

Every Student Succeeds Act Tribal Consultation Pre-Planning Tool for Tribes

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Acknowledgments

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Every Student Succeeds Act Tribal Consultation Pre-Planning Tool for Tribes

The Every Student Succeeds Act (ESSA) stresses the importance of improving educational outcomes for American Indian and Alaska Native students. Along with an increased emphasis on teaching Native languages, identifying the impact of English language learner (ELL) status, and embedding culture into curriculum, ESSA has created opportunities for tribes to work more closely with state and local education agencies in support of Native students. This final consultation requirement also supports tribal sovereignty and the strengthening of government-to-government relationships.

Under ESSA, state and local educational agencies are required to engage in “timely and meaningful” consultation with area tribes while preparing and submitting plans or applications for federal programs, including Title I and Title IV Indian Education Formula Grants. This is a significant change from the No Child Left Behind Act, which had no local consultation requirements. Districts that receive more than \$40,000 for Title IV or have more than 50 percent American Indian enrollment are required to consult with tribes.

TIMELY CONSULTATION

The local education agency (LEA) is responsible for initiating the contact with a tribal leader. This should be done before making any significant decisions regarding plans

or applications to ensure that “appropriate officials from Indian tribes or tribal organizations . . . meaningfully and substantively contribute” to an LEA’s plan (section 85378 (a), ESSA). If consultation is not initiated by the LEA, tribes can formally request that the process begin as soon as possible.

To ensure timely consultation, LEAs should schedule regular meetings. This should include an introductory hearing to gather tribal feedback, as well as ongoing meetings that provide opportunities for tribes to have a voice in how plans are finalized, submitted, implemented, and reviewed. The National Indian Education Association’s Building relationships with tribes: A Native process for ESSA consultation under ESSA has additional suggestions for the introductory hearing and subsequent meetings (see page 5 of that publication).

MEANINGFUL CONSULTATION

Meaningful consultation is when states, districts, and tribes are equal participants and collaborators in the conversation, on a government-to-government basis. Consultation is built on mutual understanding, respect, and consensus-based decision making.

As part of meaningful consultation tribes should be provided with—or receive upon request—the following:

- Dates for upcoming meetings, including school improvement meetings, tribal consultation meetings, and information or input meetings that are open to the public
- Formats and submission information for tribal input
- Contact information for district personnel or members of committees
- American Indian student data, including:
 - Population numbers by grade, dropout rates, participation rates in free or reduced-price lunch programs, rates of students with an individualized education program (IEP) or identified for English language learner (ELL) status, students in alternative education programs, numbers of students concurrently enrolled in college
 - State and local assessments on students’ academic progress and growth over time
- Presentations from state or local representatives about existing school programs so that tribes have clarity regarding how the programs operate in the local, district, or state context
- Deadlines for school district plans (including those required under ESSA)
 - Notification of significant changes in plans
 - A final copy of plans or applications

Every Student Succeeds Act Tribal Consultation Pre-Planning Tool for Tribes

PLANNING/PREPARATION CHECKLIST

- Share your understanding of consultation at the federal level (use attached documents and Questions to Consider During the Consultation Process) and state level (review the consultation protocols that are already in place, if any)
- Share your understanding of your state’s ESSA plans
- Review current Memoranda of Understandings or Agreements
- Review any current state education acts/bills/policies related to Indian Education
- Articulate clarity on consultation goals:
 - What does a successful consultation look like?
 - What is your tribe’s commitment to the consultation process?
 - What concerns do you have about this process?
- What data do we have, and what data do we need?
- What are the outcomes and objectives of the consultation?
- Review the guide and answer questions or adjust the form accordingly
- Follow-up/support
 - Meeting facilitation?
 - Help with logistics (e.g., location, AV needs, transportation)
 - Who is representing your tribe at the consultation?

Entity	Name
LEA	<i>Example: Harrison Public School District</i>
School Official	<i>Name of the superintendent, deputy superintendent, principal, etc. (NOT a consultant, NOT a contracted third party or any non-sanctioned public employee). This person must be in an administrative capacity:</i>
Tribal Officials to Attend	<i>Suggestion: Tribal education or youth director or at least one tribal council member should be in attendance.</i>

Description	Prior knowledge/ related experiences and/or previous tribal input	Tribal support to schools on this topic (past and current)	Relevant tribal needs for topic	Future tribal support on this topic, including (but not limited to) tribal government resolutions	Questions for SEA (state education agency)	Questions for LEA (local education agency)	Language and culture supports	Agreements and next steps
<p>TITLE I Improving the Academic Achievement of the Disadvantaged <i>Part A-Improving Basic Programs Operated by LEAs</i> <i>Part C-Education of Migratory Children</i></p>								
<p>TITLE II Preparing, Training, and Recruiting High-Quality Teachers, Principals, and Other School Leaders <i>Part A-Supporting Effective Instruction</i></p> <p>Possible topics:</p> <ul style="list-style-type: none"> • Indian Education at the state level • Teacher preparation • Effective educator development (professional development) on culturally responsive pedagogy and instructional practices 								
<p>TITLE III Language Instruction for English Learners and Immigrant Students <i>Part A-English Language Acquisition, Language Enhancement, and Academic Achievement</i></p> <p>Possible topic:</p> <ul style="list-style-type: none"> • Native language assessment 								

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<p>TITLE IV 21st Century Schools</p> <p><i>Part A-Student Support and Academic Enrichment Grants</i></p> <p><i>Part B-21st Century Community Learning Centers</i></p> <p>Possible topics:</p> <ul style="list-style-type: none"> • Before- and after-school academic enrichment • Courses and curriculum on tribal histories to provide access to a well-rounded education 								
<p>TITLE V Flexibility and Accountability</p> <p><i>Part B, Subpart 2-Rural and Low-Income School Program</i></p>								
<p>TITLE VI American Indian, Native Hawaiian, and Alaska Native Education</p> <p><i>Part A, Subpart 1-American Indian Education Formula Grants to LEAs</i></p> <p>Possible topic:</p> <ul style="list-style-type: none"> • Data and identification of AI/AN students 								

