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EDUCATION SOVEREIGNTY:

**RESTORING SELF-DETERMINATION IN
NATIVE AMERICAN EDUCATION**

POLICY PAPER NO. 16-01

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**PATHKEEPERS FOR INDIGENOUS KNOWLEDGE
BOARD OF DIRECTORS**



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What is “Education Sovereignty”?

Control over the learning and education of one’s children is a basic human power that all sovereigns exercise within their communities to perpetuate the uniqueness of their culture, identity and language. Tribes as sovereign governments must be able to assert this same power. However, existing Federal education laws and policies fundamentally limit Tribal sovereignty over their youth’s education. These limitations are in conflict with and undermine Federal self-determination laws and policies as well as the Federal trust responsibility.

Native youth are the future problem-solvers and social entrepreneurs for their communities: future Tribal leaders, medicine people, artisans, administrators, educators, doctors, mechanics, carpenters, nurses, lawyers, and more. To develop the critical and creative thinking skills they will need to fulfill these rolls and lead Indian Country into the 21st century, Native children must have the opportunity to develop and practice these skills during their youth.

The Federal government has treaty and trust responsibilities to provide for and fund the education of Native children. Just as they do in other areas, like taxation, jurisdiction, and regulation, Tribes should be able to maintain sovereign control over their education systems, standards, and policies. Tribes – not Federal or State governments – are in the best position to know what and how their youth should be educated. As such, the Federal government should fund Tribally-designed education systems and their supportive infrastructure. This is similar to the Federal government’s funding of Tribal membership, elections, and other internal governance while not interfering with them as they are purely internal operations.

In the event that any Tribes choose to participate in existing Federal and State education systems, Federal laws should be amended to allow Tribes to “opt-in” versus the “opt-out” provisions of current laws. Legislation or administrative programs providing for pilot projects funded by the Federal government, in which Tribes can design their own education systems, should also be created.

Today, Tribes are not teaching the majority of Native youth. Instead, States – not Tribes – now teach most Native youth and are arguably the greatest influence on the intellectual and social development of young Native minds. Currently, about 92% of all Native youth attend State public schools. Nonetheless, whether they attend State public schools or schools funded by the U.S. Bureau of Indian Education (“BIE”), Native youth are almost completely subject to State public

school policies, curriculum and standards. In the State schools, Tribes have little opportunity to influence their youth's education and social development. In schools funded by the BIE, Tribes tend to have more opportunities to influence how their children are educated, but they are still generally required to apply State education policies. The result has been that in all these schools, Native youth remain at the bottom of education and social statistics with the worst graduation rates, achievement results, teen suicide rates, and attainment of college degrees, for example.

Under existing law, the only way for Tribes to exercise true sovereignty over the education of their children is to create Tribally funded and operated schools without any financial assistance from States or the Federal government. This contradicts the Federal trust responsibility to provide education for Native youth and its policy of Tribal self-determination over their youth's education. Furthermore, very few Tribes have the resources to create and fund such schools themselves.

The Southern Ute Indian Tribe is one of a very few Tribes to establish such a school: the Southern Ute Indian Montessori Academy ("Academy"). The Southern Ute Tribe founded the Academy in 2002 as a Montessori school for Southern Ute children age 0 to 12 years. Southern Ute removed many of its children from local State public schools and started this school to provide its children with a strong academic foundation but also a learning environment that supports Southern Ute culture, language, and values. The result has been a new generation of Southern Ute children who can speak their language, are immersed in their culture, and actually enjoy going to school.

To reform Native education and empower Tribal education sovereignty, Federal law must be revised to remove all these Federal and State standards and limitations from education policies impacting Tribes. This is the only way to ensure that Tribes will be able to truly self-determine their education and logic systems just as any sovereign does.

Federal Trust Responsibility and Self-Determination Policies in Native Education.

Through treaties, the U.S. Constitution, U.S. Supreme Court decisions, and Congressional laws, the Federal government has a trust responsibility to provide for the education of Native youth. This responsibility is rooted in the government-to-government relationship between the Federal government and Indian Tribes which began with the first exchanges and treaty negotiations. In fact, most treaties and agreements contain provisions requiring the Federal government to provide schools and education to Tribes, which Tribes accepted in part for relinquishing lands and resources. For example, in treaties with the Choctaw, the Federal government agreed to provide schools and staff "in said nation . . . at the option of the Choctaw Nation." Treaty with the Choctaws, Jan. 20, 1825, art. 2 (7 Stat. 234); *see also* Treaty with the Nisqually, Puyallup and Other Indians, Dec. 26, 1854 (10 Stat. 1132).

