and Alaska Native students.

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

In the operation of its programs, ED will consult with tribes and seriously consider tribal views, information, and interests, taking into account the resource and time constraints for conducting agency business. ED will also make a serious effort to incorporate those views, information, and interests in ED's programs whenever new initiatives or program changes would have a substantial direct effect on Indian educational opportunities under those programs.

Consultation should be part of a mutual 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 program 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. ED will make proactive efforts to identify policies appropriate for consultation. ED will not rely solely on tribal requests for consultation to trigger consultation.

Determining if consultation is appropriate:

1. 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.
2. 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 policy initiatives for these programs will often affect Indian tribes.

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 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).

3. ED may also consult with Indian tribes on an action or policy that does not have obvious 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 will make a serious effort to include Indian tribes in the outreach normally conducted with other stakeholders who are affected by the action.
4. In accordance with EO 13175, ED must identify and consult with Indian tribes regarding any proposed regulation that has tribal implications (i.e., that have substantial direct effects). 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.
5. ED will invite nominations for representatives of Indian tribes to participate in any negotiated rulemaking process that is used to develop significant regulations or other formal policies that have tribal implications.

B. Notification of Tribal Consultation Opportunity: ED will notify potentially affected Indian tribe(s) in writing as soon as possible after determining that a proposed program change or initiative 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 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:

1. A description of the proposed policy
2. A description of the potential tribal impacts
3. An expected timeline for departmental action
4. Contact information for appropriate ED staff
5. Instructions for providing feedback or asking questions about the consultation process, in accordance with this policy
6. The tribes' ability to request additional information on consultation topics
7. The date and location of the consultation opportunities, if applicable

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

C. Tribal Input: Indian tribes may ask questions and provide ED with their concerns, interests, and recommendations during a formal consultation opportunity. Tribes may propose and comment on topics other than those raised by ED, such as recommendations

for ED's consideration on program initiatives and budgets. Possible consultation mechanisms may include one or more of the following, or another appropriate means of communication:

1. Face-to-face meetings at the local, regional, and national levels
2. Roundtables
3. Teleconferences, videoconferences, and webinars
4. Mailings (either electronically or by postal mail)
5. Publication of a Tribal Consultation Opportunity in the Federal Register
6. Tribal Official Task Force – A Tribal Official Task Force may be used for regional or issue-specific matters
7. Negotiated Rulemaking Committees
8. Other regular or special consultation sessions that conform to the processes and procedures of this policy

ED will provide accommodations to American Indians and Alaska Natives with disabilities as necessary in order for them to participate in the consultation.

ED will keep a record of information provided and comments made during the consultation process for the length of time required by ED's record retention policy. 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 may 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 that 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.

ED will announce any deadlines for written tribal views to be submitted to ED for timely consideration.

Tribal views may be shared informally with ED at any time in recognition of the government-to-government relationship.

D. Follow-up: After consultation, ED will consider the input that was received. Consultation may continue after the end of formal input from tribes. ED will work to integrate tribal priorities and input into ED's decisions, with the goal of reaching solutions that are consistent with the Guiding Principles (Section II) of this document.

When a decision about the policy at issue is reached, ED will make reasonable efforts to make available 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, ED will provide the appropriate parties with periodic status reports.

E. Response to Tribal Correspondence: ED commits to being responsive to correspondence received from tribes and will work diligently to provide information and answers to tribal requests from ED officials at the highest appropriate level.

V. WAIVERS

In accordance with EO 13175, ED will:

- A. In consultation with tribes, 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 important to improving the educational experience of AI/AN students. Additionally, outreach and engagement with other entities that also serve AI/AN students may increase the likelihood of more effective and efficient delivery of services for these students.

To better serve AI/AN students it is important 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 ED programs with tribal implications. For appropriate programs, grants, and other opportunities funded by ED, ED will encourage state and local governments to engage tribal governments in the administration of those programs, grants, or opportunities in a manner similar to the guidance in this document.

Additional outreach and engagement by ED on matters affecting AI/AN students, tribes, and other stakeholders in ED programs may also be desirable, which will vary in different contexts. Thus, ED will make an effort to take local contexts into account and be flexible about outreach and engagement with the aim of accepting input from a broad range of relevant stakeholders, such as: State Educational Agencies, Local Educational Agencies, Tribal Colleges and Universities, Native Hawaiian-Serving Institutions, Native American-Serving, Non-Tribal Institutions, Alaska Native-Serving Institutions, and other organizations.

For consultation events, in addition to Indian tribes, ED may invite other tribal entities, tribal organizations, or individual tribal members to participate. If entities or individuals other than tribal officials are present at the consultation, tribal officials will be provided the opportunity to speak first.

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 program policy and 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.

IX. DEFINITIONS

Alaska Native-serving Institution: As defined in section 317(b)(2) of the HEA.

Indian Tribe: The term “Indian tribe” means any 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 USC 479a.

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

Native American-serving, Nontribal institution: As defined in section 319(b)(2) of the HEA.

Native Hawaiian-serving Institution: As defined in section 317(b)(4) of the HEA.

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

Tribal Colleges and Universities (TCUs): As defined in section 316(b)(3) of the HEA.