



June 30, 2017

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Ave., SW
Washington, D.C. 20202

Re: Secretary’s Review of Regulatory Requirements in the Department of Education

Dear Secretary DeVos,

Thank you for the opportunity to provide feedback on the Department of Education’s (the Department’s) review of regulatory requirements related to Native education. The National Indian Education Association (NIEA) advocates for improved educational opportunities to enable Native students to thrive in the classroom and beyond. Part of our work and our mission is providing the Department feedback on how it serves Native students, so we take the Secretary’s request on regulatory provisions related to Native education seriously.

The Federal Trust Relationship

Since our creation in 1969, NIEA’s work has centered on reversing negative trends within Native education, an objective that is possible only if the federal government upholds its trust responsibility to tribes. Established through treaties, federal law, and U.S. Supreme Court decisions, this relationship includes a fiduciary obligation to provide parity in access and equal resources to all American Indian and Alaska Native students, regardless of where they attend school. So, as we look at regulatory reform, it is important to state that under the federal government’s trust corpus in the field of Indian education, the obligation is shared between the Administration and Congress for federally-recognized Indian tribes.

Regulations that Impact Native Educations

For several of the programs that impact Native students, NIEA has no concerns because there are either no or very few regulations: the Indian Education Formula Grant Program in Section 7112 of the Every Student Succeeds Act (ESSA), the two main programs that serve Alaska Native and Native Hawaiian students in Section 7202 (The Native Hawaiian Education Act), and Section 7301 of ESSA (The Alaska Native Educational Equity, Support, and Assistance Act). There are no or very limited regulations that interpret their statutory language. As a result, our comments focus on regulations that impact Native students outside these programs.

NIEA’s Views on Title 34’s Regulations Regarding the Department and Native Education

Overall, we support the Title 34 regulations. Based on our experience working with the Department and with the regulatory frameworks we have advocated on since our founding and on a thorough review of Title 34 of the Code of Federal Regulations, NIEA does not believe that Native programs that are related to the Department of Education regulations are overregulated, with one exception. The sections below

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identify this exception as well as three regulations we particularly support and our suggested revisions and additions for two.

Regulations That We Recommend Eliminating

NIEA recommends eliminating one regulation as duplicative and unnecessary:

1. Eliminate 34 CFR Section 263.4: What Costs May a Professional Development Program Include? NIEA recommends eliminating the limits on the eligible costs for Professional Development Programs in the Indian Education Discretionary Grants Program. Section 6122 of ESSA provides flexibility for tribes and other eligible entities to promote the education and professional development of Indian educators. The regulations limit such activities to scholarship and career placement programs for Indian students. Eliminating Section 263.4 will allow for more flexibility in awarding funding as long as proposals meet the purposes identified in the statute: Indian teacher development, training, professional development, and retention.

Regulations NIEA Supports as Critical for Native Student Success

Title 34 has three regulations that we see as particularly important:

1. NIEA strongly supports regulations related to the collection of data on Native students in 34 CFR Section 100.6, 34 CFR Section 106.61, and 35 CFR Section 100.71. Collection of data with respect to Native students is absolutely essential to serving American Indian, Alaska Native, and Native Hawaiian students and the regulations that enable the Department to collect data on Native students must continue. The regulations are consistent with the most widely agreed upon conclusion from educational efforts over the last twenty years: accessible data on students is essential to improving education for groups of students who have historically not been served well. NIEA strongly supports maintaining the Civil Rights Data Collection (CRDC) as a whole and the collection of data on Native students under the regulations. We stand with the Leadership Conference on Civil and Human Rights with respect to CRDC data and encourage states to work with tribes and tribal education departments on data collection in order to be specific on which tribe a student is affiliated with.
2. 34 CFR Section 263.5: Preserve Priority for Indian Tribes, Indian Organizations, and Indian Institutions of Higher Education. NIEA supports the competitive priority provided to Indian tribes, Indian organizations, and Indian Institutions of Higher Education that apply for Professional Development Grants within Indian Education Discretionary Grants Programs in Section 263.5 of Title 34 of the Code of Federal Regulations. The priority recognizes the trust relationship that the United States shares with tribal governments and the critical role of tribal communities in educating the next generation of Native leaders. As the Department reviews and streamlines regulations, NIEA believes it is important to preserve Native leadership with respect to the Discretionary Grant Program for Native Professional Development. This Regulation allows for that priority, consistent with NIEA's experience.
3. 34 CFR 222: Impact Aid. NIEA is concerned that states not include Impact Aid funding in calculations of eligibility or when determining the amount of funding schools can receive. With



respect to equalization of state funding, NIEA stands with the National Association of Federally Impacted Schools and the National Indian Impacted Schools Association and their comments.