For the next 150 years, the Federal government employed education policies aimed to "remove the Indian from the Indian" by assimilating Native children to Western beliefs and practices. The United States forcibly removed Native youth from their families and put them in boarding and day schools where school staff cut their hair, changed their dress, restricted Native languages, and required the learning of non-Native subjects. As intended, this had the effect of transforming entire generations of Native peoples.

Finally forced to admit the glaring failures of these policies, the Federal government acknowledged in the Indian Self-Determination and Education Assistance Act that its “education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide.” 25 U.S.C. § 450(b)(2). To address these miscarriages, the Federal government set forth a “meaningful Indian self-determination policy . . . [to] permit an orderly transition from the 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.” 25 U.S.C. § 450a(b); *see also* 25 U.S.C. § 2501(b).

It is now the policy of the Federal government “to facilitate Indian control of Indian affairs in all matters relating to education.” 25 U.S.C. § 2011(a). Federal regulations further support this policy recognizing that Tribes should “fully exercise self-determination and control in planning, priority-setting, development, management, operation, staffing and evaluation in *all* aspects of the education process.” 25 C.F.R. § 32.4(a)(3) (emphasis added).

Implementation Fails to Fulfill Self-Determination Education Policies.

While the Federal government claims to support Tribal self-determination in the education of Native youth, it has failed to properly implement these policies. Instead, the Federal government requires that all State and BIE funded schools follow Federal and State (not Tribal) curriculum, academic standards, accreditation requirements, truancy laws, assessment, and other education policies. These requirements do not “facilitate Indian control of Indian affairs in all matters relating to education.” 25 U.S.C. § 2011(a). In addition, as we explain in the next section, so-called “alternatives” to these requirements provide little support for Tribes’ sovereign control over their education systems.

In short, both State and BIE funded schools fundamentally do not reflect Tribal self-determination and control in the planning and management of Native youth’s education. Below are just a few examples of the intrusions of State and Federal standards and policies into Tribal education:

- **Accreditation.** All Tribal schools funded by the Federal government must satisfy State or regional accrediting standards equal to or approved by the State in which a school is located or by a regional accrediting agency. *See* 25 U.S.C. § 2001(b)(1)(A).
- **Assessment Standards.** All Tribal schools funded by the Federal government must follow the assessment standards of the State in which they are located. *See* Every Student Succeeds Act, Pub. L. No. 114-95, § 8007(2) (Dec. 10, 2015) (“ESSA”); 20 U.S.C. § 6311(m); 25 C.F.R. §§ 36.12, 36.50. Even schools accredited by a Tribal accrediting agency or Tribal division of education must use assessment standards that are essentially the same as the State assessment standards. 20 U.S.C. § 6311(m)(3).
- **Academic Standards.** All Tribal schools funded by the Federal government must follow Federal and State academic standards. 25 C.F.R. Part 36; ESSA, Pub. L. No. 114-95, §§ 6002(b), 8007(2).

- **Compulsory Attendance.** Continuing the historical legacy of forcing Native youth to attend school (often away from their families, culture and communities), Federal regulations require Native children to attend school in compliance with the compulsory attendance policies of Federal regulations, Tribal education ordinances, *and* “statutes of the State.” 25 C.F.R. §§ 31.4, 36.11(b). In addition, a parent or guardian “commits a [criminal] violation if he or she neglects or refuses to send the child to school,” 25 C.F.R. § 11.424(b), and is subject to up to 3 months in prison, or a fine of up to \$1,000, or both, *id.* § 11.450.
- **Graduation Requirements.** To graduate and receive a high school diploma, Native students must follow the Federal credit requirements at a minimum or the State credit requirements if they exceed the Federal credit requirements. 25 C.F.R. § 36.32(b).
- **Qualified Teachers.** Except for Native teachers specifically hired to teach Tribal culture and language, “[j]ob qualification requirements shall be at least equivalent to those established by the appropriate licensing and certification authorities *of the State* in which the position is located.” 25 C.F.R. § 38.5(a), (b)(1) (emphasis added).
- **Substitute Teachers.** All substitute teachers within a Federally-funded school must be “a certified substitute teacher who meets *the State* substitute teacher qualifications.” 25 C.F.R. § 36.11(a)(5) (emphasis added).
- **Immunization.** To attend school, Native children must be “immunized in accordance with the regulations and requirements *of the state* in which they attend school or standards of the Indian Health Service.” 25 C.F.R. § 36.11(c) (emphasis added).

With all these requirements and more, the Federal government, despite Tribal self-determination policies, prevents Tribes from exercising sovereign control and direction in educating their youth.

Federal “Alternative” Education Policies Fall Short.

