LET NO NATIVE AMERICAN CHILD BE LEFT BEHIND: RE-ENVISIONING NATIVE AMERICAN EDUCATION FOR THE TWENTY-FIRST CENTURY

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The work of the government directed toward the education and advancement of the Indian...is largely ineffective.... [T]he government has not appropriated enough funds to permit the Indian Service to employ an adequate personnel properly qualified for the task before it.

—Meriam Report, 1928[1]

[O]ur national policies for educating American Indians are a failure of major proportions. They have not offered Indian children—either in years past or today—an educational opportunity anywhere near equal to that offered the great bulk of American children.

—Kennedy Report, 1969[2]

If the [Native American] drop out rate continues, then the future for Native American children will become even bleaker.... The opportunity gap between them and their peers will widen to a dangerous chasm.

—President William J. Clinton, 1998[3]

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1. INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 8 (1928) (Lewis Meriam, Technical Director) [hereinafter MERIAM REPORT].

2. SENATE SPECIAL SUBCOMM. ON INDIAN EDUC., COMM. ON LABOR & PUBLIC WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 91-501, at xi (1969) [hereinafter KENNEDY REPORT].

3. Brenda Norrell, *National Press Favors Scandal; Indian Education Found Not Worthy*, INDIAN COUNTRY TODAY, Sept. 28–Oct. 5, 1998, at C1 (quoting President

The federal role in education is not to serve the system. It is to serve the children.

—President George W. Bush, 2001[4]

I. INTRODUCTION

In August of 1998, President William Jefferson Clinton issued an executive order on American Indian and Alaska Native education.[5] The Order hailed the unique relationship between Indian tribes and the federal government and acknowledged the federal government's historic responsibility for Indian education.[6] It highlighted a number of issues, including basic educational achievement concerns, high drop out rates, and social problems that hamper educational opportunity, that needed to be addressed and acknowledged the importance of developing a comprehensive, coordinated government response to confront these issues.[7] Federal agencies were instructed to spring into action to gather data, form a task force, organize meetings, and develop strategies to deal with the issues raised by the Order.[8] All of this activity was to take place with input from representatives of tribes and Indian organizations.[9]

The 1998 Executive Order was the culmination of four years of efforts by the Native American Rights Fund, the National Congress of American Indians, the National Indian Education Association, and the National Advisory Council on Indian Education, along with members of the Clinton Administration.[10] President Clinton's historic action has rightly been praised by Indian leaders, who view the Order as a hopeful step in the right direction.[11] For those who have studied the

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William Jefferson Clinton's remarks at the signing of an executive order on Indian education). The article noted that the national news media did not attend the press conference accompanying the signing of the order because they were more interested in reporting on the Monica Lewinsky scandal. *See id.*

4. PRESIDENT GEORGE W. BUSH, NO CHILD LEFT BEHIND i (cover page) (2001) [hereinafter NO CHILD LEFT BEHIND], *available at* http://www.whitehouse.gov/news/reports/no-child-left-behind.html.

5. American Indian and Alaska Native Education, Exec. Order No. 13,096, 63 Fed. Reg. 42,683 (1998), *reprinted in* 20 U.S.C. § 7801 (Supp. V 1999). This Article, like the Executive Order itself, addresses issues related to the education of American Indians and Alaska Natives, without touching upon issues related to the education of Native Hawaiians. American Indians and Alaska Natives are generally referred to herein collectively as "Indians."

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See President Clinton Signs Executive Order on Indian Education; Historic Announcement Will Direct Sweeping Changes in Indian Education*, 23 NARF LEGAL REV. 1 (1998) [hereinafter *President Clinton Signs*].

11. *See, e.g., id.* at 1 (statement of Native American Rights Fund Executive Director John Echohawk); *see also* Philip Brasher, *Clinton: Improve Indian Education Order Requires Policy Within Two Years, Calls for Pilot Schools to Test New Teaching*