Regulations that we Recommend Revising

NIEA recommends revising two sets of regulation to better serve Native students:

1. 34 CFR Section 200.29: Consolidation of Funds in a Schoolwide Program. NIEA recommends that the Department revise the Title I regulations in 200.29 (c) (2) to clarify that Title VI parent advisory committees have full discretion not to allow consolidation of Title VI funding with Title I funding. Title VI is intended to benefit Native students. NIEA has heard of far too many instances where Title VI funding is not used for its intended purpose and is instead used for students with limited incomes as a whole. We recommend that the regulations be revised to include the underlined words:

(2) *Indian education.* The school may consolidate funds received under subpart 1 of part A of Title VII (Title VI) of the ESEA if and only if the parent committee established by the LEA under section 7114(c)(4) of the ESEA approves the inclusion of these funds.

Adding the underlined language will clarify to parent committees that they do not have to approve the use of Title VI funding for schoolwide programs if they are not confident that Native students will benefit. This signal is important as school officials have been known to pressure parent committees into signing against their instincts.

2. 34 CFR Sections 222.17: Include Tribes in Each Step of Process to Withhold Funds. NIEA recommends that the Department notify tribes after a denial of a request for a hearing on withholding Impact Aid funds from LEAs under Section 7004 of ESSA. Specifically, under Section 222.17(d)(2), tribes are not notified when an LEA’s request for a hearing on withholding funds is denied due to problems with the LEA’s Indian Policies and Procedures (IPP). As a critical source of funding for Native students on Indian lands, the decision to withhold Impact Aid funding has a significant impact on Native students and their communities. Tribes should be notified even when an LEA’s request for hearing is denied.

Add Regulations on Consultation Consistent with Local Control of Education

NIEA’s history and commitment to Native education compels us to identify the one other subject where additional regulations are appropriate: tribal consultation. Tribal consultation at both the state and local levels are critical components of the ESSA. At NIEA, we see consultation as its own subject, fully distinct from the Accountability Regulations that your letter asked us not to consider in 34 C.F.R. 200.12-200.79. Tribal consultation is a distinct process from stakeholder consultation, and it is consistent with tribal sovereignty and the Federal Trust responsibility for Native students. Based on this history, the Department should provide simple regulations that clarify simple, fair steps for consultation under ESSA.¹

¹ Your letter asking for comment on regulations applicable to Native students mentions that 34 C.F.R. Section 200.12-200.79 has no force and effect. We acknowledge that the Accountability Regulations include references to



Conclusion

Through the recommendations on the Department’s organizational structure and regulations that impact Native education, NIEA looks forward to working alongside the Department to drive federal resources to the only students that the federal government has a direct responsibility to educate – Native students. If you have any questions, please contact Ahniwake Rose, NIEA Executive Director, at arose@niea.org.

CC: Bernard Garcia, Acting Director, Office of Indian Education

Sincerely,

Principal Chief James Floyd
Muscogee (Creek) Nation

Brian Cladoosby
Swinomish Indian Tribal Community
President, National Congress of American Indians

Chief Kirk Francis, Sr.
Penobscot Indian Nation
President, United Southeastern Tribes, Sovereignty Protection Fund

Jackson Brossy
Navajo Nation
Executive Director, Navajo Nation Washington Office

consultation, but think Section 8538 of ESSA and state tribal consultation are distinct subjects that are not “substantially similar” under the Congressional Review Act.



A handwritten signature in black ink, appearing to read "Yatibaey Evans".

Yatibaey Evans
Antna (Athabascan)
President, National Indian Education Association

A handwritten signature in blue ink, appearing to read "Gloria Sly".

Gloria Sly
Cherokee Nation
President, Tribal Education Department National Assembly

A handwritten signature in black ink, appearing to read "Carla Mann".

Carla Mann
Blackfeet Nation
President, National Johnson-O'Malley Association