

**THE FUTURE OF INDIAN EDUCATION –
OPPORTUNITIES FOR INCREASED TRIBAL CONTROL**

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The Future of Indian Education
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Future of Indian Education—Opportunities for Increased Tribal Control

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I. Existing Opportunities That Might Be Used More Widely

A. Funding for Tribal Education Departments/Agencies (TEDs/TEAs)

1. Section 2020 Grants to TEDS (25 USC 2020)

- Statutory authority has been on the books for years
- Funded by Congress for the first time in FY15 budget—full \$2 million
- Forward funded so money goes out on July 1, 2015 at earliest for next school year, application instructions coming soon
- Statutory priorities for tribes with three or more schools and tribes that wish to take over Education Line Offices
- Use of funds includes code drafting, planning coordination of all education services in tribe's territory (tribal, state, federal, etc).
- DOI has seen a great need for coordination of education for children in the juvenile justice system

2. Sovereignty in Indian Education Enhancements

- 5-6 Tribes participating in the first cohort
- Application Period for next cohort upcoming (eligibility reduced to tribes with two schools)
- Funds TEDs/TEAs to research and plan capacity building for greater tribal control
- Tribes design their own vision for their education system and the path for getting to that vision

B. Grade level expansion for tribally controlled schools

1. FY2014 Budget includes language allowing the Secretary to waive the prohibition on grade level expansion for one grade level at a time when in the best interest of the Indian community. One tribe has applied and been granted the waiver so far. No formal application requirements or regulations yet.
2. Since this authority is contained in annual appropriations act, will need to verify its continued authority every year unless made more permanent by Congress.

C. Adopting a tribal accountability system

1. Accountability system/definition of Adequate Yearly Progress refers to student assessments required under No Child Left Behind and school report cards.
2. Currently, Bureau of Indian Education funded schools use state accountability system (25 CFR 30.104(a))
3. Statutory authority for tribal alternative definition: 20 USC 6316(g)(1)(B)
4. Governing DOI regulations are 25 CFR 30.104-.113
5. Approval of both Secretary of the Interior and the Secretary of Education required.
6. Currently several applications on the verge of approval, may be path marking for other tribes

D. Datasharing Agreements with BIE under FERPA

1. Family Education Rights and Privacy Act (FERPA) is a federal law that generally protects the privacy of student education records. 20 U.S.C. § 1232g; 34 CFR Part 99.
2. Educational institutions may share data with tribes if under a signed agreement designating the tribe as the institution's authorized representative to audit or evaluate Federal or State-supported education programs. See 34 CFR 99.3, 99.31(a)(3), 99.35, 76 FR 75604 (December 2, 2011) (<http://www.gpo.gov/fdsys/pkg/FR-2011-12-02/pdf/2011-30683.pdf>)
3. First Agreement to share student data with a tribe signed in 2013
4. Template available to other tribes as a basis to start drafting a datasharing agreement and also attached to this outline

E. Native language immersion programs

1. Some tribally controlled schools are already operating native language immersion programs.
2. 25 CFR 36.20. "The school's language arts program shall assess the English and native language abilities of its students and provide instruction that teaches and/or maintains both the English and the primary native language of the school population. Programs shall meet local tribal approval."
3. State assessments in English are currently a potential obstacle.

F. Funding Flexibilities

1. Increased Administrative Cost Grant funding from Congress
2. *Shiprock Associated Schools Inc. v. United States*, Tribally controlled schools may use ISEP and other federal funds to fill the gap in Administrative Cost Grant funding appropriations. See attached guidance letter.
3. Spending Guidance from Department of Education available at: <http://www.bie.edu/cs/groups/xbic/documents/text/idc1-029077.pdf>

II. Future Opportunities

A. ESEA reauthorization could include statutory amendments

1. Senator Lamar Alexander's discussion draft at: <http://www.help.senate.gov/imo/media/AEG15033.pdf>

B. Tribally Controlled Colleges and Universities Act reauthorization/amendments

C. Johnson O'Malley student count for supplementary education at public schools

1. Upcoming tribal consultations on allocation method to incorporate new count
2. New JOM Coordinator on staff at BIE

D. Negotiated Rulemaking on the DOI Definition of Adequate Yearly Progress

1. Watch for notices calling for nomination of committee members.

**FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)
AGREEMENT BETWEEN
THE BUREAU OF INDIAN EDUCATION
AND
THE [TRIBAL NATION]**

THIS FERPA AGREEMENT (“Agreement”) is made by and between the Bureau of Indian Education (“BIE”) and the [Tribal Nation full name] (“[Tribal Nation shorter name if applicable]”).

