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Tribally Authorized Charter Schools

Native American tribes, nations and pueblos have expressed the desire to set their own curriculum and accountability standards when it comes to the education of their students. They seek to ensure that their curriculums and accountability standards align with the tribal values, culture, and language and that they maintain their tribal sovereignty and autonomy.

New Mexico Constitutional Considerations

- One potential barrier for tribally authorized charter schools may be the Anti-Donation Clause of the New Mexico Constitution. Article IX, Section 14 states that “neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through G of this section”. This clause of the New Mexico Constitution prohibits the state from providing most forms of aid to anyone who is not listed in one of the exceptions in Subsection A through G of that Section. Tribal governments are not listed as an exception under the Anti-Donation Clause and such, are likely subject to it. Related to the Anti-Donation Clause, is Article IV, Section 31, which states that “no appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state.” Since all Native American tribes, nations and pueblos in New Mexico have tribal sovereignty and are not under the absolute control of the state, the legislature is forbidden to provide funding directly to a tribe, nation or pueblo.
- The structure of these two constitutional provisions may allow for the Legislature to provide funding to a state agency and then for that state agency to enter into an agreement with a governmental entity to provide services that benefit the State of New Mexico. There must be a benefit received by the state in exchange for the funding in order for the funding to not be considered a donation, which would be subject to the Anti-Donation Clause.
- An additional consideration may be Article 12, Section 3 of the New Mexico Constitution, which state that “...no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.” Public funding may not go to fund education at sectarian, denominational, or private schools. Of particular concern is the question of whether schools managed by Native American tribes, nations, and

pueblos would be considered private schools. If an exception is made in this instance, this could open the door, or at least open debate, for this constitutional prohibition to be interpreted in a way to allow other non-state controlled educational institutions to receive public funding.

Indian Education Act

- In 2003, the New Mexico Legislature passed the Indian Education Act (IEA) [22-23A-1 through 22-23A-11 NMSA 1978]. One of the main purposes of the IEA, is to ensure equitable and culturally relevant learning environments, educational opportunities and culturally relevant instructional materials for American Indian students enrolled in public schools. With the passing of the IEA, the PED established the “Indian Education Division” within the department and created the “Indian Education Fund”. Both the division and the fund assist in serving the purposes of the IEA and the desire to improve educational outcomes for Native American students.
- During the 2022 Legislative Session, the Indian Education Fund received approximately \$15 million to meet requirements of the Indian Education Act. The PED Secretary and the Assistant Secretary of the Indian Education Division are tasked with developing a methodology to allocate the funding to tribal education departments, tribal libraries, Native American language programs, school districts and charter schools based on operational needs and student enrollment.

State Control and State Funding

- There have been legislative attempts to divert funding directly to Native American tribes, nations and pueblos through their tribal education departments for the education of Native American students; most recently, House Bill 87 from the 2022 Legislative Session, but these attempts have been unsuccessful. Certain constitutional provisions continue to be a barrier to these legislative attempts because the state does not have absolute control of a Native American tribe, nation, or pueblo. The need for state control and the desire to maintain tribal sovereignty are important considerations in the development of tribally authorized charter schools.
- Currently, there are two options in the state to start a charter school; a charter school can be chartered through a local school district or chartered through the public education commission. Both of these options may still pose an issue to tribal sovereignty and a tribe’s desire to set their own accountability measures, because a charter school chartered through the state still has to abide by the state required curriculum and testing standards, along with any guidelines and requirements for licensure of teachers.
- Before 1995, Native American tribes, nations and pueblos did have a federal option to operate tribal schools through the Bureau of Indian Affairs (BIA) and Bureau of Indian Education (BIE). However, because of a 1995 temporary moratorium still in effect today, tribes are prohibited from opening new BIE-operated schools or expanding grade levels offered in existing BIE-operated schools. Nevertheless, the federally enacted Tribally

Controlled Schools of 1988 (Public Laws 100-297) allows a Native American tribe to enter into a Public Law 100-297 grant agreement with the BIA if:

- The tribe operates a school under the Indian Self-Determination and Education Assistance Act¹ contract agreement and elects instead to operate the school under a grant agreement;
 - The tribe operates other tribally controlled schools that are eligible for assistance; or
 - The tribe elects to assume operation of BIA-funded schools under a grant agreement.
 - The Grants Management Division works with all Divisions to support the BIE mission.
- The federal Tribally Controlled Schools of 1988 allowed schools to become a tribally controlled school governed by a Board of Trustees. This provided tribes with educational sovereignty to operate and administer their educational programs in a manner that supports the Native American children's cultural and traditional belief systems. A New Mexico tribe that operates a BIE school can transition the school to a tribally controlled school through the options listed above, but if a tribe does not currently have a BIE school, they would not be able to take advantage of this option because of the federal moratorium.
 - Definitions-
 - BIE Tribally Controlled Grant Schools are funded by the BIE and operated according to grant and, if applicable, inter-local agreement terms.
 - BIE Contract Schools are funded by the BIE and operated according to the terms of a contract with the BIE and, if applicable, any inter-local agreement.

