

White Paper on
Transformational Education, Post Pandemic: A Path Forward
December, 2021

Background: Among the lessons we have learned during this once in a lifetime COVID 19 pandemic, is that disruptions to our lives are real, change is constant including the fast pace of technology, and we need to work to ensure the institutions around us have flexibility to adapt to meet the true needs of the people. We are grateful for all the efforts on the federal, state and tribal level to address the pandemic and keep a sense of normality going, while saving lives.

It is in this spirit that the Alaska Federation of Natives (AFN), on behalf of the State of Alaska, Department of Education has undertaken to support a strong collaboration between the State of Alaska and the dedicated people within the educational arena in our state to look for lasting ways to improve education systems and outcomes for our children. AFN conducted a review of a potential legal basis upon which the State of Alaska may elect to compact with Alaska Native Tribes or Tribal organizations to operate one or more K-12 public schools, while protecting and utilizing the federal trust responsibility of the federal government to provide education to Native Americans, including Alaska Natives.

The primary purpose of this compact would be to use one of the most effective tools of the U.S. government – compacting-- to demonstrate a transformational approach to education in Alaska. Compacting works to improve educational opportunities in an innovative and cost-effective manner.¹

Compacting is an effective tool not used just with Native Americans. The U.S. Government uses compacts for other purposes as well.²

Alaska Natives seek to be leaders in our relationship with the federal government, supporting innovation and new arrangements which can provide for the needs of Alaska Native people, keep up with change, and support U.S. interests. We note different arrangements the U.S. government has with others and seek to learn and adapt where appropriate. Alaska is also held up as a model in a number of areas.

¹ Currently self-governance compacts are authorized by the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended and are used primarily for tribes to assume operation of the Indian Health Service and Bureau of Indian Affairs programs. However, the statute also authorized tribal compacting of programs from other bureaus of the Department of Interior. Interior publishes a list annually of all non-BIA programs, services, functions and activities that are eligible for inclusion in self-governance agreements. There are required programmatic targets. Currently nearly the entire Indian Health Service and Bureau of Indian Affairs is compacted – with Alaska Native tribes, consortiums or statewide compacts running for example the statewide hospital, regional hospitals, subregional and village health clinics.

² For international engagement, the U.S. uses two types of compacts: the Compact of Free Association with the Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Marshall Islands and Palau; and the Millennium Challenge compact for countries such as Mongolia, Indonesia and a host of other low and medium income, qualified countries.

Alaska is known for its innovative approach to managing resource wealth with the Alaska Permanent Fund. Alaska is known for innovation in its approach to managing public lands and other resources. The State of Alaska negotiated its first ever child welfare compact, and its growth and maturity is continuing. **It is time for Alaska, with the strong support of the Commissioner of Education, and the State Board of Education to continue to support innovation in education, including a demonstration project in compacting.**

There has been much welcomed progress over the years in many Alaskan schools that adopted the teaching recommendations of Alaska Native leaders, tribes and tribal organizations, educators, and academic experts. Native language education is now part of the curriculum and many schools have found ways to present other aspects of Native culture to students. This incorporation of Native language and culture into the classroom has been successful and appreciated; but it is also clear that just teaching about culture is not enough to change educational outcomes. To influence those outcomes and improve our children's future, we need our schools to implement pedagogies based on and provided through Alaska Native cultural perspectives. Schools not only teach reading, writing, and math; they help shape the way students think about the world and prepare them to live in that world. Academic research has clearly established that for Alaska Native children to become confident, knowledgeable adults that are able to contribute to their own happiness and the wellbeing of their family, community, state and country it is critical that they remain linguistically and culturally connected. It is time to go beyond the theory and work on implementing change that will transform the education of Alaska Native students to improve outcomes for them, their schools, and their communities.

AFN considers compacting a mechanism to bring about this kind of change.

The demonstration project approach would serve multiple purposes. It would offer Tribes and Native communities an opportunity to have a direct role in providing their children an education grounded in and driven by their culture, language, traditions, and values. The experience will provide valuable information that will guide Native education planning and ensure future success in implementing tribal compacts for education.

The concept of an education compact between tribal, state and federal governments is significant in itself. We cannot re-write the difficult history of Alaska Native education in our state, but there is precedent setting value and certainly progress in the idea of Alaska Tribal, State and Federal collaboration; utilizing and sharing expertise and resources to find innovative and meaningful ways to support our children. The lessons learned from that collaboration and the demonstrations themselves may have other local, state, or national applications in terms of American Indian/Alaska Native programs or other multi-cultural programs or services.

A demonstration project would also help address questions and concerns of governments, government officials, educators, districts or parents. It could also allow time to perfect the model.

Legal Research: Based on our preliminary legal review, AFN believes that, as a matter of law, the State may enter into a compact with a Tribe, in which the State agrees to fund the operation of schools with a primary focus for the benefit of the Alaska Native student population, but the State's ability to do so through an agreement in the form of a compact likely requires new State

legislation. This demonstration project would essentially be a hybrid. It is necessary to be structured this way to look at all the aspects involved, assess and prove out the value.

This paper is intended to provide information on the historical and legal basis for compacting for the operation of schools for the education of Alaska Native students, with a goal of identifying the components needed for a successful education compact. The paper also seeks to identify, even as a preliminary matter, what actions would be needed to create or maintain the requisite legal authority for an Alaska Native Tribe to operate a school in conjunction with, and under, all federal and State authorities.

There is a vast amount of federal authority for funding and operations of educational programs for the benefit of Alaska Natives, and there is ample State authority, founded in the State Constitution, for educational programs and school operations for all students in Alaska, including Alaska Native students. At the same time, the convoluted history in Alaska of federal/state/local/tribal educational relationships with respect to the education of Alaska Native students in their home community creates some potential hurdles.

Recognizing that AFN's interest is less in the history of the educational legal precedents and history and more in moving forward toward best practices in the education of Alaska Native students, we note that in order to fully understand the authority for designing a state-of-the-art school, we need focus some on history, since it tells us largely what has not worked, and what has been inequitable to Native students. In short, we need to learn from that history.

Finally, as outlined more completely below, while there is ample authority for the use of *contracts* in the administration of educational programs for the benefit of Alaska Native students, particularly on the federal side, there is little authority for the full *compacting* of a Tribally operated school as part of the State educational commitment to all Alaska students. There is a gap in this instance—which may well require state legislation, at least—to fill, if the goal remains to have clear legal authority for the operation of a school or schools by an Alaska Native Tribe as part of the State of Alaska public school system, while protecting and enhancing the federal trust responsibility for education.

PART I: **TRIBAL COMPACTING OF EDUCATION**

I. What is Tribal Compacting of Education?

An education compact is a negotiated agreement between Tribes and a state and/or the federal government that sets forth the terms and conditions of the relationship. Unlike contracts, compacts may set political policies for the State and Tribes “and therefore have inherent value even beyond their stated goals”³ and practices under the compact may be changed without requiring new approvals for the change.

Under a self-governance compact, Tribes may partner with the State of Alaska and/or the federal government for the delivery of education, assuming the responsibility (and receiving the

³ Intergovernmental Compacts in Native American Law: Models for Expanded Usage, 112 Harv. L. Rev. 922, 924 (1999).

associated funding) to carry out educational programs, functions, services, and activities (PFSAs) the State or federal government otherwise would be obligated to provide. In the present proposal, a Tribal compact would formally recognize the Tribal entity's authority to oversee certain K-12 public schools.

II. Legal Basis and Principles for Tribal Compacting of Education

A. *Historical Background Setting the Stage for Tribal Compacting/Federal Self-Determination Legislation*

Alaska has long struggled with reconciling the dual systems of education for Alaska Natives. These systems created not only de jure separation and discrimination in the schooling of Alaska Natives, but also complicated questions of jurisdiction as to whether the State or the federal government is ultimately responsible for the education of Alaska Native children. As the following high-level overview of the history of education of Alaska's Native students demonstrates, the duplicative and dual nature of the federal and State school systems, while troubling as a matter of history and cultural preservation, help to create more of an opportunity for Tribal compacting of education in some circumstances.

I. Pre-Nelson Act Schooling of Alaska Native Children

Although Russia had operated schools in Alaska, education services languished following the United States' purchase of Alaska in 1867.⁴ Education in Alaska was not formally provided for following the United States' purchase of the territory until Alaska's Organic Act of 1884,⁵ which for the first time established a U.S. civil government in the territory and provided for education of children, including Native children. Specifically, Congress charged the Secretary of the Interior with making "needful and proper provision for the education of the children of school age in the Territory of Alaska, without reference to race, until such time as permanent provision shall be made for the same. . . ."⁶ Some of this was accomplished through entering into contracts with churches and missionary societies to operate schools throughout the State.⁷ By agreeing to pay a monthly tuition for Native children, the federal government created an incentive for these entities to keep Native children at the schools and away from their families, despite a lack of compulsory attendance.⁸

By the end of the nineteenth century, the federal government was moving away from using religiously operated schools for Native education. In 1896, the Department of the Interior Appropriations Act declared it to be federal policy that the government would not make appropriations for Native education by sectarian schools,⁹ though this was modified the following year to add the qualifier that it could be done if "non sectarian schools cannot be provided," but

⁴ See Getches, I.A.

⁵ Act of May 17, 1884, c. 53, 23 Stat. 24.

⁶ Act of May 17, 1884, c. 53, 23 Stat. 24, 27-28.

⁷ See Getches I.A.

⁸ See Getches I.A.

⁹ CITE.

no more than 50 percent of the 1895 contract amount could be so used.¹⁰ So began a phasing out of the use of contracting with sectarian schools for Native education in Alaska.