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TITLE VII Impact Aid								
TITLE VIII General Provisions Possible programs: <ul style="list-style-type: none"> • Increase opportunities in schools located in or near reservations of dual-enrollment or concurrent and early college programs on relevant coursework that is in alignment with a postsecondary certification or degree • Tribal college partnerships 								
OTHER								
<i>Transportation</i>								
<i>Special Education</i>								
<i>English Language Learners</i>								
<i>Professional Development</i>								

Description	Prior knowledge/ related experiences and/or previous tribal input	Tribal support to schools on this topic (past and current)	Relevant tribal needs for topic	Future tribal support on this topic, including (but not limited to) tribal government resolutions	Questions for SEA (state education agency)	Questions for LEA (local education agency)	Language and culture supports	Agreements and next steps
<i>Career and College Readiness</i>								
<i>Child Nutrition</i>								
<i>Johnson-O'Malley Program</i>								
<i>Title I-D</i>								
<i>Homeless and Delinquent</i>								
<i>Gear Up/Trio, etc.</i>								
<i>Other:</i>								

Summary of Federal Legislation Relevant to Tribal Consultation with School Districts

This document provides a summary of certain sections of the Elementary and Secondary Education Act (ESEA) as amended by the Every Student Succeeds Act of 2015 (ESSA). We have attempted to provide the parts of the legislation that are most relevant to tribal members who will be consulting with public school districts. In most cases, the following language is not the actual legislation but rather a description of what is found in it. A reference list with links to the actual legislation is provided at the end of this document.

TITLE I, PART A Improving Basic Programs Operated by Local Educational Agencies (LEAs)

PURPOSE

Provide financial assistance to local educational agencies (LEAs) and schools with high numbers or high percentages of children from low-income families to ensure that all children meet challenging state academic standards. Federal funds are currently allocated through four statutory formulas that are based primarily on U.S. Census poverty estimates and the cost of education in each state.

LEAs target the Title I funds they receive to public schools with the highest percentages of children from low-income families. Unless a participating school is operating a schoolwide program, the school must focus Title I services on children who are failing, or most at risk of failing, to meet state academic standards. Schools enrolling at least 40 percent of children from low-income families are eligible to use Title I funds for schoolwide programs designed to upgrade their entire educational programs to improve achievement for all students, particularly the lowest achieving students.

Title I schools with less than the 40 percent schoolwide threshold—or that choose not to operate a schoolwide program—must offer a “targeted assistance program” in which the school identifies students who are failing, or most at risk of failing, to meet the state’s challenging academic achievement standards. Targeted assistance schools design, in consultation with parents, school staff, and district staff, an instructional program to meet the needs of those students. Both schoolwide and targeted assistance programs must use instructional strategies based on scientifically based research and must implement parental involvement activities.

(U.S. Department of Education, 2015)

TITLE I, PART A Improving Basic Programs Operated by Local Educational Agencies (LEAs)

PURPOSE

- (1) Support high-quality and comprehensive educational programs for migratory children to reduce the educational disruptions and other problems that result from repeated moves.
- (2) Ensure that migratory children who move among the states are not penalized in any manner by disparities among the states in curriculum, graduation requirements, and state academic content and student academic achievement standards.

(3) Ensure that migratory children are provided with appropriate educational services (including supportive services) that address their special needs in a coordinated and efficient manner.

(4) Ensure that migratory children receive full and appropriate opportunities to meet the same challenging state academic content and student academic achievement standards that all children are expected to meet.

(5) Design programs to help migratory children overcome educational disruption, cultural and language barriers, social isolation, various health-related problems, and other factors that inhibit the ability of such children to do well in school, and to prepare such children to make a successful transition to postsecondary education or employment.

(6) Ensure that migratory children benefit from state and local systemic reforms.

(U.S. Department of Education, 2004a)

TITLE I, PART D Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At-Risk

PURPOSE

(1) Improve educational services for children and youth in local and state institutions for neglected or delinquent children and youth so that such children and youth have the opportunity to meet the same challenging state academic content standards and challenging state student academic achievement standards that all children in the state are expected to meet.

(2) Provide such children and youth with the services needed to make a successful transition from institutionalization to further schooling or employment.

(3) Prevent at-risk youth from dropping out of school and provide dropouts and children and youth returning from correctional facilities or institutions for neglected or delinquent children and youth with a support system to ensure their continued education.

(U.S. Department of Education, 2004b)

TITLE II, PART A Preparing, Training, and Recruiting High-Quality Teachers and Principals

PURPOSE

Title II, Part A aims to ensure that English learners (ELs) and immigrant students attain English proficiency and develop high levels of academic achievement in English, by:

(1) Increasing student academic achievement through strategies such as improving teacher and principal quality and increasing the number of highly qualified teachers in the classroom and highly qualified principals and assistant principals in schools.

(2) Holding local educational agencies and schools accountable for improvements in student academic achievement.

(U.S. Department of Education, 2004c)

TITLE III Language Instruction for English Learners and Immigrant Students

PURPOSE

- (1) Ensure that children who are English learners, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging state academic content and student academic achievement standards as all children are expected to meet.
- (2) Assist all English learner children, including immigrant children and youth, to achieve at high levels in the core academic subjects so that those children can meet the same challenging state academic content and student academic achievement standards as all children are expected to meet.
- (3) Develop high-quality language instruction educational programs designed to assist state educational agencies, local educational agencies, and schools in teaching English learner children and serving immigrant children and youth.
- (4) Assist state educational agencies and local educational agencies to develop and enhance their capacity to provide high-quality instructional programs designed to prepare English learner children, including immigrant children and youth, to enter all-English instructional settings
- (5) Assist state educational agencies, local educational agencies, and schools to build their capacity to establish, implement, and sustain language instruction educational programs and programs of English language development for English learner children.
- (6) Promote parental and community participation in language instruction educational programs for the parents and communities of English learner children.
- (7) Streamline language instruction educational programs into a program carried out through formula grants to state educational agencies and local educational agencies to help English learner children, including immigrant children and youth, develop proficiency in English, while meeting challenging state academic content and student academic achievement standards.
- (8) Hold state educational agencies, local educational agencies, and schools accountable for increases in English proficiency and core academic content knowledge of English learner children by requiring demonstrated improvements in the English proficiency of English learner children each fiscal year and adequate yearly progress for English learner children, including immigrant children and youth.
- (9) Provide state educational agencies and local educational agencies with the flexibility to implement language instruction educational programs, based on scientifically based research on teaching English learner children, that the agencies believe to be the most effective for teaching English.