WHEREAS, BIE-operated schools, grant schools, and contract schools operate on the [Name of Tribe/Reservation] pursuant to Title X, Part D of the No Child Left Behind Act of 2001 (P.L. 107-110) at 25 U.S.C. § 2000 et seq. (P.L. 95-561 as amended) and 25 U.S.C. § 2501 et seq. (P.L. 100-297 as Amended), at 25 U.S.C. § 450 et seq.; and

WHEREAS, the [Tribal Nation] [describe tribal entity with oversight of schools, cite applicable tribal law giving authority to that entity if any]; and

WHEREAS, many BIE-funded schools on the [Tribal Nation/Reservation] have not been successful in meeting the student performance criteria established by the states the schools are located in and so far [insert #] [grant or contract] schools are in School Improvement, Corrective Action and Restructuring status under P.L. 107-110; and

WHEREAS, the [Tribal Nation] is working with the Department of the Interior and the Department of Education on enacting an alternative definition of adequate yearly progress under 25 C.F.R. Part 30 that would better serve the specific needs of [Tribe] students [delete this paragraph if not applicable]; and

WHEREAS, both the BIE and the [Tribal Nation] desire to evaluate and improve adequate yearly progress on the [Tribal Nation/Reservation] and improve compliance with the No Child Left Behind Act of 2001; and

WHEREAS, the FERPA, set forth in title 20 U.S.C. § 1232g, and its regulation at Title 34 C.F.R. § 99.1 et seq. (as amended in 2012) generally prohibits the disclosure of a student’s Personally Identifiable Information without consent subject to certain exceptions; and

WHEREAS, 20 U.S.C. § 1232g(b)(1), 34 C.F.R. §§ 99.31(a)(3), 99.35, and 25 C.F.R. § 43.14(i) allow for distribution of student personally identifiable information to authorized representatives of state and local educational authorities in connection with an audit or evaluation of Federal or State supported education programs; and

WHEREAS, the purpose of this Agreement is for the BIE to designate [insert name of individual or tribal entity who will be authorized to receive data] as an authorized representative able to receive student data consistent with FERPA so that it may conduct an evaluation of academic achievement of [Tribe] students attending BIE-funded schools within the [Tribe]’s reservation and receive Personally Identifiable Information without written consent under 25 C.F.R. § 43.14(g) and 34 C.F.R. § 99.31(a)(3); and

WHEREAS, FERPA requires that such information be shared in a way which does not permit personal identification of parents and students by individuals other than employees, officers, or agents

of BIE and the [Tribal Nation] and requires further that the information be destroyed when no longer needed for the purposes for which the evaluation was conducted; and

WHEREAS, the Privacy Act, 5 U.S.C. 552a(b)(3)(5), requires that no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be for a routine use as defined in subsection (e)(4)(D) of this section; and to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable. Furthermore, the Privacy Act, 5 U.S.C. 552a(c)(1)(A)(B),(2)(3)(4), each agency, with respect to each system of records under its control, shall:

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of-- (A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and (B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

WHEREAS, FERPA provides that if any party allowed access to Personally Identifiable Information does not destroy that information when no longer needed for the purposes for which the evaluation was conducted, then that party will be prohibited from access to Personally Identifiable Information from educational records for at least five (5) years.

NOW, THEREFORE, IT IS AGREED as follows:

I. TERM OF AGREEMENT

This Agreement shall be effective upon signature by the authorized representatives of the BIE and the [Tribal Nation], and shall remain in effect until [insert date year from date signed or the end of current school year], or until termination by BIE or the [Tribal Nation] pursuant to Paragraph V herein, whichever occurs first. Upon termination of this Agreement, the [Tribal Nation] shall provide written assurance to the BIE that all data obtained under this Agreement has been promptly destroyed or returned in accordance with the requirements of 34 C.F.R. § 99.35(b).