In 1900, Congress authorized communities with at least 300 people to incorporate as towns, elect school boards, and assume control of public schools.¹¹ While some communities were able to incorporate as towns and open schools, many communities failed to meet the size criteria but still wanted autonomy over their school management. This led to the Congressional authorization of schools outside incorporated towns through the Nelson Act.

ii. Long History of Challenging Dual School System in Alaska for Native Students: De Jure Separation and Discrimination¹²

The passage of the Nelson Act in 1905¹³ created a dual system of education for Native and non-Native students in Alaska. The Nelson Act required the establishment public school districts in incorporated towns, provided for establishing school districts outside of towns, and required town councils to provide adequate schoolhouses and funding for schools.¹⁴ Importantly, once a Nelson Act school was created in a location, the federal Bureau of Education was no longer responsible for education there.

However, Nelson Act schools were not for Alaska Natives. The Nelson Act stated, “the schools specified and provided for this act shall be devoted to the education of white children and children of mixed blood who lead a civilized life. The education of the Eskimos and Indians in the district of Alaska shall remain under the direction and control of the Secretary of the Interior . . .”¹⁵ Thus, the federal Bureau of Education retained responsibility for the education of Native students, leading to segregated district schools. Historical evidence suggests that the divergent paths of educating Native versus non-Native children in Alaska stemmed from racism rather than any fiscal concerns.¹⁶

Congress officially designated Alaska as a territory in 1912,¹⁷ and through passage of the Uniform School Act in 1917¹⁸ authorized Alaska’s territorial legislature “to establish and maintain schools for white and colored children and children of mixed blood who lead a civilized life.”¹⁹ The Nelson Act schools kept much of their local control, but they were subject to a territorial department of education and received funds appropriated from territorial funds by the legislature,

¹⁰ Act of June 10, 1896, c. 398, § 1, 29 Stat. 345.

¹¹ Act of June 6, 1900, c. 786, § 201-03, 31 Stat. 321, 521, *as amended*, 31 Stat. 1438.

¹² Note: This history does not address the complex history of the education of students deemed to be “part” Native. More information about the evolution of educational responsibility for these students is addressed in David H. Getches, *Law and Alaska Native Education: The Influence of Federal and State Legislation upon Education of Rural Alaska Natives* (Sept. 1977) (hereinafter “Getches”), *available at* http://www.alaskool.org/native_ed/law/law_ane.html.

¹³ Act of Jan. 27; 1905, c. 277, 33 Stat. 616.

¹⁴ Act of Jan. 27; 1905, c. 277, 33 Stat. 616, 617.

¹⁵ Act of Jan. 27; 1905, c. 277, 33 Stat. 616, 619.

¹⁶ *See* Getches I.A.

¹⁷ Act of Aug. 24, 1912, c. 387, 37 Stat. 512.

¹⁸ Ch. 64, [1917] -Sess. Laws of Alaska.

¹⁹ Act of Mar. 31, 1917, c. 167, 41 Stat. 1131.

while the federal government retained sole responsibility for Native education.²⁰ Thus began the dual federal-territorial school system and continued the racially segregated education of Alaska's Native students that began with the Nelson Act.

However, it was often not practical to provide separate educational facilities for Native and non-Native students, which led to the de facto integration of some of these schools.²¹ In 1930, Congress authorized the Secretary of the Interior to contract with school boards to provide education for "non-taxpaying Natives including those of mixed Native and white blood,"²² allowing payments up to the total it would cost to operate a separate Native school and for the Secretary to lease federal buildings to these contracting school boards. Freeing up these resources allowed the federal government to focus on areas with no educational facilities for Native children, but dozens of communities and hundreds of Native students still had no educational facilities at all by 1950.²³

iii. *Statehood and the Provision of Education in Alaska's Constitution*

Alaska's statehood in 1959 and the adoption of the Alaska Constitution made clear the State's commitment to full responsibility for the education of *all* children, including Alaska Native children. In addition to the general commandment that "[t]he legislature shall provide for public welfare,"²⁴ the Alaska Constitution specifically provides for public education, and it states, "[t]he legislature shall by general law establish and maintain a system of public schools open to all children of the State and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control."²⁵ The Alaska Supreme Court confirmed that, not only does this provision establish a "constitutional mandate for pervasive state authority in the field of education,"²⁶ it "guarantees *all* children of Alaska a right to public education."²⁷

Even following Alaska statehood and the new constitutional provision that specifically requires the State to "establish and maintain a system of public schools open to *all* children of the State,"²⁸ in reality, the dual system of separate education for Alaska's Native students continued for decades because the territorial schooling laws (which excluded the federally-run schools for Native children from State-operated school system) remained in effect.

The history of attempts to transfer control of these federally-controlled schools to the State of Alaska are detailed below.

²⁰ See Getches I.A.

²¹ See Getches I.A.

²² Act of May 14, 1930, ch. 273, 46 Stat. 279, 321.

²³ See Getches I.A.

²⁴ Alaska Const. art. VII, § 5. Public Welfare.

²⁵ Alaska Const. art. VII, § 1. Public Education.

²⁶ *Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971).

²⁷ *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972) (emphasis added).

²⁸ Alaska Const. art. VII, § 1. Public Education (emphasis added).

III. Alaska-Specific History of Federal Legislation and Executive Orders Related to Native Education

A. History of Transfers of BIA Schools from Federal to Alaska Territorial/State Government

As described below, the passage of the Johnson-O'Malley (JOM) Act in 1934,²⁹ led to the beginning of negotiations between the Alaska Territorial Department of Education and the BIA for transfer of rural BIA elementary schools to the Territory. Though Alaska's legislature quickly authorized its Territorial Board of Administration to enter into Johnson-O'Malley contracts, the first one in Alaska was not entered into until 1952.³⁰ Though 27 schools were transferred from federal to Territorial control, these transfers halted in 1954 due to the Territory's concern over costs.

Following Alaska statehood in 1959 and the new constitutional provision that specifically requires the State to "establish and maintain a system of public schools open to *all* children of the State,"³¹ the dual system of separate education for Alaska's Native students (created by the Nelson Act) continued because the territorial schooling laws (which excluded the federal BIA schools for Native children) remained in effect. However, conflict arose in 1960 when Alaska asked the BIA for funds to operate a new vocational school that would be largely attended by Alaska Natives.³² Questions and disputes over responsibility for providing education in rural Alaska, which primarily served Native students, ultimately resulted in a Memorandum of General Agreement between Alaska and BIA in 1963. This Memorandum stated that, although the State of Alaska was primarily responsible for education of all children, and that all State schools would be under one system, that federal funding was required as an essential bridge due to the State's finances. Pursuant to the agreement, the State was to develop a plan to transfer Alaska's BIA schools to State administration. However, the agreement did not contain a schedule for the transfer, and budgets and personnel for Alaska's BIA schools continued to increase.

In 1975, the State legislature set up 21 separate rural school districts (Regional Educational Attendance Areas) to decentralize education operations. In 1976, BIA began transferring schools to the new REAA districts. Perhaps accelerated by a reduction in the BIA's educational budget, competing demands on federal resources and by the growth in state wealth due to Prudhoe Bay oil revenues, DOI began negotiations with Alaska State officials in 1982 to complete the transfer of BIA schools to the State.³³

Congress appropriated approximately \$40 million over several years to repair and improve these schools prior to their transfer from BIA to the State of Alaska.³⁴ In a supplemental

²⁹ 25 U.S.C. § 452 (1970) (Act of April 16, 1934, c. 147, § 1, 48 Stat. 596, as amended 49 Stat. 1458).

³⁰ See Study of Title II of P.L. 93-638, prepared for the Bureau of Indian Affairs, 11-68 (1975), at 192.

³¹ Alaska Const. art. VII, § 1. Public Education (emphasis added).

³² See Getches I.B.

³³ See "Bia Official Will Negotiate Transfer Of Schools to State System" (Feb. 8, 1982), *available at* <https://www.bia.gov/as-ia/opa/online-press-release/bia-official-will-negotiate-transfer-schools-state-system>.

³⁴ U.S. Congress, House Committee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1994, hearings, part 8, 103rd Cong., 1st sess. (Washington: GPO, 1993), p. 167.

appropriations bill in July 1983, Congress set forth a pathway for winding down federal operation of BIA schools in Alaska. Congress appropriated \$22,000,000 to the State “on the condition that the State use the funds for the benefit of Alaska Native secondary students by either renovating the former Bureau of Indian Affairs Mount Edgecumbe Boarding School or constructing another non-Federal boarding school facility . . . and the Bureau of Indian Affairs shall not expend any other funds for the operation of any secondary educational program or facility in the State after June 30, 1983.”³⁵

Congress appropriated another \$9,350,000 to Alaska “to assist in the rehabilitation or reconstruction of Bureau-owned schools which are transferred to the State,” and clarified that the \$9,350,000 previously appropriated³⁶ to Alaska for such purposes “to assist in the rehabilitation of Bureau-owned schools which are transferred to the State may also be used for reconstruction.”³⁷ BIA could fund no more than ten day schools in Alaska after June 30, 1984, and BIA was prohibited from funding any schools in Alaska after June 30, 1985.³⁸ The legislation goes on to add that “while consultation concerning day school transfers to the State of Alaska will continue affected villages, local concurrence is not required in this continuing effort to establish a single system of education envisioned by the State’s constitution.”³⁹

During this time, other federal assets were transferred to the State of Alaska such as the Alaska Railroad in 1985. Alaska’s oil wealth made federal expenditures to Alaska more and more difficult. Final transfer of BIA schools to Alaska occurred in 1985. The language in the 1983 supplemental appropriations legislation above, including “that the Bureau of Indian Affairs shall not fund any schools in Alaska after June 30, 1985,” is codified at 25 U.S. Code § 292b.