(U.S. Department of Education, 2004d)

TITLE IV, PART A Student Support and Academic Enrichment Grants

PURPOSE

This legislation supports programs that prevent violence in and around schools; prevent the illegal use of alcohol, tobacco, and drugs; involve parents and communities; and are coordinated with related federal, state, school, and community efforts and resources to foster a safe and drug-free

learning environment that supports student academic achievement. This is carried out through the provision of federal assistance to:

- (1) States for grants to local educational agencies and consortia of such agencies to establish, operate, and improve local programs of school drug and violence prevention and early intervention.
- (2) States for grants to, and contracts with, community-based organizations and public and private entities for programs of drug and violence prevention and early intervention, including communitywide drug and violence prevention planning and organizing activities.
- (3) States for development, training, technical assistance, and coordination activities.
- (4) Public and private entities to provide technical assistance; conduct training, demonstrations, and evaluation; and to provide supplementary services and communitywide drug and violence prevention planning and organizing activities for the prevention of drug use and violence among students and youth.

(U.S. Department of Education, 2004e)

TITLE IV, PART B 21st Century Community Learning Centers

PURPOSE

The purpose of this legislation is to provide opportunities for communities to establish or expand activities in community learning centers that:

- (1) Provide opportunities for academic enrichment, including providing tutorial services to help students, particularly students who attend low-performing schools, to meet state and local student academic achievement standards in core academic subjects, such as reading and mathematics.
- (2) Offer students a broad array of additional services, programs, and activities—such as youth development activities; drug and violence prevention programs; counseling programs; art, music, and recreation programs; technology education programs; and character education programs—that are designed to reinforce and complement the regular academic program of participating students.
- (3) Offer families of students served by community learning centers opportunities for literacy and related educational development.

(U.S. Department of Education, 2004f)

TITLE IV, PART C Expanding Opportunities Through Quality Charter Schools

PURPOSE

- (1) Improve the United States education system and education opportunities for all by supporting innovation in public school settings that prepare students to compete in the global economy and contribute to a stronger nation.
- (2) Provide financial assistance for the planning, program design, and initial implementation of charter schools.

- (3) Increase the number of high-quality charter schools available to students across the United States.
- (4) Evaluate the impact of charter schools on student achievement, families, and communities, and share best practices between charter schools and other public schools.
- (5) Encourage states to provide support to charter schools for facilities financing in an amount commensurate to that which states typically provide for traditional public schools.
- (6) Expand opportunities for children with disabilities, English learners, and other traditionally underserved students to attend charter schools and meet the challenging state academic standards.
- (7) Support efforts to strengthen the charter school authorizing process to improve performance management, including transparency, oversight and monitoring (including financial audits), and evaluation of such schools.
- (8) Support quality, accountability, and transparency in the operational performance of all authorized public chartering agencies, including state educational agencies, local educational agencies, and other authorizing entities.

(U.S. Department of Education, Office of Innovation and Improvement, 2017)

TITLE IV, PART D Magnet School Assistance

TITLE IV, PART E Family Engagement in Education Programs

TITLE IV, PART F National Activities

TITLE V, PART B Subpart 2 – Rural and Low-Income School Program

PURPOSE

This legislation addresses the unique needs of rural school districts that frequently:

- (1) Lack the personnel and resources needed to compete effectively for Federal competitive grants.
- (2) Receive formula grant allocations in amounts too small to be effective in meeting their intended purposes.

(U.S. Dept of Education, 2004g)

In addition, the purpose of Title V is to allow states and districts the flexibility to target federal funds to the programs and activities that most effectively address the unique needs of states and localities. In particular, Title V, Part B—the Rural Education Initiative—is designed to help states and districts meet the unique needs of rural school districts that frequently lack the personnel and resources needed to compete effectively for federal competitive grants and receive formula funds in amounts too small to be effective in meeting their intended purposes. Title V matters because it can ensure that principals and school leaders working in states and districts with rural populations have funding flexibility so teachers, school personnel, and students get the extra support they need.

(NASSP, n.d.)

TITLE VI, PART A American Indian, Native Hawaiian, and Alaska Native Education

Statement of Policy

It is the policy of the United States to fulfill the federal government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children. The federal government will continue to work with local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities toward the goal of ensuring that programs that serve Indian children are of the highest quality and provide for not only the basic elementary and secondary educational needs, but also the unique educational and culturally related academic needs of these children.

PURPOSE

The purpose of this legislation is to provide opportunities for communities to establish or expand activities in community learning centers that:

(a) Support the efforts of local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities to meet the unique educational and culturally related academic needs of American Indian and Alaska Native students, so that such students can meet state student academic achievement standards.

(b) Authorizing programs of direct assistance for:

- Meeting the unique educational and culturally related academic needs of American Indian and Alaska Native students.
- The education of Indian children and adults.
- The training of Indian persons as educators and counselors and in other professions serving Indian people.
- Research, evaluation, data collection, and technical assistance.

(U.S. Department of Education, 2004h)

TITLE VII Impact Aid

Many local school districts across the United States include within their boundaries parcels of land that are owned by the federal government or that have been removed from the local tax rolls by the federal government, including Indian lands. These school districts face special challenges — they must provide a quality education to the children living on the Indian and other federal lands and meet the requirements of the Every Student Succeeds Act, while sometimes operating with less local revenue than is available to other school districts, because the federal property is exempt from local property taxes.

Impact Aid was designed to assist local school districts that have lost property tax revenue due to the presence of tax-exempt federal property, or that have experienced increased expenditures due to the enrollment of federally connected children, including children living on Indian lands.