II. DEFINITIONS AND ABBREVIATIONS

- a) “Disclose” or “disclosure” means the release, transfer, or other communication of Personally Identifiable Information contained in education records by any means, including oral, written, or electronic means, to any party except the party that provided or created the record. Further disclosure of any information released to the Navajo Nation by the BIE is prohibited by this Agreement in that it constitutes a redisclosure of information. 34 C.F.R. § 99.33.
- b) “FERPA” refers to the Family Educational Rights and Privacy Act of 1974 and for purposes of this Agreement means Title 20 U.S.C. § 1232g, as well as all requirements of Part 99 of Title 34 of the C.F.R. (2012), “Family Educational Rights and Privacy.” Nothing in this Agreement may be construed to allow either party to maintain, use, disclose, or share student information in a manner not allowed by Federal law.
- c) “Personally Identifiable Information” has the meaning set forth at 34 C.F.R. § 99.3.

III. REQUIRED TASKS UNDER THE AGREEMENT

a) Joint Responsibilities

- 1. BIE and the [Tribal Nation] shall comply with the provisions of FERPA and applicable regulations in all respects. Nothing in this Agreement may be construed to allow any signatory to this Agreement to maintain, use, disclose or share student information in a manner not allowed by federal law.
- 2. BIE may seek to review or seek written assurances and the [Tribal Nation] agrees to permit the BIE to review its written assurances regarding the use of data transmitted under this Agreement. The purpose of this provision is to ensure that appropriate policies and procedures are in place to protect the Personally Identifiable Information and that personally identifiable information has not been redisclosed or released.
- 3. The parties will reconsider the scope and necessity of this agreement on an annual basis.

b) Responsibilities of BIE

- 1. BIE shall share the requested data with [insert authorized individual or tribal entity] by assigning user right access (READ access) to the Native American Student Information System (NASIS) district edition, Native Star, Northwest Evaluation Association (NWEA), and other student information system data collection programs for purposes of the [Tribal Nation] conducting a study and evaluation of student achievement of [Tribe] Students in grades K-12 in BIE and tribally controlled schools.
- 2. BIE shall designate, and through execution of this agreement, hereby does designate, [name of individual or tribal entity] as an authorized representative for purposes of having access to Personally Identifiable Information of students as detailed in this Agreement and in accordance with 34 C.F.R. § 99.35 and 25 C.F.R. § 43.14(i). [Individual or entity] is an authorized representative for the purpose of 1) conducting an evaluation of the academic performance of [Tribe] students in BIE-funded schools on the [Tribe] reservation in compliance with No Child Left Behind Act of 2011, 2) development of an alternative definition of adequate yearly progress for the [Tribal Nation] under 25 C.F.R. Part 30, and 3) [state any other purposes of study or evaluation—Note: use of data is limited to stated purposes].
- 3. BIE shall post for public access a copy of this Agreement on the BIE website.
- 4. BIE shall allow [individual or entity staff] access to required federal training to become proficient in the use and management of all student information systems. The training will

include security awareness protocols, data management policies, and usage of student information systems. Additionally, BIE shall allow access to [individual or entity] any statistical training to improve the analysis of academic achievement of students and other indicators (cultural, demographic, teacher background, etc.).

5. BIE shall provide technical assistance and guidance on reports developed by the [Tribal Nation].
6. In order to confirm there has been no redisclosure, BIE shall monitor the [Tribal Nation's] use of shared data, including requesting copies of lists of current [tribal entity if applicable] staff authorized to access the data, copies of policies and procedures designed to maintain the security of the data as long as this Agreement is in effect, monitoring activity of user accounts in the NASIS system, and conducting site visits to offices of the [individual or tribal entity].

c) Responsibilities of the [Tribal Nation]