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The 1994 Appropriations legislation for the Department of the Interior and Related Agencies contained a provision that prohibited the use of funding (excluding Johnson-O’Malley funds) to support the operation of elementary and secondary schools in Alaska.⁴⁰ The provision stated:

That notwithstanding any other provision of law, no funds available to the Bureau of Indian Affairs, other than the amounts provided herein for assistance to public schools under the Act of April 16, 1934 (48 Stat. 596), as amended (25 U.S.C. 452 et seq.), shall be available to support the operation of any elementary or secondary school in the State of Alaska in fiscal year 1994.⁴¹

³⁵ PL 98–63 (HR 3069), PL 98–63, JULY 30, 1983, 97 Stat 301.

³⁶ Public Law 97-394, 96 Stat. 1974.

³⁷ PL 98–63 (HR 3069), PL 98–63, JULY 30, 1983, 97 Stat 301.

³⁸ PL 98–63 (HR 3069), PL 98–63, JULY 30, 1983, 97 Stat 301.

³⁹ PL 98–63 (HR 3069), PL 98–63, JULY 30, 1983, 97 Stat 301.

⁴⁰ U.S. Congress, House Committee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1994, hearings, part 8, 103rd Cong., 1st sess. (Washington: GPO, 1993), p. 166.

⁴¹ Public Law 103-138, 107 Stat. 1379, 1392 (Nov. 11, 1993).

In the House Committee on Appropriations' hearing on this legislation, in an exchange with Rep. Norm Dicks (D-WA), Assistant Secretary of Indian Affairs Dr. Eddie Brown explained the reasoning for this requested language:

We looked at the costs and the precedent that would be set. I think it's important to understand that there is an application process for Alaskan schools wanting to have the Bureau take over that is required by law. As we are all aware, a number of years ago, the education responsibility was taken from the Bureau and given to the State of Alaska. However, another act outlined a process by which schools could re-enter again into the Bureau. We have about 18 applications coming down the pike here in regard to Alaska. Our concern is this: it would exceed \$250 million per school year if all 87 schools were granted a transfer back to the Federal Government. I've visited Alaska and have talked with representatives, Congressional representatives, State representatives, and village and corporation representatives. They are concerned, there is a definite need in education up in Alaska, but I'm not sure the answer is, "Turn it back over to the Bureau and things will be better."⁴²

The following exchange between Rep. Norm Dicks (D-WA) and Dr. John Tippeconnic, Director of the Office of Indian Education Programs, at the House Committee on Appropriations' hearing on this legislation indicates that it was the position of the BIA that the federal government is not obligated to provide for education in Alaska:

Mr. DICKS. Is the State still obligated to provide education for all its citizens, including Alaska natives?

Mr. TIPPECONNIC. Yes.

Mr. DICKS. Is it continuing to do so?

Mr. TIPPECONNIC. Yes.

Mr. DICKS. What if anything has changed that would require the Federal Government to provide for education in the State of Alaska now?

Mr. TIPPECONNIC. The Alaska villages, I think, questioned the type and quality of education that they were receiving from the state, and had looked to alternatives. And the alternative that they are looking at is the Bureau.

Mr. DICKS. And your position is you basically don't have the money to do it?

Mr. TIPPECONNIC. We don't have the money to do it right now, that's right.

Mr. DICKS. And you want this language added to the appropriations bill that would prohibit it?

Mr. TIPPECONNIC. Yes, sir.⁴³

Currently, annual appropriation legislation for DOI regularly include an administrative provision prohibiting BIA expenditures to support operation of elementary and secondary schools

⁴² U.S. Congress, House Committee on Appropriations, *Department of the Interior and Related Agencies Appropriations for 1994*, hearings, part 8, 103rd Cong., 1st sess. (Washington: GPO, 1993), p. 166.

⁴³ U.S. Congress, House Committee on Appropriations, *Department of the Interior and Related Agencies Appropriations for 1994*, hearings, part 8, 103rd Cong., 1st sess. (Washington: GPO, 1993), p. 168.

in Alaska (except through the Johnson-O'Malley program); see, for example, P.L. 110-161 (121 Stat. 2113).⁴⁴

Repealing this legislation should be considered as part of a strategy for developing adequately funded education for Alaska Native students considered by Tribal compacting.

IV. State Action Relevant to Education of Native Students

A. State Constitutional and Statutory Requirements

As described above, the ratification of Alaska's Constitution made clear the State's commitment to full responsibility for the education of *all* children. The Alaska Constitution specifically provides for public education, and it states, "[t]he legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions."⁴⁵ The Alaska Supreme Court confirmed that, not only does this provision establish a "constitutional mandate for pervasive state authority in the field of education,"⁴⁶ it "guarantees *all* children of Alaska a right to public education."⁴⁷

Even following Alaska statehood in 1959 and the new constitutional provision that specifically requires the State to "establish and maintain a system of public schools open to *all* children of the State,"⁴⁸ in reality, the dual system of separate education for Alaska's Native students continued for decades because the territorial schooling laws (which excluded the federal BIA schools for Native children) remained in effect.

Pursuant to Alaska's constitutional directive, Alaska law provides that "[t]here is established in the state a system of public schools to be administered and maintained as provided in this title."⁴⁹ It is the State's education policy "that the purpose of education is to help ensure that *all students* will succeed in their education and work, shape worthwhile and satisfying lives for themselves, exemplify the best values of society, and be effective in improving the character and quality of the world about them."⁵⁰

Alaska law does specifically provide to schools districts the authority to contract for educational services.⁵¹ The agency must be accredited by the Department of Education and Early Development, and the Department must adopt regulations and program standards for these contracted services.⁵² However, the Department and the State's Board of Education and Early Development "may not enter into or renew a contract or agreement, or participate, with any organization, entity, group, or consortium after July 1, 2014 that requires the state to cede any

⁴⁴ Cassandra Dortch, Cong. Research Serv., RL34205, Indian Elementary-Secondary Education: Programs, Background, and Issues 11 (2020) (citing as an example P.L. 110-161, 121 Stat. 2113).

⁴⁵ Alaska Const. art. VII, § 1. Public Education.

⁴⁶ *Macaulay v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971).

⁴⁷ *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972) (emphasis added).

⁴⁸ Alaska Const. art. VII, § 1. Public Education (emphasis added).

⁴⁹ A.S. 14.03.010.

⁵⁰ A.S. 14.03.015 (emphasis added).

⁵¹ A.S. 14.03.083.

⁵² A.S. 14.03.083(a)-(b).

measure of autonomy or control over education standards and assessments, including the determination of passing scores.”⁵³

B. *Molly Hootch Case/Tubelike Consent Decree*

In 1972, a group of Alaska Native student plaintiffs—led by 16-year-old Molly Hootch from Emmonak and 18-year-old Anna Tubelike from Nunapitchuk—sued the State for failing to provide local high schools in predominantly Alaska Native villages.⁵⁴ These cases were settled by the signing of the tubelike Consent Decree in 1976, which committed Alaska to provide high schools in any community with at least eight or more students of high school age (later increased to ten or more), rather than sending these students to boarding schools. These lawsuits led to the apparent reversal of the assimilation policy over Alaska Natives.

Before the lawsuits, Alaska sent these students to BIA boarding schools, primarily Mt. Edgecumbe High School in Sitka or other BIA boarding schools in Oregon, California, or Oklahoma.

C. *Native-oriented schools, curriculum, language extension*

Alaska State law specifically addresses Native language education. School boards must establish a local Native language curriculum advisory board for every school in the district in which the majority of students are Alaska Natives,⁵⁵ and may do so for every school with Alaska Native students.⁵⁶ If that advisory board so recommends, the school board may create and conduct a K-12 Native language education curriculum at that school.⁵⁷ Such a program, implemented as part of regular classroom studies, must include Native languages traditionally spoken in the local community.⁵⁸ In some ways, however, this approach, while well-intended, is incomplete. More needs to be done to understand how Native students learn best, and to incorporate that cultural diversity into teaching processes, as well as curriculum.

V. **Authority to Enter into Compact for Education Services**

A. *Different Legislative Philosophies Supporting Tribal Compacting of Education*

Tribal compacting of education in Alaska could be premised on different theories regarding Tribal control over Native education, which arise from the foundation of federal laws which have supported education for Native American students based on trust responsibilities to deliver such educational services and specific federal statutes. There is a clear need for teaching methods and

⁵³ A.S. 14.03.083(d).

⁵⁴ *Hootch v. Alaska State-Operated School System*, 536 P.2d 793 (1975). See also <https://www.adn.com/opinions/2016/10/28/molly-hootch-never-intended-to-sue-but-she-is-glad-her-case-changed-alaska/>.

⁵⁵ For the purpose of this section, “‘Native’ means a person of one-fourth degree or more Alaskan Indian, Eskimo, or Aleut blood.” A.S. 14.30.420(b)(2).

⁵⁶ A.S. 14.30.420(a).

⁵⁷ A.S. 14.30.420(a).

⁵⁸ A.S. 14.30.420(a).

teaching personnel to understand cultural differences, and to incorporate best practices addressing those differences into teaching.

Discussed in brief below are two theories supporting Tribal compacting of education that arise from two seminal pieces of legislation—the Johnson-O’Malley Act (JOM) and the Indian Self-Determination and Education Assistance Act (ISDEAA).

B. *JOM Basis*

The Johnson-O’Malley (JOM) Act⁵⁹ in 1934 marked a new federal approach for Native education. Through the JOM, Congress sought to incentivize states and territories to assume responsibility for educating Native children by authorizing the Secretary of the Interior through the Bureau of Indian Affairs (BIA) to negotiate contracts with states, territories, and local agencies that would provide federal funding to help defray the costs of educating Native students. The funding was not tied to a reservation or to Indian Country. The JOM “reaffirmed the continuing legal responsibility of both the federal government and the states to provide education for Indians. While the federal responsibility was based on treaty and statute, the states’ responsibility lay in their obligation to educate all residents.”⁶⁰

Today, the JOM authorizes contracts with eligible entities—including, certain tribal organizations, Indian corporations, school districts, or states—for the education of eligible American Indian or Alaska Native students who are enrolled in public schools and previously private schools. These local programs are operated under a Bureau of Indian Education (BIE) approved educational plan, which contains educational objectives to address the needs of the eligible American Indian and Alaska Native students. JOM programs are varied and may include such programs as culture, language, academics, and dropout prevention, but JOM funds may not be used for capital expenditures.⁶¹

Contractors providing JOM programs to Native students operate in close cooperation with the BIE. With the long history of JOM programs in Alaska, including years in which AFN served as a lead contractor, it is worth noting that there have been substantial federal education appropriations to Alaska, including through the JOM program over the years.