PURPOSE

Most Impact Aid funds, except for the additional payments for children with disabilities and construction payments, are considered general aid to the recipient school districts; these districts may use the funds in

whatever manner they choose in accordance with their local and state requirements. Most recipients use these funds for current expenditures, but recipients may use the funds for other purposes such as capital expenditures. Some Impact Aid funds must be used for specific purposes.

School districts use Impact Aid for a wide variety of expenses, including the salaries of teachers and teacher aides; purchasing textbooks, computers, and other equipment; afterschool programs and remedial tutoring; advanced placement classes; and special enrichment programs. Payments for children with disabilities must be used for the extra costs of educating these children.

Impact Aid Program Components

Payments for Federal Property (Section 7002)

These payments assist local school districts that have lost a portion of their local tax base because of federal ownership of property.

Basic Support Payments (Section 7003(b))

These payments help local school districts that educate federally connected children. These may be the children of members of the uniformed services, children who reside on Indian lands, children who reside on federal property or in federally subsidized low-rent housing, and children whose parents work on federal property. In general, to be eligible for assistance a local school district must educate at least 400 such children in average daily attendance, or the federally connected children must make up at least 3 percent of the school district's total average daily attendance. Heavily impacted districts that enroll certain percentages of federally connected children and meet other specific statutory criteria, receive increased formula payments under Section 7003(b)(2).

Children With Disabilities Payments (Section 7003(d))

Payments for children with disabilities provide additional assistance to school districts that educate federally connected children who are eligible for services under the Individuals with Disabilities Act (IDEA). These payments are in addition to basic support payments and IDEA funds provided on behalf of these children. A school district that receives these funds must use them for the increased costs of educating federally connected children with disabilities.

Construction Grants (Section 7007)

These grants go to local school districts that educate high percentages of certain federally connected children—both children living on Indian lands and children of members of the uniformed services. These grants help pay for the construction and repair of school buildings.

(U.S. Department of Education, Office of Elementary and Secondary Education, 2017)

TITLE VIII General provisions

Part A–Definitions

Part B–Flexibility in the Use of Administrative and Other Funds

Part C–Coordination of Programs; Consolidated State and Local Plans and Applications

Part D–Waivers

Part E–Uniform Provisions

Part F–Evaluations

(U.S. Department of Education, n.d.)

TITLE IX Education for the Homeless and Other Laws

PURPOSE

(1) Each state educational agency must ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youths.

(2) In any state that has a compulsory residency requirement as a component of the state’s compulsory school attendance laws or other laws, regulations, practices, or policies that may act as a barrier to the enrollment, attendance, or success in school of homeless children and youths, the state will review and undertake steps to revise such laws, regulations, practices, or policies to ensure that homeless children and youths are afforded the same free, appropriate public education as provided to other children and youths.

(3) Homelessness alone is not a sufficient reason to separate students from the mainstream school environment.

(4) Homeless children and youth should have access to education and other services that will give them the best opportunity to meet state student academic achievement standards.

(U.S. Dept of Education, 2004i)

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Questions to Consider During the Consultation Process

Introductory meeting

Tribes should consider asking the following questions during their initial consultation meeting with LEAs:

- How many district staff members are American Indian?
- How many students are members of our tribe? What processes and practices do you use to identify students as American Indian?
- How many American Indian students speak their tribal languages?
- Are any tribal language classes offered at any schools in the district? Which languages?
- What programs, interventions, or services are provided specifically for American Indian students?
- What mechanisms are in place for engaging tribes, tribal community members, parents, and family members?

(Adapted from the Minnesota Tribal Consultation Guide)

Plans for specific Title programs

TITLE I, PART A (Improving Basic Programs Operated by State and Local Education Agencies)

1. Family engagement plans: How will the plans be developed jointly with American Indian families? Does the district utilize people who have expertise in effectively engaging American Indian families? (Sec. 116(a)(2)(B))
2. Support for American Indian students: How are American Indian students being included in comprehensive or targeted supports in low-performing schools, and how will their needs be addressed?
3. Assessments: Have the assessments being used for Title I accountability been reviewed for potential bias against American Indian students? How?
4. Evidence-based strategies: Is the district working with outside intermediary organizations that have practical expertise in evidence-based strategies and programs for American Indian students? (Sec 111(g)(2))

TITLE II, PART A (Supporting Effective Instruction)

1. Preparing educators to work with American Indian youth: What is the state or district doing to prepare, train, and recruit educators to specifically work with American Indian students? How can tribes assist in providing input?

2. Essential knowledge and skills: What do educators need to know and be able to do to effectively educate American Indian students and students from a specific tribe? What does the district know about evidence-based strategies that work with American Indian students?
3. Inservice training: Is the district consulting with trainers who have explicit experience with cultural responsiveness or any other approaches that have proven to be effective for American Indian students specifically?

TITLE III, PART A (English Language Acquisition, Language Enhancement, and Academic Achievement Act)

1. English language proficiency assessment and placement: Are American Indian students being appropriately assessed and placed in ELL programs? How are home language surveys being used to place American Indian students? How are teachers informed about the unique ELL needs of American Indian students?
2. Language immersion: What evidence-based language immersion models will be used with American Indian students?

TITLE IV, PART A AND PART B (Student Support and Academic Enrichment Grants and 21st Century Community Learning Centers)

1. Community learning centers serving American Indians: Are there any centers that are currently serving American Indian students? What do their evaluations say has been effective? How do they address the specific needs of American Indian students?
2. Academic enrichment: How are district programs and instruction culturally responsive?
3. Technology: How will access to online technology be expanded to include American Indian students?

TITLE V, PART B, SUBPART 2 (Rural and Low-Income School Program)

1. Flexibility: If eligible, has the district applied for any flexibilities under this program?
2. Activities: What district programs have been developed in support of student academic achievement?

TITLE VI, PART A, SUBPART 1 (Indian Education Formula Grants to Local Education Agencies)

1. Existing program: Does the district currently run a Title VI Part A program. If not, are there plans to apply for one? Are there tribal representatives on the committee? What outcome data are available for the program?
2. Tribal partnerships: How can tribes partner with the district to develop the program to better serve its needs? How will the district determine what the tribes' needs are and develop a plan for meeting them? How will the district hold open hearings to solicit feedback and recommendations?