Some provisions in Federal education law allow Tribes to “opt out” and request permission to use an “alternative” education standard. However, these “alternatives” must still comply with the fundamentals of State education standards, systems, and procedures. For example, Tribes with schools funded by the Federal government may submit a proposal to the Secretary of Education to use “alternative standards, assessments, and an accountability system.” ESSA, Pub. L. No. 114-95, § 8007(2). But, these Tribal alternatives must still be “consistent with section 1111” of the Elementary and Secondary Education Act (20 U.S.C. § 6311). ESSA, § 8007(2). Section 1111 is an extremely detailed law setting forth requirements for States to follow in determining their academic standards, assessment and accountability systems. ESSA applies these same State requirements to Tribes. ESSA, § 8007(2). As a result, when seeking an alternative, Tribes are still limited in how much they can vary from Federal and State education standards.

To date, only two tribes – the Miccosukee Tribe of Florida and the Navajo Nation – have received permission to use an alternative definition for education standards and assessments. Receiving this permission took many years of negotiations with the Departments of Education and

Interior for both Tribes. Miccosukee's alternative standard incorporates tribal culture, language and individualized attention into the classroom. While the Tribe's standard was largely consistent with Section 1111, it diverged in several ways. Miccosukee requested waivers for these differences under ESSA and its precursor, No Child Left Behind Act. ESSA, § 8013(1). For the first time in history, the Departments of Education and Interior approved a Tribe's request for a waiver. However, they limited Miccosukee's waiver to three years, after which, the Tribe may request an extension if it can demonstrate the effectiveness of its alternative standard.

Efforts of these Tribes to use alternatives are important steps in advancing Tribal control over the education of their youth. However, these alternatives do not do enough to fully uphold Tribal education sovereignty. Tribes can be granted authority to develop alternative standards, but only if they generally adhere to the Western education model requiring tests, grades, standardized assessment, rote memorization, set curriculum, etc. It is doubtful that a Tribe who set forth an education standard that did not follow this system would be granted an alternative standard or a waiver.

Federal Government Largely Funds States – Not Tribes – to Educate Native Youth.

1. State public schools. States – not Tribes – now teach most Native youth and are arguably the greatest influence on the intellectual and social development of young Native minds. Currently, about 92% of all Native youth attend State public schools. Acknowledging that it has a treaty and trust responsibility to educate Native youth, the Federal government pays States to educate these Native youth based on the number of Native students in State schools. *See e.g.*, ESSA, Pub. L. No. 114-95, titles VI (Formula Grants), VII (Impact Aid); Johnson-O'Malley Act of April 16, 1934 (48 Stat. 596). Federal funding of State public schools enriches State school budgets and is significantly cheaper for the Federal government than funding the operation of entire schools through the BIE. This is effectively an unlawful delegation of Federal treaty and trust obligations to States.

In this State school environment, Tribes and Native parents have little opportunity to direct and influence how their children are educated. Native youth in State schools are often the minority of the school population, are subject to bullying, racial taunts and more frequent disciplinary measures, suffer depression and low self-esteem, are not surrounded by their culture and Native language, and are relegated to slower academic tracks. *See School Environment Listening Sessions: Final Report* (U.S. Dep't of Educ. Oct. 2015).

Most Native youth attend State schools because that is the only option available to them. In urban and suburban areas, State public schools are often the only option. Even in Indian Country, many local schools are State public schools as opposed to Tribal or BIE schools. Supportive Native programs in these State public schools are limited or non-existent, and may or may not have Tribal input. In addition, the Federal government has placed a moratorium on the creation of any new BIE funded schools, and so no new BIE funded schools have been built since 1996. *See e.g.*, Pub. L. No. 114-113 (Dec. 18, 2015).

One example of States educating Native youth in Indian Country is the schools on the Nez Perce Reservation. The United States' treaties with the Nez Perce Tribe require the Federal

government to provide two schools and staff to the Tribe, but 150 years later, there are no BIE-funded schools at Nez Perce. *See* Treaty with the Nez Perce of June 9, 1863, art. 5 (14 Stat. 647). Instead, the schools within the Tribe’s reservation are State public schools, which receive Federal funding to educate Nez Perce youth. In 2015, the Tribe applied for and has received two U.S. Department of Education “State Tribal Education Partnership” grants. With these grants, the Tribe will partner with local and state education agencies to provide consultation and assistance to local schools to hopefully improve the educational and cultural needs of the Tribe’s students in the State schools. However, these State public schools will still ultimately be required to apply the State education model and policies to all their students, including Nez Perce youth.