C. *ISDEAA Basis*

The Indian Self-Determination and Education Assistance Act (ISDEAA)⁶² in 1975 marked a drastic shift in self-determination legislation for Tribes. This legislation provided far greater authority for Tribes to assume responsibility for aid programs that benefit their members and emphasized tribal self-determination and self-governance “in planning, conduct, and

⁵⁹ 25 U.S.C. § 452 (1970) (Act of April 16, 1934, c. 147, § 1, 48 Stat. 596, as amended 49 Stat. 1458).

⁶⁰ Carol Barnhardt, “A History of Schooling for Alaska Native People,” 40 *Journal of American Indian Education* 1 (2001) (quoting DeJong, 1993, p. 178).

⁶¹ *Johnson-O’Malley*, Bureau of Indian Education, U.S. Dep’t of the Interior, <https://www.bie.edu/topic-page/johnson-omalley>.

⁶² Public Law 93-638, 25 U.S.C. §§5301 et seq.

administration” of certain federal programs. “[ISDEAA] answered the call for a new national policy of autonomy and control for Native Americans and Alaska Natives.”⁶³

ISDEAA sought to decentralize the provision of federal benefits to Native Americans away from the federal government and towards Native organizations by allowing any Tribe to request that the Secretary of the Interior enter into a self-determination contract with a designated “tribal organization.”⁶⁴ Through these contracts, the Tribal organization can deliver federally-funded economic, infrastructure, health, or education benefits to the Tribe’s membership.

These two federal statutes provide clear authority for the contracting between the Federal government and Tribal organizations to conduct culturally-appropriate educational programs for the benefit of Alaska Native students, and also provide the basis for the operation of a school for culturally-specific purposes.

Other Authorities for Compacting

Each party must have the authority to enter into a Tribal compact. Accordingly, both the State of Alaska and the Tribe entering into the compact must have the requisite authority to engage in the tribal compacting of education. This authority derives from different sources depending on the signatory.

A. Tribes

The ability of Tribes to enter into compacts derives from their inherent sovereignty. The Tribal governments of the 229 federally-recognized Alaska Native Tribes, “have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.”⁶⁵

As the Alaska Tribal Child Welfare Compact notes, “the Alaska Native people have governed themselves and lived in the area known as Alaska since time immemorial.”⁶⁶ As part of their sovereign authority, Tribes have inherent authority to provide for the well-being of their members.⁶⁷ This has been explicitly recognized in other compacts entered into by the State of Alaska and Tribes.⁶⁸

⁶³ *Yellen v. Confederated Tribes of Chehalis Rsr.,* 141 S. Ct. 2434, 2439 (2021).

⁶⁴ 25 U.S.C. § 5321(a)(1).

⁶⁵ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54364 (Oct 21, 1993); 82 Fed. Reg. 4915 (Jan. 17, 2017).

⁶⁶ Alaska Tribal Child Welfare Compact, at 2.

⁶⁷ *See, e.g.,* Alaska Tribal Child Welfare Compact, at 9. *See also id.* at 5 (acknowledging “the inherent and statutory authority of Tribes over health and welfare . . .”).

⁶⁸ *See, e.g.,* Alaska Tribal Child Welfare Compact, at 9 (“Tribes have inherent authority to provide for the well-being of their members, including authority to carry out public health and safety programs, including child welfare and child protective services.”).

Tribes entering into compacts with the federal government, through ISDEAA or other applicable federal law, “without diminishing inherent tribal authority . . . have the authority and obligation to carry out federal programs, services, functions, and activities, or portions thereof, as if they were the federal agency.”⁶⁹

Typically, a Tribe enters into compacts through the authorized action of its governing body.⁷⁰ Tribes may also enter into compacts through “Tribal Organizations, Consortia, and Inter-Tribal Consortia.” *See, e.g.,* Alaska Tribal Child Welfare Compact, at 3 (“[C]ertain Tribes in Alaska have formed and authorized certain Tribal Organizations, Consortia, and Inter-Tribal Consortia as defined in 25 U.S.C. § 5304(*I*), 25 C.F.R. § 1000.2, and 25 U.S.C. § 5381 (a)(5), respectively, for the purpose of providing services to Alaska Natives and to contract with federal and non-tribal agencies for such purposes as well as to provide services to the other residents of their respective service areas, as permitted under by Section 813 of the Indian Health Care Improvement Act, as amended, codified at 25 U.S.C. § 1680c, or other applicable law[.]”)⁷¹

Tribes could also enter into a compact through authorizing a consortium or other statewide Native entity to do so. *See, e.g.,* Alaska Tribal Child Welfare Compact, at 9-10 (“The governing body of a Tribe that intends to participate in this Compact . . . through delegation of authority to another Tribe or Tribal Organization must authorize such other Tribe or Tribal Organization to enter into this Compact . . . on its behalf.”). *See also id.* at 10 (“A Tribal Organization may enter into this Compact . . . on behalf of Tribes that have individually authorized it to do so, or on its own behalf, under authority the Tribal Organization exercises pursuant to ISDEAA, provided that certain governmental functions may be carried out by a Tribal Organization only upon express authority of one or more Tribes.”).

B. *State of Alaska*

As noted above, the Alaska’s Constitutional provision “[t]he legislature shall by general law establish and maintain a system of public schools open to all children of the State,” is a “constitutional mandate for pervasive state authority in the field of education.”⁷² While the federal government’s general authority to enter into educational compacts with Tribes derives from the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA),⁷³ there does not appear to be general authority for State of Alaska to enter into compacts with Tribes for the provision of services such as education. Therefore, it is very likely that the State will need to enact legislation specifically authorizing the Tribal compacting of education.

Compacting with Tribes derives from the State’s recognition of Tribal sovereignty. Alaska explicitly “recognizes and supports the unique status of Alaska Native Tribes and their right to a sovereign existence, self-government, and self-determination.”⁷⁴ In other State-Tribal compacts,

⁶⁹ Alaska Tribal Child Welfare Compact, at 9.

⁷⁰ *See, e.g.,* Alaska Tribal Child Welfare Compact, at 9.

⁷¹ Alaska Tribal Child Welfare Compact, at 3.

⁷² *Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971).

⁷³ We are currently researching other authorities beyond ISDEAA that offer foundational authority for Native education compacts.

⁷⁴ Alaska Tribal Child Welfare Compact, at 2.

State policy has been reflected as “the State of Alaska values government-to-government relations with Alaska’s sovereign Tribes and recognizes that the development of strong, reliable government-to-government relationships between the Tribes and the State of Alaska benefits all Alaskans.”⁷⁵ Related to compacting with Tribes, Alaska recognizes that “[g]overnment-to-government agreements are required for information sharing purposes so that both systems are able to build trust, and track progress and outcomes of the families served[.]” Helpfully, for Tribal compacting of education, past State-Tribal compacts have stated, “[t]he State recognizes [Alaska Native Tribe’s] inherent tribal authority to . . . deliver local, culturally relevant services and other programs to support the well-being of their communities through a holistic and healing approach[.]”⁷⁶

While the State law and policy clearly support compacting with Tribal governments, it does seem that specific legislative authority is required in order for the State to enter into a State-Tribal education compact. Other tribal-state compacts entered into by the State of Alaska examined appear to have specific authorization in State statute (see, e.g., compacts related to the implementation of ICWA, Health Care).⁷⁷

Similarly, other states appear to have passed specific legislation authorizing such compacts. For example, when Washington State began to enter into Tribal compacting of education in 2013, the Washington State Legislature passed Engrossed Second Substitute House Bill (E2 SHB) 1134 authorizing State-Tribal education compact schools.

Accordingly, because there does not appear to be any general authority for the State to enter into education compacts, the State legislature likely needs to enact legislation specifically authorizing a revision of State law in order to enter into a compact for education services.

On January 25, 2021, Alaska State Senator Gary Stevens introduced a bill that would provide for the establishment of public schools through State-Tribal compacts.⁷⁸ SB 136, which is modeled after the State’s approach to boarding and charter schools, would allow the Alaska Commissioner of Education to enter into compacts with federally-recognized Alaska Native Tribes to establish Tribally-controlled schools. When introducing the bill, Senator Stevens encouraged committee members to look at Washington State’s Tribal school compacting program as an example of what Alaska intends to accomplish. Commissioner of the Department of Education and Early Development, Michael Johnson, spoke in support of the effort to pass compacting legislation and described Tribal compacting as a priority for the State Board of Education. Dr. Johnson emphasized the persistent educational achievement gap in Alaska and said a compacting program would help address a historical lack of respect for Native cultures and languages in Alaska’s school system. He also noted that the actions of Alaska Native Tribes to keep schools open and operating during the pandemic proved that coordination with Tribal

⁷⁵ Alaska Tribal Child Welfare Compact, at 2.

⁷⁶ Alaska Tribal Child Welfare Compact, at 2.

⁷⁷ Alaska Tribal Child Welfare Compact has one: AS 47.14.100(g): The department may enter into agreements with Alaska Native villages or Native organizations under 25 U.S.C. 1919 (Indian Child Welfare Act of 1978) respecting the care and custody of Native children and jurisdiction of Native child custody proceedings.

⁷⁸ The text of the SB 34 is available at <http://www.akleg.gov/PDF/32/Bills/SB0034A.PDF>. Bill history for SB 34 is available at http://www.akleg.gov/basis/Bill/Detail/32?Root=SB%20%2034#tab1_4.

governments can lead to positive results for education. AFN has reviewed this legislation and is seeking additional changes and improvements in it.