3. Evidence: What research is the district using to develop culturally responsive programming, models, curriculum, assessment, and professional development?

TITLE VII Impact Aid

1. Parent consultation: How will tribal member families be consulted on school programs and be involved in school plans? What are the detailed policies and procedures for when these consultations will take place?

OTHER CONSIDERATIONS

RESOURCES

- American Institutes for Research, Midwest Comprehensive Center. (2018). *Tribal consultation under the Elementary and Secondary Education Act*. Retrieved from <https://midwest-cc.org/sites/default/files/2018-06/MWCC-Tribal-Consultation-Under-ESSA-Brief-508.pdf>
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Frequently Asked Questions
ESEA, Section 8538, CONSULTATION WITH INDIAN TRIBES AND TRIBAL ORGANIZATIONS

1. What are the consultation requirements under section 8538 of the ESEA¹?

In general, section 8538 requires affected local educational agencies (LEAs) (see Question 3 for definition of “affected LEA”) to consult with Indian tribes, or those tribal organizations approved by the tribes located in the area served by the LEA, prior to submitting a plan or application for covered programs (see Question 5 for more information on the programs covered by section 8538). This requirement is designed “to ensure timely and meaningful consultation on issues affecting American Indian and Alaska Native students.” The consultation must be done “in a manner and in such time that provides the opportunity for such appropriate officials from Indian tribes or tribal organizations to meaningfully and substantively contribute” to plans under covered programs.

2. When do the consultation requirements under section 8538 of the ESEA begin?

Consultation requirements under section 8538 of the ESEA begin with the plans or applications for fiscal year (FY) 2017 formula grant funding, or for the 2017-2018 school year. Affected LEAs (see Question 3) that educate American Indian/Alaska Native (AI/AN) students will be required to consult with local Indian tribes prior to submitting a plan or application under covered ESEA formula grant programs (see Question 5).

3. Which LEAs must consult with Indian tribes in accordance with section 8538 of the ESEA?

Under section 8538, an affected LEA is one that either: 1) has 50 percent or more of its student enrollment made up of AI/AN students; *or* 2) received an Indian education formula grant under Title VI of the ESEA, as amended by the ESSA¹, in the previous fiscal year that exceeds \$40,000. In order to determine whether an LEA has 50 percent or more of its enrollment made up of AI/AN students, an LEA should use the enrollment data from the 2016-2017 school year to determine whether it is an affected LEA in FY 2017. The total AI/AN enrollment data would include those students who self-identify as AI/AN alone and AI/AN in combination with one or more races, regardless of Hispanic ethnicity. An LEA that receives an Indian education formula grant award greater than \$40,000 in FY 2016 is an affected LEA for consultation purposes in FY 2017. Please contact Bernard Garcia, at bernard.garcia@ed.gov, Group Lead for Title VI Indian Education Formula Program, Office of Indian Education, OESE, for assistance in determining whether an LEA is an affected LEA under section 8538 of the ESEA.

4. How can an LEA find information about tribes?

The Bureau of Indian Affairs (BIA) publishes an official list of federally recognized tribes each year. This list is available at the Title VI community of practice website under “Additional Resources”: <https://easie.grads360.org/#communities/pdc/documents/9980>. To find tribal addresses, see the list at the National Congress of American Indians (NCAI) website: <http://www.ncai.org/tribal-directory>. If you need information about the tribes in your service area, contact your respective state office for assistance.

¹ Throughout this document, unless otherwise indicated, citations to the ESEA refer to the ESEA, as amended by the ESSA.

5. On which programs must an affected LEA consult with Indian tribes?

Beginning with FY 2017, affected LEAs must consult with Indian tribes before submitting plans or applications for the following programs under ESEA:

- Title I, Part A (Improving Basic Programs Operated by State and Local Educational Agencies)
- Title I, Part C (Education of Migratory Children)
- Title I, Part D (Prevention and Intervention Programs for Children and Youth who are Neglected, Delinquent, or At-Risk)
- Title II, Part A (Supporting Effective Instruction)
- Title III, Part A (English Language Acquisition, Language Enhancement, and Academic Achievement Act)
- Title IV, Part A (Student Support and Academic Enrichment Grants)
- Title IV, Part B (21st Century Community Learning Centers)
- Title V, Part B, subpart 2 (Rural and Low-Income School Program)
- Title VI, Part A, subpart 1 (Indian Education Formula Grants to Local Educational Agencies)

6. When should affected LEAs conduct the consultation required under section 8538 of the ESEA?

LEAs should conduct their consultation in advance of making significant decisions regarding plans or applications for covered programs, to ensure an “opportunity for . . . appropriate officials from Indian tribes or tribal organizations to meaningfully and substantively contribute” to an LEA’s plan (section 8538(a)). The timeline for each consultation is dictated by requirements of the relevant formula grant program, which have different application deadlines. For example, a State may have a deadline for LEAs to submit a consolidated local plan to the State by a certain date in 2017, so for those programs the consultation must be completed before that date. Given that tribes may receive multiple requests for consultation, LEAs should consider arranging for informational meetings prior to consultation.

7. What should an LEA do to ensure “meaningful consultation”?

In order to ensure that consultation is meaningful, LEAs should provide Indian tribes, or those tribal organizations approved by the tribes located in the area served by the LEA, an opportunity to provide input and feedback to the LEA on plans for any covered program. An LEA should consider providing a list of issues or questions on which the LEA seeks input, or provide draft plans for this purpose, in advance of the consultation. An LEA should consult before it makes a final decision on significant and substantive issues related to the content of the plans. In addition, an LEA should consider providing written responses to tribal input received during consultation to explain how input was considered.

8. What documentation is required for consultation with Indian tribes under section 8538 of the ESEA?

Each LEA must maintain in the agency’s records and, for State-administered ESEA programs, provide to the SEA, a written affirmation signed by the appropriate officials of the participating tribes (or tribal organizations approved by the tribes) that the required consultation occurred. If tribal officials do not provide such affirmation within a reasonable period of time, the LEA must forward to the SEA documentation that consultation has taken place.