1. The [Tribal Nation] shall use data shared under this Agreement for no purpose other than to conduct an evaluation of federal and state supported education programs in BIE and tribally controlled schools on the [Tribe] reservation including student achievement of [Tribe] Students in grades K-12.
2. The [Tribal Nation] shall not share or re-disclose Personally Identifiable Information received under this Agreement with any other entity, organization, or individual without the prior written approval from BIE. This does not prohibit the [Tribal Nation] or BIE from sharing aggregate student data.
3. The [Tribal Nation] shall maintain all data obtained pursuant to this Agreement separate from all other data files that it possesses and not copy, reproduce, or transmit data obtained pursuant to this Agreement, except as necessary to fulfill the purpose of this Agreement, or the [Tribal Nation] evaluation described in this agreement. Transmission of all FERPA-protected data must be by SECURE electronic systems and/or networks. All copies of data of any type including any modifications or additions to data from any source that contains information regarding individual students, are subject to the provisions of this Agreement in the same manner as the original data.
4. Employees within the [Tribal entity if applicable or name individuals] shall follow current protocols for gaining access to the NASIS system, including completion of Federal Information System Security Awareness Plus Privacy and Records Management Training and completion NASIS Account Access forms and associated Rules of Behavior.
5. [Tribal entity if applicable—delete this paragraph if naming individuals] shall provide to BIE a list of its employees authorized to access NASIS prior to any sharing of Personally Identifiable Information and shall immediately notify the BIE when any of its listed employees leaves employment or is otherwise removed from the list of authorized NASIS users.
6. The ability to access or maintain data under this Agreement shall not under any circumstances transfer from or be assigned to any other individual, institution, organization, government, or entity.
7. The [Tribal Nation] agrees not to disclose any data obtained under this Agreement in a manner which could identify an individual student or parent to any other individual, institution, organization, government, or entity.
8. The [Tribal Nation] shall establish procedures and systems to ensure that all Personally Identifiable Data is processed, stored, and transmitted under the provisions of this Agreement shall be maintained in a secure manner that prevents further disclosure, including the interception, diversion, duplication or other unauthorized access to said data. The [Tribal Nation] shall provide copies of such procedures and systems to BIE upon request.

9. The [Tribal Nation] shall establish procedures and systems to ensure all Personally Identifiable Information obtained is kept in secured facilities and media and that access to such records is restricted to the [Tribal Nation personnel or named individuals] authorized to have access to said data for the purposes of conducting the aforementioned evaluation. The [Tribal Nation] shall provide copies of such procedures and systems and lists of authorized personnel to the BIE upon request [delete “and lists of authorized personnel” if naming individuals].
10. The [Tribal Nation] shall within one (1) hour of being made aware, report in detail to BIE any incidents of any personally identifiable information received from BIE where confidentiality was breached or is believed to have been breached.
11. The [Tribal Nation] agrees to destroy all Personally Identifiable Information obtained under this Agreement within 30 days of when it is no longer needed for the evaluations described by this Agreement or the termination of this Agreement, whichever occurs first. Nothing in this Agreement authorizes the [Tribal Nation] to maintain data received from the BIE beyond the time period reasonably needed to complete the evaluation, and in no case beyond the termination date of this Agreement. Any destruction of the referenced data must be witnessed by one other person who can later attest that a complete destruction of the data occurred. The [Tribal Nation] agrees to submit a letter to BIE within 30 days of the termination of this Agreement, attesting to the destruction of any referenced Personally Identifiable Information received from BIE and describing the method of destruction. No new Agreement will be agreed to by the BIE until the data is returned or destroyed as set forth herein.
12. Unless the data is returned to the BIE, the [Tribal Nation] shall maintain records that document and verify the destruction of the data provided by BIE under this Agreement.
13. The [Tribal Nation] agrees to adhere to any Department of Interior, Indian Affairs, or BIE protocols or directives prohibiting disclosure of data, which would permit public identification of students because of the small cell sizes (i.e., subgroups of 10 or fewer students) of the data. If data is so identified by the BIE or the data elements, it may only be used in a disaggregated or other manner consistent with generally accepted statistical principles that does not permit identification of students.
14. The [Tribal Nation] shall use data to perform descriptive statistical analyses with a variety of predictor variables. Specifically, they will identify students [describe evaluation to be conducted].
15. Subject to the agreed-upon and limited use of requested data provided and only for the purposes asserted in this Agreement, there shall be no further disclosure by the [Tribal Nation] of any of the information provided by the BIE in that this would constitute a redisclosure of information. Under the applicable federal FERPA regulations, that is 34 C.F.R. § 99.33 and 25 C.F.R. 43.19(a), redisclosure is only permitted upon obtaining prior consent of the parent or eligible student of the Personally Identifiable Information. The [Tribal Nation] shall submit any proposed publication arising from this work to the BIE prior to publication in order to allow the BIE to verify that disclosure of student and parent identities has properly been avoided.
16. Under no circumstance shall the [Tribal Nation] become owners, proprietors, or custodians of any data or Personally Identifiable Information provided by the BIE under the terms of this Agreement.