VI. Examples of Other Existing Tribal Compacts in Alaska

Alaska has reaped the benefits of Tribal compacts—both federal and State—with Alaska Native entities to provide a variety of services for decades. Two model examples are Alaska Tribal Health Compact and the Tribal compact implementing the federal Indian Child Welfare Act (ICWA).

A. Alaska Tribal Health Compact

Perhaps one of the most successful Tribal compacts in the country is the Alaska Tribal Health Compact (ATHC). The ATHC is an ISDEAA⁷⁹ Tribal compact that serves as an umbrella agreement between the federal Indian Health Service (IHS) and 25 Alaskan non-profit Tribal health entities. It has been a model of resolving issues arising from self-governance compacts throughout the nation.⁸⁰ Individual regional Tribal compacts such as the Yukon-Kuskokwim Health Corporation in Bethel, or SouthCentral Foundation operate in Anchorage, are among the largest as well in the country.

Prior to 1970, health care for Alaska Natives was provided by the federal government. However, following the passage of self-governance legislation in the 1970s, Alaska Tribes began to organize under health care organizations and began to gradually assume health care provision at the regional and Tribal levels.⁸¹ The purpose of the regional or consortium approach was to stretch the health resources further and allow the formation of a coordinated “feeder system of care” rather than a fully spectrum of health care located in each community.

Formed on October 1, 1994, the ATHC authorizes the signatory Tribes and Tribal health organization to operate health and health-related programs in Alaska, and it outlines the responsibilities of each party to provide health services to Native beneficiaries in Alaska. Through this compact, IHS negotiates 25 separate Tribal funding agreements each year.⁸² It is purported to be the only multi-party compact in the country;⁸³ Tribal authority to enter into the compact was delegated through authorizing resolutions.⁸⁴ The Alaska Native Health Board (ANHB) facilitates

⁷⁹ Title V of Public Law 93-638 of the Indian Self-Determination and Education Assistance Act.

⁸⁰ Alaska Native Health Board, “Alaska Tribal Health Compact,” <http://www.anhb.org/tribal-resources/alaska-tribal-health-compact/>.

⁸¹ A history of the transition to statewide Tribal health services under Alaska Native ownership, including the ATHC, is presented in “Our Health in Our Hands, Part 3: Alaska’s Tribal health consortium takes shape, 1990-1999,” Alaska Native Tribal Health Consortium (Feb. 26, 2019), *available at* <https://anthc.org/news/our-health-in-our-hands-part-3-alaskas-tribal-health-consortium-takes-shape-1990-1999/>.

⁸² IHS, “Alaska Area,” <https://www.ihs.gov/alaska/>.

⁸³ Alaska Native Health Board, “Alaska Tribal Health Compact,” <http://www.anhb.org/tribal-resources/alaska-tribal-health-compact/>.

⁸⁴ *See History and Application of the Alaska Tribal Health Compact with the Indian Health Service*, at 8.

pre- and final negotiations and Tribal caucus, disseminates information, and coordinates workgroups as needed.⁸⁵

Per the Tribal Lead Negotiator and the IHS Alaska Area Director, the Alaska Tribal Caucus Structure for the ATHC negotiations generally follows this agenda:

- Caucuses (Tribal & Federal).
- Review of Common Open Items Issues & Updates.
- Pre-negotiations – new issues & new co-signers.
- Common Negotiations – Preserves Tribal Right to opt out of commonly negotiated items.
- Individual Tribal Funding Agreement Negotiations (drawing to determine order):
 - o Opportunity to share local concerns and issues
 - o Negotiation of Tribal-specific terms, language & issues.⁸⁶

AHTC negotiations follow several guiding principles:⁸⁷

- **Government-to-Government Relationship** – ATHC negotiations are built on the Government-to-Government relationship between the United States and the Alaska Native Tribes and Tribal organizations represented in the ATHC.
- **Respect for All Participants** – All Tribes and Tribal organizations have the opportunity to participate in negotiations through their designated Tribal representative. Decisions affecting the negotiation are addressed in Tribal caucus, which is open to all Alaska Native Tribal representatives.
- **Formal Consensus** – Co-signer's act through a formal consensus process for common issues affecting the compact. Though formal consensus does not prevent Co-Signers from adopting individual positions, all Co-Signers agree to participate in the formal consensus process.
- **Access to Information** – The Co-Signers work to provide access and analysis of information to all ATHC members through the ANHB. This includes, sharing funding agreements and open negotiations for individual agreements. During Tribal caucus and negotiations, Co-Signers agree to allow access to the expertise of individual Co-Signer specialists and compact consultants.
- **Transparency** – The Co-Signers have shared analysis and information on the IHS to provide a full understanding of IHS's actions and the impacts of these actions on all Co-Signers.
- **Unity** – To the fullest extent possible, the Co-Signers have adopted a unified approach to support and enhance the Alaska Tribal Health System and to increase influence nationally within the IHS.
- **Uniqueness** – The Co-Signers have developed unique solutions to ATHC problems when necessary and recognize the individual sovereignty of each member of the

⁸⁵ Alaska Native Health Board, "Alaska Tribal Health Compact," <http://www.anhb.org/tribal-resources/alaska-tribal-health-compact/>.

⁸⁶ History and Application of the Alaska Tribal Health Compact with the Indian Health Service, at 9.

⁸⁷ See Alaska Tribal Health Compact Handbook, at 2; *see also* Alaska Native Health Board, "Alaska Tribal Health Compact," <http://www.anhb.org/tribal-resources/alaska-tribal-health-compact/>.

ATHC. These Co-Signers have agreed to discuss the unique character of the Alaska Tribal Health System (ATHS) and to develop solutions on resource distribution and other issues addressing this uniqueness and support desirable characteristics and values of the statewide system.

More information about how the ATHC evolved, the operation of the compact, and its impact on the Alaska Tribal health system today is set forth in a presentation given by the ATHC Tribal Lead Negotiator and the IHS Alaska Area Director in 2016.⁸⁸

B. *Alaska Tribal Child Welfare Compact (ICWA Compact)*

Another example of compacting in Alaska is the Alaska Tribal Child Welfare Compact. Primary goals of this compact were to strengthen the State's compliance with the federal Indian Child Welfare Act (ICWA), which established standards for the removal and placement of Native children and enabled Tribes and Native families to be involved in child welfare cases, and to reduce the disproportionality of Alaska Native children in state custody.⁸⁹

This compact was entered into by the State of Alaska and certain Alaska Native Tribes and Tribal Organizations on December 15, 2017, "to provide child welfare services and authority to enter into inter-governmental agreements with Tribes and Tribal Organizations to fulfill its obligations, the authority of Alaska Native Tribes and Tribal Organizations under federal and tribal law to exercise authority over child welfare matters, and the unique state-tribal cooperation that has developed in Alaska to ensure improved compliance with the Indian Child Welfare Act and transformation of child welfare services in an effort to reduce the rate of out of home placement and improve the well-being of all Alaskan children and families."⁹⁰ The compact transfers specific, negotiated child welfare services and support—including associated revenue streams—from Alaska's Office of Children's Services to the Tribal Co-Signers of the compact.⁹¹ Eighteen Tribal Co-Signers representing 161 federally-recognized Tribes and Tribal organizations signed the compact.⁹²

Transferring these services from the State to Tribes offered several benefits. On the funding side, federal funding is provided to states and Tribes for social services, including foster care, transitional independent living programs, and guardianship and adoption assistance, and Tribes receive a higher reimbursement rate than states for covered services.⁹³ For Native children and communities, the compact "[p]rovides higher quality services, closer to home, at a lower cost through leveraging Tribal resources[;] [s]trengthens state services by engaging Tribes, often the

⁸⁸ History and Application of the Alaska Tribal Health Compact with the Indian Health Service, *available at* <https://www.tribalselfgov.org/wp-content/uploads/2016/04/Tribal-Self-Gov.History-and-Application-of-the-Alaska-Tribal-Health-Compact-with-the-IHS-CMmark-4.5.16.pptx>.

⁸⁹ Rep. Tiffany Zulkosky, "HB184 – Tribal Child Welfare Compact," at 3 (Apr. 22, 2021), *available at* http://www.akleg.gov/basis/get_documents.asp?session=32&docid=15303.

⁹⁰ ICWA compact at 1.

⁹¹ Rep. Tiffany Zulkosky, "HB184 – Tribal Child Welfare Compact," at 4 (Apr. 22, 2021).

⁹² Rep. Tiffany Zulkosky, "HB184 – Tribal Child Welfare Compact," at 4 (Apr. 22, 2021).

⁹³ Rep. Tiffany Zulkosky, "HB184 – Tribal Child Welfare Compact," at 3 (Apr. 22, 2021).

most local government, on an issue of shared interest[; and] [i]ncreased public trust through existing family relationships with Tribes.”⁹⁴

Helpfully, for the purposes of educational compacting, the ICWA compact states that the compact “enables the State of Alaska to maintain and improve its unique and changing relationship with Tribes and Tribal Organizations through orderly transition from state control of child welfare to direct or collaborative involvement with Tribes and Tribal Organizations in order to improve the well-being of Alaska’s children.”⁹⁵

VII. Potential Challenges/Barriers to Address in Entering into Tribal Compact for School Operations

In researching the legal basis for entering into State-Tribal compacts, we have identified the following preliminary issues that need to be considered with regard to the Tribal compacting of education. It appears that many of these issues could be specifically addressed by (and mutual risks allocated by) the compact itself, but we should be aware that the following non-exclusive list of issues could arise.