9. May an LEA combine this consultation with other requirements regarding tribal or parent involvement?

Yes, an LEA may coordinate or consolidate the required ESEA consultation with the parent activities required under the Indian Education formula grant program, the Impact Aid program, and the Johnson O'Malley program. An LEA may only do so, however, if the activity in question – *i.e.*, the consultation – meets all of the requirements of each program. For example, an LEA may plan a public hearing or meeting with its local tribe regarding its education program generally in order to meet the Impact Aid requirements for Indian Policies and Procedures; that hearing with the tribe could incorporate the elements of the LEA's proposed plans under the covered programs, rather than hold a separate consultation event. The LEA should involve the local tribe or tribes in planning the best approach that satisfies the needs of the tribe(s) and the LEA in a time-effective manner, and that meets the requirements of the various programs.

10. If an LEA has multiple tribes in the geographic area it serves, or if there is one tribe and multiple LEAs, must there be separate consultations with each tribe or LEA?

Where there are multiple tribes and a single LEA, the LEA may hold a consultation that includes all affected local tribes. Similarly, where there are multiple LEAs and one tribe, there is no federal prohibition against a joint consultation held by several LEAs. In both cases the LEA must ensure that the tribe or tribes have a meaningful and timely opportunity to give input into an LEA's plans or applications.

11. Can the Department provide additional information?

Yes, the Department may offer assistance or provide other information upon request. Please contact the Office of Indian Education (OIE) at IndianEducation@ed.gov.

State of Oregon
OREGON DEPARTMENT OF EDUCATION
POLICY MANUAL



AGENCY POLICY

XXX-XXX

AUTHORIZED SIGNATURE: Signature on file at Oregon Department of Education (ODE)

RE: Tribal Communication and Consultation Policy*

POLICY: Engage tribal officials and tribal representatives in regular and meaningful consultation, collaboration, and communication on actions which may have tribal implications. The ODE is committed to enhancing its relationships with Oregon’s tribal governments, developing strategic partnerships and implementing higher education strategies together with the tribes.

PURPOSE: The ODE is committed to enhancing its relationship with each of Oregon’s federally recognized Indian governments referred hereafter as “tribe(s).” The purpose of this policy is to provide guidance to all ODE employees on the Tribal Consultation process.

RELATED POLICIES:

Every Student Succeeds Act (ESSA)

<https://ed.gov/policy/elsec/leg/essa/index.html>

Executive Order 96-30 State/Tribal Government-to-Government Relations

http://archivedwebsites.sos.state.or.us/Governor_Kitzhaber_2003/governor/legal/execorders/eo96-30.pdf

ORS 183.162-168 Relationship of State Agencies with Indian Tribes

http://www.nrc4tribes.org/files/Tab%209_9H%20Oregon%20SB770.pdf

INTRODUCTION:

Tribal governments were in existence prior to the formation of the United States of America and thus retain a unique legal status as sovereigns separate from state governments. This distinct legal status of tribal nations is enshrined in treaties, the US Constitution and numerous Supreme court cases and other court case law.

In 2015, the reauthorization of the Elementary and Secondary Education Act (known as the Every Student Succeeds Act) included a major provision requiring tribal consultation at the state level. In 2001, Oregon Revised Statute 182.162 -168 was created, requiring all state agencies to adopt policy stating its relationship and commitment to cooperation and expressing a commitment to preserve the distinct and unique cultural heritage of

* A special recognition to the Oregon Department of Fish and Wildlife’s Tribal Consultation policy, information gathered from the Oregon Legislative Commission on Indian Services’ website, and input from the Education Cluster in the development of this policy.

American Indians indigenous to Oregon.¹ The state law emphasizes the importance of collaboration and cooperation and encourages development of meaningful relationships based on mutual respect between state agencies and the nine federally recognized Tribal governments in Oregon. In recognition of tribal sovereignty and the trust relationship between the Federal government and tribal governments, the support for educational improvement is well-documented in treaties.

BACKGROUND:

The Commission on Indian Services was created in the mid-1970s to coordinate Government to Government relationships with Oregon's nine federally recognized tribes. The Commission consists of representatives from each tribe, two representatives from the Oregon Senate, two representatives from the Oregon House of Representatives, one member from a Title VI Urban Indian Health Care program and one non-voting member appointed by the Commission. The Commission is the primary forum and framework for Government to Government interactions with Oregon tribes. In addition to the Commission, the Government to Government relationship has also been facilitated through clusters which are issue area "workgroups" of designated state agency representatives and their tribal counterparts who meet 3-6 times per year.

The Education Cluster meetings are facilitated quarterly by the Governor's Office. These meetings are a mechanism for ODE to provide tribes with program information, and to engage tribes in conversations about policies, initiatives, or programs. It is also an opportunity for ODE staff to build relationships with the tribes. The ODE provides updates to, attends the LCIS meetings per request of the Commission, and is committed to participating in the annual Tribal / State Day and the Government-to-Government Summit. ODE will submit an annual report to the LCIS no later than December 15th each year.

DEFINITIONS:

The following definitions apply for purposes of this policy only:

Consultation is an active process typically conducted face-to-face between tribal appointed officials (or representatives as tribal officials) and the ODE Deputy Superintendent or his/her designee before a decision is made. Consultation is an integral part of ODE's decision-making process addressing the interests of a tribe and any potential impact agency actions may have on tribes. Consultation is a formal process which considers the scope, scale, and degree of tribal implications. Effective consultation is direct, timely, and interactive with the intent to exchange information and receive input on an action having tribal implications. Establishing and maintaining formal consultation is essential to ensure educational and cultural values are preserved for future generations using ongoing communication to build and nurture trusting relationships.

ODE Deputy Superintendent or his/her designee is an individual or individuals who has (have) been appointed by the Deputy Superintendent to speak on behalf of ODE.