IV. SCOPE OF AGREEMENT

This Agreement incorporates all the understandings between BIE and the [Tribal Nation] concerning this subject matter. No prior agreements, verbal representations, or understandings shall be valid or enforceable unless embodied in writing in this Agreement.

V. TERMINATION OF AGREEMENT

This Agreement may be terminated by the BIE or the [Tribal Nation], upon advance written notice of 14 (fourteen) days. The BIE may terminate the Agreement immediately upon confirmation of fraud, negligence, redisclosure, or abuse of confidentiality. This Agreement shall terminate automatically on [insert date four years out or other appropriate date], unless extended by a written agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the year and date indicated, with the effective date being the most recent signature.

BUREAU OF INDIAN EDUCATION

BY: _____ Date: _____

Dr. Charles M. Roessel
Director, Bureau of Indian Education

[TRIBAL NATION]

BY: _____ Date: _____

[Name of Tribal Leader or Signing Official]
[Title of Tribal Leader or Official]



United States Department of the Interior

BUREAU OF INDIAN EDUCATION
Washington, D.C. 20240

JUL 17 2013

Dear School Administrator:

On March 28, 2013, the United States District Court for the District of New Mexico issued an opinion and order denying the agency's motion to dismiss Plaintiff's claims in *Shiprock Associated Schools, Inc. v. United States, et. al.* In its analysis of the "administrative cost limitation" in Section 2502(b) of the Tribally Controlled Schools Act ("TCSA"), the Court found that "TCSA set the administrative cost limitation at the School's Calculated Need Amount." (Op. at 13.)

Accordingly, the Court found that the TCSA allows a grant school to use TCSA grant funds "to defray the costs of its necessary administrative functions, so long as those costs do not exceed its Calculated Need Amount." (Op. at 21.) Furthermore, the Court specifically found that the grant School could use Indian Student Equalization Program ("ISEP") funds to pay for those administrative costs exceeding their pro-rata formula amount determined pursuant to 25 U.S.C. § 2008(j)(2), but falling below their calculated need amount determined pursuant to 25 U.S.C. § 2008(c).

Effective immediately, and applicable to all Public Law 100-297, Tribally Controlled Grant Schools, the Bureau of Indian Education Grants Officers will allow a grant school's use of ISEP funds to pay for its necessary administrative costs, so long as those expenditures do not exceed its Calculated Need Amount and are not disallowed under any other applicable law or regulation.

BIE Grants Officers also will allow a grant school to draw down from all other funds included in the TCSA grant in order to make up the difference between the school's pro-rata formula amount and calculated need amount for administrative costs, only if (1) the use of those funds for those costs is allowable under the non-ISEP program authority (e.g., the Elementary and Secondary Education Act or the Individuals with Disabilities Education Act, and their implementing regulations) and (2) the costs are "necessary and reasonable for proper and efficient performance and administration" of the allowable program activities. See OMB Circular A-87 (Attachment A, subsection C.1.a.)

Please share this correspondence with Certified Public Accountants conducting A-133 audits at your locations. If you have any questions, please contact David Talayumptewa, Assistant Deputy Director for Administration, at (505) 563-5227.

Sincerely,

Dr. Charles M. Roessel
Acting Director, Bureau of Indian Education

cc: Deputy Assistant Secretary – Management, IA
Deputy Bureau Director, BIE
Associate Deputy Directors, BIE – East, West and Navajo
Assistant Deputy Director - Administration, BIE
Director, Office of Internal Evaluation and Assessment