A. Liability

The Tribal Co-Signers would need to be shielded to some degree and some form from liability incurred through performing the services under the compact, otherwise, the compacting organization may pass on the opportunity to compact. For example, ISDEAA specifically brings Tribes under the coverage of the Federal Tort Claims Act (FTCA) for services performed under an ISDEAA compact (i.e., Tribal employees performing services under ISDEAA contracts are generally covered by the FTCA). Alaska State law has a similar provision that covers State employees,⁹⁶ but the term “employee” is narrowly defined,⁹⁷ and it does not appear to cover contractors. As such, the compacting Tribal entity may need to specifically negotiate for tort claims coverage from the State in the Tribal education compact.

It does appear that tribal compacting parties have broad leeway to negotiate apportionment of liabilities. For example, prior compacts have required waivers of sovereign immunity for certain activities. Tribal entities could negotiate the areas in which they are willing to assume the State’s liability for assumption of the provision of services. In any event, if compacts are developed, they should specifically define and apportion liability for specific activities and vulnerabilities, clarify sovereign immunity, if any; and delineate all rights and responsibilities of both parties.

⁹⁴ Rep. Tiffany Zulkosky, “HB184 – Tribal Child Welfare Compact,” at 7 (Apr. 22, 2021).

⁹⁵ ICWA compact at 6.

⁹⁶ A.S. 09.50.253.

⁹⁷ A.S. 09.50.253(h)(2).

B. *Possible Personnel Management and Benefits Issues*

By assuming educational functions that are traditionally within the purview of the State, compacting entities could be opening themselves up to liability or exposure for some of the following issues normally within the State's jurisdiction, including:

1. Unfunded mandates/pensions.
2. Contract negotiations and pension obligations.
3. Challenges involved in reimagining roles and responsibilities.
4. Teacher credentials.
5. Curriculum coverage.

As noted above, it does appear that parties to tribal compacts have broad leeway to negotiate apportionment of liabilities, but great care should be taken to define these areas and responsibilities.

C. *Teacher Certification and Curriculum Development*

There will likely need to be an additional teacher certification pathway developed specifically for teachers who will be educating students at the schools envisioned by the compact. The creation of this special certification that have an impact on other teacher pathway options for non-STEAC schools to gain access to credentialed teachers. Similarly, the development of the curriculum for these STEAC schools (and the subsequent standards deriving from this curriculum) could have ripple effects on other State curriculum standards. These ripple effects could be very positive as success is demonstrated in this project. Lessons learned.

These issues could be addressed through a potential statutory exemption from statutory and regulatory requirements for teachers if teaching through a compact.

D. *Other Issues*

These are only some of the challenges that could arise in negotiating the compact. Other issues for discussion should include infrastructure and resources, economies of scale and increased efficiencies may lead to competing pressure on containing costs, etc.

VIII. **Example of Successful Creation of State-Tribal Education Compact (Washington State)**

The State-Tribal education compact (STEAC) schools in Washington State offer a potential model for the Tribal compacting of education in Alaska. In 2013, in response to high dropout and low graduation rates among Native American students, Washington State became the first state to try a Tribal compacting model for education. State Senator John McCoy, a member of the Tulalip Tribes of Washington, introduced the legislation, which authorized the Washington State Superintendent of Public Instruction to enter into State-Tribal education compacts with Tribal

governments and existing BIA schools.⁹⁸ Prior to that time, Washington State had required Tribal schools to negotiate agreements with local school districts. Under that system, money was spent on a district's administrative costs before trickling down to Tribal schools. When enacting STEC legislation, lawmakers expressly found that Washington State's prior practice failed to honor Tribal sovereignty and resulted in a siphoning of funds for administration costs that could be used for teaching and learning.

Washington State STEC schools negotiate with the state at the state level of a government. Since 2013, additional legislation has addressed the terms under which STEC schools may participate in the state retirement system,⁹⁹ and the accommodation of cultural and agricultural events in school attendance requirements.¹⁰⁰ In 2018, five STEC schools also received dual language grant funding to support the strengthening and revitalization of Native languages. The state Office of Native Education (ONE), established in the 1960s, oversees STEC schools and serves as a liaison between them, Office of the Superintendent of Public Instruction (OSPI), school districts, and Tribal governments.

Currently, there are seven STEC schools in Washington State, six of which are affiliated with the BIA.¹⁰¹ Of those six, four operate under STEC compacts and BIE tribally-controlled grants and two operate under STEC compacts and BIE contracts.¹⁰² Only one STEC school operates independently from the BIA—the Chief Kitsap Academy in Suquamish.¹⁰³ In 2003, the Suquamish Tribe received a grant through the Gates Foundation to establish a Tribal high school that partnered with a local college.¹⁰⁴ In 2012, the Tribal school was reorganized and, in 2014, became one of the state's first STEC schools. The school now serves grades 6-12.¹⁰⁵ Some of the other STEC schools serve grades K-12 and the state Department of Early Learning has been directed to form a working group to develop an early learning pilot program at STEC schools.

Under Washington State law, to begin the process of opening a STEC school, the governing body of a Tribe or of a BIA school must pass a resolution and complete a four-page application¹⁰⁶ indicating the grade or grades that will be offered and demonstrating the school will operate in compliance with all applicable laws, rules, and compact terms, including provisions on:

⁹⁸ Session law available at <https://lawfilesexternal.wa.gov/biennium/2013-14/Pdf/Bills/Session%20Laws/House/1134-S2.SL.pdf?q=20211123095311>.

⁹⁹ Session law available at <https://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/6210.SL.pdf?q=20211123103521>.

¹⁰⁰ Session law available at <https://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/6474-S.SL.pdf?q=20211123103826>.

¹⁰¹ See OSPI list of types of tribal schools in Washington at <https://www.k12.wa.us/student-success/access-opportunity-education/native-education/types-tribal-schools>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Angela Dice, *Reopened Suquamish School Puts Emphasis on Heritage*, Kitsap Sun, Sept. 17, 2012, available at <https://archive.kitsapsun.com/news/local/reopened-suquamish-school-puts-emphasis-on-heritage-ep-417150739-356518961.html>.

¹⁰⁵ Kipp Robertson, *Chief Kitsap Academy Now Operated Solely By Suquamish Tribe Education Department*, Kitsap Daily News, Oct. 23, 2014, available at <https://www.kitsapdailynews.com/news/chief-kitsap-academy-now-operated-solely-by-suquamish-tribe-education-department/>.

¹⁰⁶ Available at <https://www.k12.wa.us/sites/default/files/public/indianed/pubdocs/2021-22tribaleducationcompactapplicationRev11-1.pdf>.

compliance, notices of violation, dispute resolution, recordkeeping and auditing, the delineation of respective roles and responsibilities, the term or length of the contract and whether it is renewable, and provisions for compact termination.

Other provisions of the legislation require STEC schools meet specific requirements, including:

- Provide a curriculum and have their educational program satisfy state law requirements.
- Employ certified instructional staff as required under state law but may hire noncertified instructional staff “of unusual competence and in exceptional cases” so long as they are supervised by certified staff.
- Comply with state record check requirements and mandatory termination and notification provisions.
- Comply with nondiscrimination laws.
- Adhere to generally accepted accounting principles and be subject to financial examinations and audits, including annual compliance audits.
- Not engage in any “sectarian practices” in their educational programs, admissions, or employment policies or operations; and
- Not limit student enrollment, but if capacity is insufficient to enroll all who apply, STEC schools may prioritize enrollment of Tribal members and siblings. They may also implement a policy of Indian preference in employment.

Within 90 days of receiving an application, OSPI must convene a government-to-government meeting to consider and initiate negotiations for the compact. Once finalized, signatories on executed compacts most often include the state superintendent and Tribal chairperson.

PART II: **LOOKING FORWARD**

The intention of the State of Alaska and Alaska Native Tribes behind providing for the compacting of education is to do what is best for Alaska’s Native children. This work is meant to be forward-looking and transformational, to assist in the design and development of educational structures and programs that are among the best practices for culturally appropriate and effective educational programs for Alaska Native students. The successful operation of schools with a renewed focus on indigenous cultural values and linguistics must include evaluation of best practices from indigenous education across the country, as well as opportunities in current or upcoming legislation. The programs considered below are not the limit of what can be done, but they can inform recommendations to be made in later phases for a re-envisioning of educational programs and operations, on a culturally appropriate basis.

As a critical component of the compacting conversation, the STEC must be negotiated and created, on a voluntary basis and in a manner so as not to diminish either Alaska Natives’ right to self-determination or the federal government’s trust responsibility toward Alaska Natives. Only by preserving these ideals can appropriate pathways forward be established.

I. Best Practices

A. *Example of Successful Creation of State-Tribal Education Compact (Washington State)*

The success of the State-Tribal education compact in Washington State is discussed above. Many of the key issues raised in Washington State can provide valuable lessons for Alaska, including the use of compacting, specifically identified state legislation, relationships running between the Tribes and State government. We recommend a more extensive review of those compacts, and consultation with education interests in Washington State for a greater assessment of lessons learned in that state which can be applied in Alaska. While the Treaty status of many Tribes in Washington States applies a special trust obligation with respect to the federal government, the State-Tribal issues in the educational arena are common between the two states.

B. *Success in curriculum-and schools operated on a cultural basis.*

The following offers some examples of U.S. public schools with Indigenous focus or Programming:

- Anahuacalmecac International University Preparatory of North America (Los Angeles, California).¹⁰⁷
- Indigenous World School.
 - “IndigeNations Scholars Diploma Program” for students in grades 11 and 12 as a culminating experience to their TK-12 “Xinachohtli” school program.
 - “Survivance Studies” involves four-semester courses: Sovereign Knowledge, Metacognition of Indigeneity, Chicana/o Studies, and Latin American Studies offered to all students in grades eleven and twelve.
- American Indian Academy of Denver (Denver, Colorado).¹⁰⁸
 - Mission is to collaborate with students, educators, families, and community members in creating a school where indigenous principles and knowledge are placed in a student-driven STEAM curriculum to prepare all students to be college, career, and life ready.
- Kamehameha Schools’ Hawai’i (Honolulu, Hawaii).¹⁰⁹
 - Their educational approach empowers students with a strong ancestral foundation, worldview and mindsets to actively shape a rapidly changing world with vision, courage, and aloha.
 - Trauma-informed programming.
- Native American Community Academy (Albuquerque, New Mexico).¹¹⁰
 - NACA is a small school that focuses on identity through culture & language, holistic wellness, community & family, and academic preparation. Their

¹⁰⁷ https://www.dignidad.org/apps/pages/index.jsp?uREC_ID=327555&type=d&pREC_ID=739954.