¹ http://www.nrc4tribes.org/files/Tab%209_9H%20Oregon%20SB770.pdf

Sovereignty refers to tribes' rights to govern themselves, define their own membership, manage tribal property, and regulate tribal business and domestic relations; it further recognizes the existence of a Government to Government relationship between such tribes and US federal/state governments. Common definitions of “sovereignty” include having supreme power².

Tribal Official is an individual or individuals who has (have) been appointed by the Tribe to speak on behalf of the tribal government.

Tribe or Tribal government means one of nine federally recognized tribal governments in Oregon:

1. Burns Paiute Tribe
2. Confederated Tribes of Coos, Lower Umpqua, and Siuslaw
3. Confederated Tribes of Grand Ronde
4. Confederated Tribes of Siletz
5. Confederated Tribes of Umatilla Indian Reservation
6. Confederated Tribes of Warm Springs
7. Coquille Tribe
8. Cow Creek Tribe Band of Umpqua
9. Klamath Tribes

Tribal Implications means an ODE action (e.g., regulations, rules, legislative proposals, policies, guidance documents, directives, and other policy statements) having substantial direct effects on one or more tribes; on the relationship between ODE and tribe; or on the distribution of power and responsibilities between the ODE and tribe.

Tribal Interests may include but are not limited to educational, traditional, spiritual, natural and cultural resource practices conducted by a tribe which may be affected by an ODE policy, program or impacts tribal citizens.

SCOPE:

This policy applies to all ODE employees responsible for engaging in consultation, coordination, and communication with tribal officials and tribe(s). This is in compliance with [ORS 172.100-.14](#) (previously SB 770) and [ORS 182.162-168](#) which mandates state agencies develop and implement policy on relationships with Oregon tribes. It also outlines training of state agency staff who communicate with tribes. ODE plans to review and update this policy as needed to reflect ongoing engagement and collaboration with tribal partners.

ORS 182.162-168 requires each agency adopt a policy that:

- (1) A state agency shall develop and implement a policy that:
 - (a) Identifies individuals in the state agency who are responsible for developing and implementing programs of the state agency that affect tribes.

² <https://www.merriam-webster.com/dictionary/sovereignty>

- (b) Establishes a process to identify the programs of the state agency that affect tribes.
 - (c) Promotes communication between the state agency and tribes.
 - (d) Promotes positive government-to-government relations between the state and tribes.
 - (e) Establishes a method for notifying employees of the state agency of the provisions of ORS 182.162 to 182.168 and the policy the state agency adopts under this section.
- (2) In the process of identifying and developing the programs of the state agency that affect tribes, a state agency shall include representatives designated by the tribes.
- (3) A state agency shall make a reasonable effort to cooperate with tribes in the development and implementation of programs of the state agency that affect tribes, including the use of agreements authorized by ORS 190.110. [2001 c.177 §2]

THE CONSULTATION PROCESS

ODE staff considers the input received from tribes into its decision-making process. To successfully identify the needs and interests of the tribes, ODE staff work to build meaningful relationships. Consultation at ODE consists of four phases: *identification*, *notification*, *input*, and *follow-up*.

Phase 1: Identification of an action with tribal implication

Identification occurs when: (1) ODE staff recognizes an action to consider for tribal consultation; or (2) the tribe requests ODE staff to consult on an action. Regardless of whether ODE or a tribe requests consultation, ODE will consider the following:

Consultation Determination. Regardless of who initiates the consultation consideration, ODE will follow these steps to determine whether to engage in consultation.

1. Is this action that impacts tribal interests? What is an agency action? An “action” can include, but is not limited to the following ODE actions related to ODE programs:
 - a. Regulations or rules,
 - b. Legislative proposals,
 - c. Policies, guidance documents, directives, initiatives, or other policy statements.
2. When is there a tribal implication on an agency action? There is an impact on tribal interests when the action has a substantial direct effect on:
 - a. One or more Oregon tribes (e.g., ODE is developing a new policy that applies only to certain Oregon tribe(s) in a specific area),
 - b. The relationship between ODE and a Oregon tribe (e.g., ODE is developing a regulation that proposes a new method that an Oregon tribe may seek assistance from ODE, and this regulation will not change this process for local governments), or

- c. The distribution of power and responsibilities between ODE and an Oregon tribe (e.g., ODE is developing a new policy that gives an Oregon federally recognized tribe the option to operate a grant program on behalf of ODE, altering the Oregon tribe's power and responsibility over the administration of the grant).
- d. Tribal citizens (e.g., ODE is developing a new policy, initiative, or program which will directly affect individual tribal citizens of an Oregon tribe).
- e. The term "substantial direct effect" generally refers to an effect on an Oregon tribe(s) that is:
 - ✓ Directly caused by ODE action,
 - ✓ Beneficial or adverse, and
 - ✓ Significant.

For example, ODE may be distributing funds via a grant program, and in doing so, changes the tribe's power and responsibility for the administration of the grant. Or ODE may develop a new policy, initiative, or program which will directly affect citizens of a tribe.

Determining Consultation Method. There are various ways to conduct consultation with Oregon tribe(s). Consultation may include, but is not limited to: face-to-face meetings with one or more Oregon tribes, regional meetings with several Oregon tribes, video conferencing, phone calls, emails, or correspondence.

1. Each tribe will determine their preferred form of consultation. If ODE and the tribe(s) have divergent views about the method of consultation, both parties should make every effort to come to an agreement, considering factors such as:
 - a. The tribe's stated preference
 - b. The complexity of the ODE action
 - c. The number of Oregon tribes impacted
 - d. The scope, scale, and degree of the impact to tribal interests
 - e. ODE and tribal time and resource constraints

Determine with whom to consult. The Deputy Superintendent or his/her designee is responsible for consulting with tribal officials on actions having tribal implications. ODE can expect the tribe to identify the tribal official(s) or the duly appointed designee(s) for the consultation. The duly appointed designee may include, but is not limited to, the tribe's subject matter expert, tribal council members, or employees.