The Federal government cannot fulfill its treaty and trust obligations to Tribes by funding States to educate Native children. This should be corrected in part by the Federal government reinstating its commitment to fund Tribal schools and by directing Impact Aid, other “State” education dollars and new Federal education funds to Tribes for the construction and operation of Tribal schools free of State and Federal education standards and policies. In fulfillment of the self-determination policy, Tribes should be able to decide their own standards, accreditation, curriculum, etc.

2. BIE funded schools. The remaining 8% of Native students attend schools funded by the BIE, which oversees 183 elementary, secondary, residential and peripheral dormitories. Of these 183 schools, 131 schools are Tribally operated under P.L. 93-638 Indian Self Determination Contracts or P.L. 100-297 Tribally Controlled Schools Grants, and 52 schools are directly operated by the BIE. While there are significant problems with BIE funded schools, these schools at least demonstrate the Federal government’s commitment to Native education. Unfortunately, even when Tribes operate a BIE school, they are still required to apply Federal and State education policies and models. Therefore, policies regulating BIE funded schools must be reformed to allow Tribes’ sovereign control and oversight “in all aspects of the education process” as Federal law requires. 25 C.F.R. § 32.4(a)(3).

A Call for an Education (R)evolution in Indian Country.

To reform Native education and empower Tribal education sovereignty, Federal laws must be enacted to remove all Federal and State standards and limitations from education policies impacting Tribes. Reforming Federal education policy is needed to meaningfully support Tribal self-determination and control over the education of their children. This will significantly change the future of Native education and allow both a *revolution* away from assimilationist education policies and an *evolution* towards Tribal education systems which incorporate the best of both Native and Western learning approaches and curriculum.

While the last several decades have shown some advances in the education of Native youth, the growth has not been enough to pull Native youth from the bottom of academic and social statistics. It is time for systemic change and implementation of true Tribal control over their youth’s education. This “Education (R)evolution,” where Tribes can decide what and how their youth should be educated, promises the restoration of Native youth who are self-motivated, life-long learners, confident in their culture and language, problem-solvers, and strong leaders in their communities.

With the legacy of historical trauma, geographic displacement and cultural upheaval, the Federal government continues to deny Tribal sovereignty over their youth's education and learning. The Federal government claims that it recognizes and promotes Tribal self-determination over the education of Tribal youth, however, upon examination of the Federal rules and regulations that govern Tribal education, Tribes are still forced to accept State and Federal education policies. This has resulted in a modern educational system that requires compulsory educational practices, rote memorization of State-approved curriculum, discourages self-directed independent thought, limits creativity, requires regular testing, and often separates youth from Tribal elders, language, culture and their communities.

It is time to stop these modern "assimilationist" practices. It is time for the Federal government to uphold its treaty and trust responsibilities and recognize that Tribes know best how their youth should be educated and that Tribes can and should self-determine their own curriculum, standards, accreditation and other education policies without State or Federal interference. Tribes can facilitate this by demanding that the Federal government recognize Tribes' ability to adopt and control their own education systems, and for the Federal government to fund these Tribal education systems in fulfillment of its treaty and trust responsibilities.

In all other areas (for example, taxation, jurisdiction, and regulation), Tribes strongly resist the intrusion of State law into internal Tribal workings. Tribes should similarly reject State intrusion into their children's education and demand that the Federal government support and fund Tribes' development of unique educational strategies that reflect what and how Native children learn. For Tribes who wish to continue participation in the current Federal and State education system, Federal laws should be passed that allow Tribes to "opt-in" as opposed to the current "opt-out" approach.

In Spring 2016, the Departments of Education and Interior began a negotiated rulemaking process to develop new regulations to implement ESSA. The Department of Education released proposed accountability regulations to implement ESSA on May 31, 2016. 81 Fed. Reg. 34,539 (May 31, 2016). These proposed regulations allow States to determine their own accountability measures but do not recognize that same authority in Tribes. Instead, the proposed regulations only provide additional opportunities for Tribes to consult with States and possibly influence education programs impacting Native youth. The proposed regulations still follow the underlying limitations of ESSA and other Congressional laws and do little to support Tribal sovereignty over their youth's education.

As we have demonstrated in this policy paper, the restraints of these laws on Tribal education sovereignty are significant, and therefore, education sovereignty and self-determination cannot be fulfilled with these new laws and regulations. To reform Native education and empower Tribal education sovereignty, Federal laws must be enacted to remove all Federal and State standards from education policies impacting Tribes. To ensure that the next generations of Native youth are self-motivated learners, problem-solvers, confident in their culture, logic models and language, and leaders in their communities, we call for a systemic "Education (R)evolution" of Native learning. Pathkeepers will outline this "Education (R)evolution" and what alternative Native education systems can look like in our next policy paper.