¹⁰⁸ <https://www.aiadschool.org/>.

¹⁰⁹ <https://www.ksbe.edu/education/hawaii/>.

¹¹⁰ <https://www.nacaschool.org/>.

philosophy is grounded in both the Indigenous thought and a rigorous approach to career-preparatory education.

- NACA continually seeks to build a strong foundation for education through (1) unique learning approaches, (2) diverse cultural perspectives, and (3) an unprecedented network of community organizations and professionals who support its students.
- Six Directions Indigenous School (Gallup, New Mexico).¹¹¹
 - The school has a commitment to culturally relevant indigenous education and interdisciplinary project-based learning, will develop critically conscious students who are engaged in their communities, demonstrate holistic well-being, and have a personal plan for succeeding in post-secondary opportunities.
 - Indigenous education at its core is about more than simply ensuring students learn academic material. It is also about raising youth who are holistically well and healthy. Traditional notions of wellness indicate that we should all concern ourselves with our students' intellectual wellness, mental and emotional wellness, social and relational wellness, spiritual wellness, identity wellness, and physical wellness. Within the idea of wellness, the school includes an acknowledgement of the importance of identity security, of developing strength from one's identity, and of finding one's "inner center."
- **Sovereign Community School** (Oklahoma City, Oklahoma).¹¹²
 - Mission is to activate the next generation of indigenous leaders by engaging our youth with rigorous, culturally relevant curriculum that challenges them to understand and affirm their roles as citizens of our many Native nations.
 - The school believes that rigorous and culturally relevant classroom content increases student engagement, learning, understanding and critical thinking while also elevating student consciousness about justice for Native communities.

There are also some important Alaska-specific examples cited in a recent report by Dr. Hershberg:

These include language immersion programs as well as culture-focused efforts. In the Ayaprun Elitnaurvik Yup'ik Immersion School in Bethel, an elementary school, students learn in Yupik, the primary Indigenous language of the region, in grades K–2 and are then introduced to English starting in grade three. Pedagogical approaches mix traditional Yupik ways of teaching and learning with more Western styles. Students in the school generally outperform district averages on standardized tests, and graduates have gone on to be valedictorians in their high school classes.

The Anchorage School District (ASD), the state's largest, started its first Indigenous language immersion program in Fall 2018, opening a Yupik immersion option for kindergarten students within an existing school. The district plans to add a grade each year until there is a full K–6 Yupik immersion program, mirroring the structure of World Languages immersion programs in other district schools.

¹¹¹ <https://www.sixdirectionschool.org/>.

¹¹² <https://www.sovereignschools.org/>.

The North Slope Borough School District in Alaska begins its mission statement by saying, “Learning in our schools is rooted in the values, history and language of the Iñupiat.” The district has developed the Iñupiaq Learning Framework, based on extensive work with elders, educators, and community members across all borough villages, to determine what children should know when they graduate, rooted in Iñupiaq culture, values, and beliefs rather than in the system imposed by external Western education policymakers. They are developing curriculum and pedagogical approaches to support an Iñupiaq education system based on local epistemologies but also on preparing students to succeed in the Western system.

Schools based on cultural immersion have been operating for a few years in two of the largest school districts, Anchorage and the Fairbanks North Star Borough.

The Alaska Native Cultural Charter School in Anchorage is a K–8 school that for over a decade has used Alaska Native values as the basis for academic teaching and a focus on social and emotional learning, and the school has had considerable success in improving the achievement of its students.

The Effie Kokrine Early College Charter School in Fairbanks is a grade 7–12 school grounded in Alaska Native cultural beliefs and values.

C. *Opportunities from Current Legislation/Federal Initiatives to Provide Specific Authorities/Parameters for Compacting, including:*

AFN notes there are on-going legislative proposals both on pandemic relief and in supporting education on both the federal and state level. While not specifically related to compacting, they may provide further tools such as high-speed telecommunications, water and sanitation, energy upgrades and infrastructure development which are essential.

PART III: **CONCLUSION**

There is important work to be done to establish successful initiation and operation of one or more compact schools in Alaska, including research and analysis on the need for greater State authority, finalizing draft state legislation, participating in federal oversight hearings which have been requested, dealing with State educational and personnel requirements, on-going and continual analysis of best practices, and dialogue with key stakeholders. At the same time, the interest of the State and federal governments in more culturally appropriate curriculum and schools themselves is strong, and that, combined with significant federal and state interests in better school operations for the betterment of Alaska Natives, provides significant opportunities for the development and operation of successful compacted schools. These are historic opportunities more than a century in the making.

Appendix

*A. Specific Authorities and Actions by Congress to Provide for Education of Native Americans, Including Alaska Natives*¹¹³

The key authorities and actions by Congress providing the framework that establishes the federal government's obligation to provide for primary and secondary education of Native Americans, including Alaska Natives, include the following statutes (authorities with particular significance are explained in more detail):

- **1819 Civilization Fund Act** – appropriated an annual “civilizing” fund and initiated a program whereby the federal government contracted with religious groups to operate schools for Native American children.
- Through this Act, the federal government established a second legal basis for federal responsibility for schooling for all American Indian/Alaska Native children, not only those covered under treaties.
- **Snyder Act of 1921**¹¹⁴ – provided broad and permanent authorization for federal Indian programs for “the benefit, care, and assistance of the Indians throughout the United States for . . . [g]eneral support and civilization, including education.”¹¹⁵
- Passed because Congress had never enacted specific statutory authorizations for most BIA activities, including BIA schools.¹¹⁶
- **Indian Reorganization Act of 1934 (IRA)** – introduces the teaching of Indian history and culture in BIA schools (change from prior federal policy to acculturate and assimilate Indian people by eradicating tribal cultures through a “boarding school” system).
- **Johnson-O'Malley Act (JOM)**¹¹⁷ (included in IRA).

The JOM authorizes the Secretary of the Interior to enter into contracts to provide for education, medical care, relief and social welfare of Indians.¹¹⁸ JOM marked a new federal approach for Native education, and it was designed primarily to provide supplemental aid to meet the special educational needs of Indian children in public schools. Through the JOM, Congress sought to incentivize states and territories to assume responsibility for educating Native children by authorizing the Secretary of the Interior through the BIA to negotiate contracts with states, territories, and local agencies that would provide federal funding to help defray the costs of educating Native students. The funding was not tied to a reservation or to Indian Country. The JOM “reaffirmed the continuing legal responsibility of both the federal government and the states

¹¹³ Note that Jane Haigh's “History of Alaska Native Education: Alaska Education Timeline” (Feb. 24, 2021), available at <http://sites.kpc.alaska.edu/jhaighalaskahistory/history-of-alaska-native-education/>, provides a helpful timeline that includes relevant federal legislation.

¹¹⁴ Act of November 2, 1921, 42 Stat. 208, as amended.

¹¹⁵ 25 U.S.C. § 13.

¹¹⁶ Cassandra Dortch, Cong. Research Serv., RL34205, Indian Elementary-Secondary Education: Programs, Background, and Issues 4 (2020).

¹¹⁷ 25 U.S.C. § 452 (1970) (Act of April 16, 1934, c. 147, § 1, 48 Stat. 596, as amended 49 Stat. 1458).

¹¹⁸ 25 U.S.C. § 5342.

to provide education for Indians. While the federal responsibility was based on treaty and statute, the states' responsibility lay in their obligation to educate all residents.”¹¹⁹

Today, the JOM authorizes contracts with eligible entities—including certain Tribal organizations, Indian corporations, school districts, or states—for the education of eligible American Indian or Alaska Native students who are enrolled in public schools and previously private schools. These local programs are operated under a Bureau of Indian Education (BIE) approved educational plan, which contains educational objectives to address the needs of the eligible American Indian and Alaska Native students. JOM programs are varied as may include such programs as culture, language, academics, and dropout prevention, but JOM funds may not be used for capital expenditures.¹²⁰ JOM requires “maximum Indian participation” in development, approval, and implementation of programs.¹²¹

- **Impact Aid Legislation**¹²² – first major non-DOI funding for Native education in twentieth century.
- In 1953, Federal Assistance for Local Educational Agencies Affected by Federal Activities Program¹²³ (Impact Aid) amended to cover Indian children eligible for BIA schools.
- P.L. 874 – Provides funding to local educational agencies for education of children whose parents are federal employees, or who reside on federal or Indian lands.
- P.L. 815 – Impact Aid provides financial assistance for construction of schools in federally impacted areas. Alaska previously received funding under this provision to build schools in Togiak and Unalakleet.
- Note: Congressional appropriations for Impact Aid have increased, while JOM funding has decreased.¹²⁴
- **1966 Amendments**¹²⁵ **to Elementary and Secondary Education Act of 1965**¹²⁶ (ESEA) – ESEA is the main act authorizing federal education aid to public school districts.
- Set aside funds for BIA schools from the program-authorizing assistance to educational agencies for the education of children of low-income families (now known as ESEA

¹¹⁹ Carol Barnhardt, “A History of Schooling for Alaska Native People,” 40 *Journal of American Indian Education* 1 (2001) (quoting DeJong, 1993, p. 178).

¹²⁰ *Johnson-O'Malley*, Bureau of Indian Education, U.S. Dep't of the Interior, <https://www.bie.edu/topic-page/johnson-omalley>.

¹²¹ 25 C.F.R. § 273.103.