State Models

- The state of Washington has a collaborative approach to establishing tribal schools that allows the tribes to enter into state-tribal compacts with the state to create a state-tribal education compact school. State-Tribal education compact schools are operated according to the terms of a state-tribal education compact.
- In 2013, the Washington Legislature passed the Engrossed Second Substitute House Bill (E2 SHB) 1134². This bill authorized the creation of state-tribal education compact schools, by allowing the Washington Superintendent of Public Instruction to enter into state-tribal education compacts. The act exempts schools that are the subjects of state-

¹ The Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638) authorized the Secretary of the Interior, the Secretary of Health, Education, and Welfare, and some other government agencies to enter into contracts with, and make grants directly to, federally recognized Indian tribes. The tribes would have authority for how they administered the funds, which gave them greater control over their welfare. <https://www.bie.edu/topic-page/tribally-controlled-schools#:~:text=Tribally%20Controlled%20Grant%20Schools%20Assurances&text=Public%20Law%20100%2D297%20allowed,operational%20and%20administration%20educational%20programs.>

² Copy of the Engrossed Second Substitute House Bill (E2 SHB) 1134 can be found at: <https://app.leg.wa.gov/billssummary?BillNumber=1134&Year=2013>.

tribal education compacts from all existing state statutes and rules regarding school districts and district boards of directors; establishes standards for teachers, staff, and curriculum; outlines admissions policies and school funding; and establishes reporting requirements on student enrollment.³ Within the Washington Office of Superintendent of Public Instruction, the Office of Native Education provides consultation to eligible federally recognized tribes and BIE schools located in Washington who are interested in starting a state-tribal education compact school. As of today, there are seven state-tribal education compact schools in Washington.⁴

- Alaska established a similar structure for allowing the tribal compacting of education.⁵ In April 2017, the Alaska's Education Challenge was launched and a committee of nearly one hundred Alaskans was formed to develop and offer a strategic plan to the Alaska State Board of Education & Early Development. The committee offered the Alaska State Board of Education & Early Development the idea of establishing self-governance compacting. This would allow for the Alaskan tribes or tribally empowered Alaska Native organizations to enter into state-tribal compacts to provide for the education of Native students in state tribal education compact school. These compacts provide that a tribe or tribal organization will partner with the State of Alaska to assume the responsibility to carry out educational programs, functions, services, and activities the State otherwise would be obligated to provide. The tribes or tribal entities would also receive funding to help maintain the public school and educate the students.
- The Cherokee Nation in Oklahoma established the Cherokee Immersion School (CWY ᎠᎿᎾᎿᎾᎿᎾᎿ (Tsalagi Tsunadeloquasdi)) in 2001 in response to the Cherokee Nation Language and Cultural Preservation Act and the need to promote and preserve the Cherokee language, history, and culture. The school provides education for pre-kindergarten through eighth grade students and the instruction is taught exclusively in the Cherokee language, both written and spoken. Different from other states, the curriculum is based off of the grade level standards of the Oklahoma Department of Education. In 2010, the Cherokee Nation accepted the charter of the Cherokee Immersion School making it the first Oklahoma charter school for Cherokee language Immersion. Language immersion schools are continuing to grow in the state of Oklahoma with the Durbin Feeling Language Center, which will be an immersion school for students in Tahlequah and a second Immersion School in Stilwell, Oklahoma.

³ Washington Office of Superintendent of Public Instruction, State-Tribal Education Compact Schools, <https://www.k12.wa.us/student-success/access-opportunity-education/native-education/state-tribal-education-compact-schools-stees>.

⁴ See Attachment 1-Copy of a state-tribal compact for the Lummi Nation.

⁵<https://education.alaska.gov/compacting#:~:text=Compacting%20is%20a%20process%20through,and%20oversee%20K%2D12%20schools>.