history of federal government activity in Indian education in the twentieth century, however, this executive order may also have triggered a sensation of déjà vu. Although the 1998 initiative was the first comprehensive executive order on Indian education,[12] it was certainly not the first statement from the federal government indicating that Indian education was in need of comprehensive changes for which the government had an obligation to take responsibility. Almost thirty years prior to the signing of the 1998 Executive Order, the U.S. Senate released a report entitled *Indian Education: A National Tragedy—A National Challenge*, commonly referred to as the Kennedy Report, which examined the status of Indian education in the United States and recommended extensive changes in the federal government's Indian education policy and in the federal and state educational systems in which Indian children were enrolled.[13] When it was released in 1969, the Kennedy Report may itself have evoked a feeling of déjà vu among its readers, as it echoed some of the criticisms of the government's actions in Indian education and the recommendations for improvement that had been expressed in the Meriam Report, a 1928 government-commissioned evaluation of Indians' economic and social condition.[14] In short, in light of this history of periodic national outcries over the dismal state of Indian education, there is a room for serious concern that the 1998 Executive Order could prove to be just the latest in a series of government pronouncements on the inadequacies of, and need for improvement of, the education provided to Indian students—pronouncements that highlight many of the same previously identified problems and offer solutions that ultimately are never implemented in a way that is adequate to fully address the problems identified. Moreover, with a new presidential Administration in office, there is the risk that whatever momentum for carrying out the Executive Order had been built up may be dissipated if the new Administration lacks an enthusiastic commitment to fulfilling the Executive Order's potential.

This Article considers the future of Indian education in light of the 1998 Executive Order, and against the backdrop of the history of prior Indian education policies and government reports on Indian education. The Executive Order, and the reports that underlie it, are examined with a view toward ascertaining the extent to which the Order highlights problems that were noted in earlier government reports but were not adequately addressed in the intervening years. This examination provides the basis for considering whether the Order represents a real government commitment to, and any real hope for, at last providing equal educational opportunity to Indians. The advent of both a new century and a new presidential Administration, which has pledged to foster an educational system that will meet the educational needs of all students, makes this a particularly appropriate time to consider the past, present, and future of the educational opportunities provided to Indian students. Part II of the Article examines the

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Methods, ROCKY MT. NEWS, Aug. 7, 1998, at 38A (statement of Oglala Sioux President John Yellow Bird Steele).

12. *See President Clinton Signs*, *supra* note 10, at 1.

13. *See also infra* notes 204–352 and accompanying text (discussing the Kennedy Report). *See generally* KENNEDY REPORT, *supra* note 2.

14. *See generally* MERIAM REPORT, *supra* note 1.

history of European and American education programs for Indians and the policies that were developed and carried over into twentieth century federal Indian education policy. These programs sought to destroy tribal cultures and prepare Indians for the subordinate role that they were expected to play in the American society and economy. Part III examines the 1969 Kennedy Report and its historical and legislative backdrop, including the 1928 Meriam Report and its aftermath. Only by exploring the history of education programs imposed on Indians by non-Indians and the government reports documenting the adverse effects of these programs is it possible to have a comprehensive understanding of the nature and the extent of the issues that face Indian education today. Part IV explores the Executive Order itself, against the backdrop of the government Indian education report and the Comprehensive Federal Indian Education Policy Statement, developed by Indian leaders, that preceded it. Part IV also assesses the extent to which the Executive Order offers hope for meaningful change in Indian education, rather than simply representing a reprise of problems brought to light by the Kennedy Report. It then considers how the implementation of the Executive Order may fare under the Administration of President George W. Bush, who has announced a number of new educational initiatives and pledged "to ensure that no child is left behind."[15] Part V examines the role that tribal education departments could play in creating new pathways for Indian education in the twenty-first century. The Conclusion offers some final thoughts on the past, present, and future of Indian education.

II. A BRIEF HISTORY OF EURO-AMERICAN EDUCATIONAL PROGRAMS FOR INDIANS: COLONIZATION, ASSIMILATION, AND SUBORDINATION

> *With only minor exceptions the history of Indian education has been primarily the transmission of white American education, little altered, to the Indian child as a one-way process. The institution of the school is one that was imposed and controlled by non-Indian society...its goals primarily aimed at removing the child from his aboriginal culture and assimilating him into the dominant white culture.*[16]

Beginning in the sixteenth century, European policymakers and educators, and later their American successors, imposed upon the indigenous peoples of North America educational programs that were designed to further the goals of the new dominant society, without any consideration of the opinions and aspirations of these peoples themselves. These programs, carried out with the