¹²² P.L. 83-248, Act of August 8, 1953, 67 Stat. 530.

¹²³ P.L. 81-874, Act of September 30, 1950, 64 Stat. 1100, as amended. This statute is currently codified as Title VII of the Elementary and Secondary Education Act.

¹²⁴ Cassandra Dortch, Cong. Research Serv., RL34205, *Indian Elementary-Secondary Education: Programs, Background, and Issues* 5 (2020).

¹²⁵ Elementary and Secondary Education Amendments of 1966, P.L. 89-750, Act of Nov 3, 1966, 80 Stat 1191.

¹²⁶ P.L. 89-10, Act of April 11, 1965, 79 Stat. 27, as amended.

Title I-A); School Library Resources, Textbook, and Instructional Materials (Title II); and Supplementary Educational Centers and Services (Title III).¹²⁷

- **President Nixon’s 1970 “Special Message to Congress on Indian Affairs”** – though not a congressional action, 1970 marked a major turning point for the nation’s Native American policy. President Richard Nixon delivered a “Special Message to Congress on Indian Affairs” in which he denounced the previous federal policy of forced assimilation and termination of Indian nations. This address laid the foundation for a new federal Tribal policy to promote the self-determination of Native Americans and led to a new policy for the federal government.
- **Indian Education Act of 1972**¹²⁸ (now known as ESEA Title VI).

In 1972, Congress passed the landmark Indian Education Act, which reflected a comprehensive approach to providing adequate and appropriate educational services for Native Americans. The Act established the Office of Indian Education (the first non-DOI organization since its creation in 1849, created expressly to oversee a federal Indian educational program)¹²⁹ and the National Advisory Council on Indian Education. The Act also authorized federal funds for a series of programs on American Indian and Alaska Native education at all grade levels (elementary, secondary, and higher education) and authorized the creation of advisory boards filled by Native parents for federally operated boarding schools and public schools with programs for Native students.

The Indian Education Act was unique in the following ways:

1. It recognizes that American Indians have unique, educational and culturally related academic needs and distinct language and cultural needs.
2. It is the only comprehensive Federal Indian Education legislation, that deals with American Indian education from pre-school to graduate-level education and reflects the diversity of government involvement in Indian education.
3. It focuses national attention on the educational needs of American Indian learners, reaffirming the Federal government’s special responsibility related to the education of American Indians and Alaska Natives; and
4. It provides services to American Indians and Alaska Natives that are not provided by the Bureau of Indian Affairs.¹³⁰

¹²⁷ Cassandra Dortch, Cong. Research Serv., RL34205, Indian Elementary-Secondary Education: Programs, Background, and Issues 5 (2020) (citing §102, Elementary and Secondary Education Amendments of 1966, P.L. 89 -750, Act of Nov 3, 1966, 80 Stat 1191).

¹²⁸ Title IV of the Education Amendments Act of 1972, P.L. 92-318, Act of June 23, 1972, 86 Stat. 235, 334, as amended; currently codified as ESEA Title VI-A.

¹²⁹ Cassandra Dortch, Cong. Research Serv., RL34205, Indian Elementary-Secondary Education: Programs, Background, and Issues 6 (2020).

¹³⁰ See <https://www2.ed.gov/about/offices/list/oese/oie/history.html>.

These aspects have been retained through subsequent legislative reauthorizing statutes.¹³¹ In 1974, Congress amended the Indian Education Act to include a new teacher training program and a fellowship program.¹³²

- Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA).¹³³

ISDEAA marked a drastic shift in self-determination legislation for Tribes. This legislation allowed Tribes to assume responsibility for managing and operating aid programs of IHS and BIA that benefit their members—including for the operation of BIA-funded schools and to determine suitable educational programs Native children—and emphasized Tribal self-determination and self-governance “in planning, conduct, and administration” of certain federal programs. “[ISDEAA] answered the call for a new national policy of autonomy and control for Native Americans and Alaska Natives.”¹³⁴

ISDEAA sought to decentralize the provision of federal benefits to Native Americans away from the federal government and towards Native organizations by allowing any Tribe to request that the Secretary of the Interior enter into a self-determination contract with a designated “tribal organization.”¹³⁵ Through these contracts, the Tribal organization can deliver federally funded economic, infrastructure, health, or education benefits to the Tribe’s membership.

- **Tribally Controlled Schools Act of 1988 (TCSA)**¹³⁶ – Authorized grants to Tribes and Tribal organizations to operate their BIA schools; provides that grants and self-determination contracts and compacts be for the same amounts of funding as the BIA would have expended on operation of the same schools.
- **1988 ISDEAA Amendments**¹³⁷ – created the first Self Governance Demonstration Project in the BIA.

Assistant Secretary of Indian Affairs Dr. Eddie Brown stated before Congress in 1993 that:

[s]elf-governance offers a step in-between where we originally wanted self-determination and the 638 contracting to take us. The question was, what was going to be the next step? Self-governance, as a demonstration project, has taken us that next step, allowing certain flexibilities which we did not have under the self-determination regulations, to really begin to demonstrate how tribes could through

¹³¹ The latest revision occurred with the amendments made by the 2001 No Child Left Behind Act, which reauthorized the program as Title VII Part A of the Elementary and Secondary Education Act (more below).

¹³² PL 93-380.

¹³³ Public Law 93-638, 25 U.S.C. §§5301 et seq; *see also* Tana Fitzpatrick, Cong. Research Serv., IF11877, Indian Self-Determination and Education Assistance Act (ISDEAA) and the Bureau of Indian Affairs (2021).

¹³⁴ *Yellen v. Confederated Tribes of Chehalis Rsr.*, 141 S. Ct. 2434, 2439 (2021).

¹³⁵ 25 U.S.C. § 5321(a)(1).

¹³⁶ P.L. 100-297, Title V, Act of April 28, 1988, 102 Stat. 130, 385, as amended; 25 U.S.C., Chap. 27.

¹³⁷ 102 Stat. at 2296-98.

their creativity and involvement, determine how best to divide their federal funds to assure that services were going to be delivered.¹³⁸

- **1994 Tribal Self-Governance Act** – Created ISDEAA Title IV; authorizes DOI to enter into *self-governance compacts* with tribes.
- Approved compacts allow Tribes to assume funding of, and control over, some federal programs, services, functions, or activities (PFSAs) DOI otherwise would provide directly to Tribes.
- Established Office of Self-Governance within DOI Office of the Assistant Secretary-Indian Affairs.¹³⁹
- Allows Tribe to negotiate funding agreements (annual or multiyear) with DOI for PFSAs to be assumed by the Tribe.¹⁴⁰
 - Allows Tribe to redesign or consolidate federal programs and to reallocate funds within selected programs.¹⁴¹
- **Alaska Native Educational Equity, Support, and Assistance Act of 1994**¹⁴² – Authorized grants for educational plans, curricula, teacher training, home based preschool and student enrichment programs. Amended in No Child Left Behind Act of 2001/ESSA of 2015. Additional research required regarding current status.
- 1996 – Self Governance authority expanded to allow contracting under its authority for any programs in the DOI provided for the benefit of Indians.
- **2000 Tribal Self-Governance Amendments** – Created ISDEAA Title V – permanently authorizing compacts for some IHS programs.
- **No Child Left Behind Act of 2001**¹⁴³ – Added educational requirements by holding schools accountable for improving students’ academic performance with the U.S. Department of Education supplemental program funds received through the BIA. Formula grants were now to “be based on challenging State academic content and student academic achievement standards that are used for all students and designed to assist Indian students in meeting those standards.”¹⁴⁴
- **Every Student Succeeds Act of 2015 (ESSA)** – reauthorizing the Elementary and Secondary Education Act of 1965 and replacing the No Child Left Behind Act of 2001. It includes several provisions targeting education needs of Alaska Native students.

B. *Federal Policies*

Myriad federal policies address the federal government’s responsibility for and commitment to Native education. A few of these are highlighted below:

¹³⁸ U.S. Congress, House Committee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1994, hearings, part 8, 103rd Cong., 1st sess. (Washington: GPO, 1993), p. 154.

¹³⁹ 25 U.S.C. §5362

¹⁴⁰ 25 U.S.C. §5363(p)

¹⁴¹ 25 U.S.C. §§5363(b), 5365(d)

¹⁴² 20 U.S.C. § 7541.

¹⁴³ PL 107-110 (Title VII Part A reauthorized Indian education).

¹⁴⁴ <https://www2.ed.gov/about/offices/list/oese/oie/history.html>

- Exec. Order 13,096, “American Indian and Alaska Native Education” 63 Fed. Reg. 42,681 (1998) (affirming special responsibility of the federal government for Indian education).
- Exec. Order 13592, “Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities,” 76 F.R. 76603 (Dec. 2, 2011).
- Directs Federal agencies to support activities that expand educational opportunities and improve educational outcomes for all Indian students.
- Establishes the White House Initiative on American Indian and Alaska Native Education (WHIAIANE) and directed the Executive Director of WHIAIANE to coordinate frequent consultations with Indian tribes.
- Recognizes unique political and legal relationship of United States to Alaska Native tribes.
- Biden Executive Order on the White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Native Americans and Strengthening Tribal Colleges and Universities (Oct. 11, 2021).
- U.S. Department of Education’s Consultation Policy – The U.S. Department of Education’s (ED) Policy on Consultation and Coordination with American Indian and Alaska Native Tribal Governments has as a guiding principle, “ED should assist Indian tribes, states, and school districts in meeting the unique educational and culturally related academic needs of American Indian and Alaska Native students.”¹⁴⁵ It provides in relevant part: “As part of its mission, ED is committed to helping to improve the educational outcomes of all American Indian and Alaska Native (AI/AN) students, including those attending public schools, who constitute over 90% of all Native students.”¹⁴⁶

¹⁴⁵ ED Consultation Policy, at 2.

¹⁴⁶ ED Consultation Policy, at 1.