Tribal Consultation Planning Protocol. To determine if consultation will move forward, the ODE will utilize the Consultation Planning Checklist in Appendix A. The checklist provides consultation decision-making process guidance, including how to determine whether to conduct consultation on an action and if consultation will be conducted, how to determine a suitable method(s) of consultation. For actions with impact to tribal interests, ODE retains one copy of the checklist in the administrative record for the action.

Phase 2: Invitation

If ODE intends to conduct consultation on an action, ODE will send invitation seeking consultation to tribal official(s). Regardless of who initiates the consultation, ODE then completes the following steps in an effort to prepare for meaningful consultation.

- **Consultation should occur early** in the decision-making process to allow the tribe to provide meaningful input and allow ODE sufficient time to consider the input. ODE will need to determine the best time to begin consultation but recommended **invitation time is a minimum of 3 months**.
- **Invitation includes sufficient information** for tribal officials to make an informed decision about whether to participate in consultation, and how to provide informed input. Invitation includes:
 - Overview of the consultation process – how ODE anticipates gathering input from tribe
 - Description of the topic(s) to be discussed – providing sufficient information to allow tribe to make an informed decision
 - Description of how input from the tribe(s) will be received
 - Timeframe for submitting such input
 - Contact information for the ODE employee (Indian Education Advisor to Deputy Superintendent of Public Instruction) who can provide technical assistance, respond to questions, or provide clarifications

Phase 3: Meaningful Exchange

ODE performs Consultation and documents Input from the tribe(s). ODE staff considers the input received from tribes into its decision-making process.

Phase 4: Follow-up

ODE staff will follow-up with tribe(s) regarding the action or decision taken after consultation. Prior to request for consultation, notify ODE's Indian Education Advisor. All consultations will be documented and notifications of progress sent to ODE's Indian Education Advisor.

APPENDIX A

Tribal Consultation, Communication and Collaboration Planning Protocol

Note: Respectful and effective communication is a key component of consultation.

- If possible, communicate with tribal officials directly – do not rely solely on emails and letters. ODE recommends following-up with correspondence by phone or in person and creating documentation of the communications, such as meeting notes.
- Do not anticipate quick answers. Tribal officials likely will need time to consult with others, including tribal councils or other tribal government staff.
- Do not assume silence means concurrence; it could signal disagreement.
- Ask tribal officials about their preferred way of doing business and inquire about potential tribal protocols for meetings.
- If you have not communicated with the tribe previously, do research ahead of time to find out with whom you will be consulting and their tribal positions. Make an effort to develop a basic understanding of the tribe's structure.
- Be mindful of appropriate behaviors, demonstrating respect to tribal leaders just as you would to a leader of a foreign nation. Elders are dignitaries within a tribe; show respect toward tribal elders and allow them plenty of time to speak first. Do not interrupt or raise your voice. When in doubt, ask respectfully.
- Please be aware that the cultural norms of tribes may be different from your own, and each tribe has a unique culture and heritage.

Once the ODE recognizes an obligation to consult, follow the outline below:

1. Predetermining Consultation Structure

- a. The structure and logistics of the government-to-government is a critical function shared equally by the ODE and the tribe(s). Important elements include:
 - i. Clarification of the issues and factors leading to the consultation
 - ii. Discuss any sensitivities regarding sacred sites affected by the issue(s) and determine if a spiritual leader should be invited to the consultation.
 - iii. Identifying ODE and tribal participants.
 - iv. Location and timing of the consultation.
- b. Determine necessity for information exchange preceding the consultation.

2. ODE Request for Consultation

- a. An invitation to consult on a proposed policy, regulation or action that may impact tribal interests is sent in writing to the representative of the governing body of the tribe(s), usually the Tribal Chair. The letter may be transmitted via email, mail or delivered in person to key tribal staff, unless consultation protocols specify otherwise. The correspondence will clearly indicate "Request For Government-to-Government Consultation" and

include a request for a written tribal response, within 30 days. Send notification to the Indian Education Advisor seeking request to consult.

- b. If a response is not received within the 30 day timeframe, the ODE will follow-up the written invitation with a telephone call and/or an email, whichever method is preferred by the tribe(s) and document these efforts in the consultation record.
- c. When a request to consult has been accepted, ODE will designate a staff point of contact to make consultation arrangements; this correspondence opens a consultation record.
- d. Document all attempts to communicate with the tribe. Use the **Tribal Consultation Report Form** to do so.

3. Tribe(s) Initiating Consultation

- a. A tribe(s) may initiate consultation on a proposed policy, regulation or action that may impact tribal interests. In these instances, the ODE will make every reasonable effort to meet with the tribe(s) to determine if a consultation process should be undertaken.
4. If consultation is scheduled, complete the **Consultation** section of the **Tribal Consultation Report Form**. Include meeting dates, times, and attendees.
 5. If ODE receives notification from the tribe denying consultation, complete the **Denial** section in the **Tribal Consultation Report Form**.
 6. During consultation, keep written notes of all meetings. You may request to video- or audio-record the meeting with the tribe.
 7. Prior to ending consultation process, ask tribe about next steps and add these to the **Tribal Consultation Report Form**.
- ### 8. Closing the Consultation
- a. The consultation is formally closed through a written communication from the lead ODE official to the most senior official of the tribe(s). The written communication will recount the agreed-upon consultation issue(s), how the issue(s) have been addressed or if not fully resolved, why the ODE is unable to address the issue(s) to the extent the tribe(s) has sought
 - b. Upon completion of consultation, send notification informing tribe of ODE's actions/decisions.

[Your Logo]

[Name of Tribe] Consultation with [Name of Educational Entity]

Date and Time:

Location:

Invitees:

SEA:

LEA:

Tribal Education:

AGENDA

10:00-10:15 Introductions

10:15-10:20 Agenda Modifications

10:20-11:00 Title III Discussion

- Outreach for prior knowledge/related experiences and/or previous tribal input
- Tribal support to schools on this topic (past and current)
- Relevant tribal needs for topic
- Future tribal support on this topic including but not limited to tribal government resolutions
- Questions for SEA
- Questions for LEA
- Questions for TED

11:00-11:15 Agreements and next steps

11:15-11:30 Set a date and time for follow up