15. NO CHILD LEFT BEHIND, *supra* note 4, at i.

16. ESTELLE FUCHS & ROBERT J. HAVIGHURST, TO LIVE ON THIS EARTH: AMERICAN INDIAN EDUCATION (1972). An examination of North American Indian education prior to the arrival of Europeans is beyond the scope of this Article, and the diversity of traditional Indian cultures would make any generalizations about traditional education dangerous. For an overview of traditional Indian education, see Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 945–48 (1999).

active, government-sanctioned assistance of Christian religious groups, were aimed at destroying tribal cultures, including native religions and languages, assimilating Indians into Euro-American society, and preparing them for the largely subordinate role that they were expected to play in that society and its economy. In order to fully comprehend the current state of Indian education and the challenges facing it, it is important to understand the history of these educational programs, because it is their continuing legacy that those who wish to create equal educational opportunities for Indians must undo.

A. Indian Education in Colonial America

The government of the United States was not the first colonizing government to establish programs to educate North American Indians in conformity with a non-Indian model. Indeed, these programs even antedated the U.S. government's British colonial predecessor. As early as the first half of the sixteenth century, Franciscan missionaries, most of whom were Spanish, taught the Spanish language, the Roman Catholic religion, and European agricultural and trade skills to Indians in Arizona, California, New Mexico, and Texas.[17] Jesuit missionaries, who were also active in South America,[18] established a school for Indians in Florida, another area claimed by Spain, in 1568.[19] Spanish missionaries' efforts in California continued even well into the nineteenth century.[20]

The French were also active in Indian education from an early date. Beginning in 1611, French Jesuit missionaries taught the French language and customs, academic subjects, and the Roman Catholic religion to Indian children living along the St. Lawrence and Mississippi Rivers and in the Great Lakes area.[21] In the previous year, King Louis XIV had issued an edict encouraging the implementation of a program to educate Indian children "in the French manner," in order to neutralize Indian resistance to French rule.[22] In addition to French,

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17. *See* FUCHS & HAVIGHURST, *supra* note 16, at 2. The missionaries came with the Spanish explorer Francisco Vasquez de Coronado. *See id.* Coronado arrived in the southwestern part of the future United States in 1540. *See* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 23–24 (8th prtg. 1985). For a discussion of early European educational efforts in North America, with an emphasis on language instruction, see also Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 905–09 (1999).

18. *See* Jorge Noriega, *American Indian Education in the United States: Indoctrination for Subordination to Colonialism*, *in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 371, 371 (M. Annette Jaimes ed., 1992).

19. *See* Jon Reyhner & Jeanne Eder, *A History of Indian Education*, *in* TEACHING AMERICAN INDIAN STUDENTS 33, 35 (Jon Reyhner ed., 1992).

20. *See* Noriega, *supra* note 18, at 372.

21. *See* FUCHS & HAVIGHURST, *supra* note 16, at 2; *see also* CAROL DEVENS, COUNTERING COLONIZATION: NATIVE AMERICAN WOMEN AND GREAT LAKES MISSIONS, 1630–1900, at 9 (1992) (noting that Jesuits began missionary activities in New France in 1611). Nuns, who later played an important role in teaching Indian children, arrived in Canada from France in 1639. *See* JAMES AXTELL, THE INVASION WITHIN: THE CONTEST OF CULTURES IN COLONIAL NORTH AMERICA 40 (1985).

22. *See* Noriega, *supra* note 18, at 371.

academic subjects, and Catholicism, the students were also taught animal husbandry, carpentry, and the making of handicrafts.[23]

In 1617, the English launched their involvement in these Indian educational endeavors with King James I's call for the education of Indians, which Protestant clergymen answered by founding schools to educate Indian youths.[24] For example, in the 1630s, John Eliot established a school in Roxbury, Massachusetts, and later developed a plan to bring area Indians together in so-called "praying towns," where schools were established, for proselytization and "civilization."[25] Although the schools initially used some texts that had been translated into native languages, because of the perceived difficulty of simultaneously teaching Indian students both a new language and a new religion (a key goal of the educational programs),[26] by the last quarter of the seventeenth century the schools had switched to using English texts.[27] In 1679, foreshadowing the important role that education was later to assume in American policy toward the Indians, the New England Company officially adopted the policy that establishing English schools for the Indians was the best way to "[r]educe them to [c]ivilitty."[28]

The English colonists of Connecticut and Virginia also involved themselves in Indian education. The Connecticut colonists looked to boarding schools as a means of destroying native customs by separating Indian children from the influences of their parents and communities,[29] rather than focusing on providing education in organized Indian settlements as John Eliot had done in Massachusetts. As in Massachusetts, however, the educational activities had heavy Christian overtones, with religious materials, like psalters, often used as texts for teaching reading.[30] In Virginia, Indian schools were established at Fort Christianna and at the College of William and Mary in the early eighteenth century,[31] but neither school educated large numbers of Indian pupils. Anticipating that Indian parents would be reluctant to send their children away to William and Mary, the Virginians included a provision in a treaty with Virginia and North Carolina tribes that required the tribes to each send two sons of tribal leaders to be educated at William and Mary, to serve as security for the tribes' good behavior and as a first

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23. *See id.*

24. *See* FUCHS & HAVIGHURST, *supra* note 16, at 2. Dartmouth College and Harvard College, for example, were established for the education of English and Indian students. *See id.*

25. Reyhner & Eder, *supra* note 19, at 35; *see also* AXTELL, *supra* note 21, at 183.

26. *See* AXTELL, *supra* note 21, at 184.

27. *See id.* at 185.

28. *Id.* (paraphrasing DANIEL GOOKIN, HISTORICAL COLLECTIONS OF THE INDIANS IN NEW ENGLAND 128–29 (Jeffrey H. Fiske ed., Towtaid 1970) (1674)).

29. *See id.* at 188.

30. *See id.* at 188, 189.

31. *See id.* at 190 (College of William and Mary), 192 (Fort Christianna). The Fort Christianna school closed due to lack of funding less than four years after it had been established. *See id.* at 192, 193.

step toward the conversion of the tribes to Christianity.[32] Indian enrollment at the college fluctuated throughout the eighteenth century, with increases in enrollment occurring whenever the Virginians brought new student hostages to the College following incidents of unrest.[33] Efforts to use Indian children as tools to alter the lifestyle and behavior of their families and communities and the coercive placement of Indian children in schools run by non-Indians later became important elements in U.S. Indian educational policy.[34]

The English missionaries of New England believed that vocational training, to prepare Indians for the role they were expected to play in the new dominant society's economy, was an important component of Indian education. The missionaries were eager to teach English-style farming to the New England tribes.[35] Some missionaries believed in directly combining farming and academic study in Indian educational programs. Eleazar Wheelock, for example, established a school for both English and Indian youths in Connecticut, at which the students performed farm chores.[36] This led to some complaints that the students, required to work very hard, were treated as little more than servants.[37] After Wheelock received a large sum of money from a fund-raising tour in England and Scotland, he founded Dartmouth College, purportedly to educate both Indian and English youths (although the college graduated only three Indians in the eighteenth and eight in the nineteenth century).[38] Efforts were also made to teach Indians English trades through apprenticeships,[39] although some Englishmen believed that it was better for Indians' employment opportunities to be limited to manual labor.[40]

Thus, by the time of the American Revolution, Anglo-European-imposed education had already become a well-established part of the relationship between the colonial powers and North American tribes.[41] Moreover, the early Anglo-European endeavors foreshadowed several of the features that were to characterize later American educational programs for Indians. Non-Indians set the agenda and goals of Indian education, namely, assimilation of the Indians by destruction of tribal languages, customs, and religions, and their replacement with those of the colonizers. The goals that were pursued met the needs and desires of the colonists, rather than those of the Indians. Also apparent was the heavy, government-

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32. *See id.* at 191.

33. *See id.* at 193. For example, by 1721 the College had no Indian students. Student hostages began arriving again in the 1740s following a "resurgence of frontier unrest." *Id.* at 194 (noting that "[p]erhaps half a dozen arrived in 1743, eight Cherokees stayed from 1753 to 1755, and five boarded during the 1770s, joined in 1774 by four Shawnee hostages").

34. *See infra* notes 68, 93, and accompanying text.

35. *See* AXTELL, *supra* note 21, at 162.

36. *See id.* at 163.

37. *See id.* For additional discussion of Wheelock's educational activities, see *id.* at 204–15. Wheelock's school, called "Moor's Charity School" in honor of a donor to the school, closed in 1829. *See id.* at 204, 215.

38. *See id.* at 215.

39. *See id.* at 159–61.

40. *See id.* at 160 (describing the views of the Reverend Robert Gray).

41. *See* Noriega, *supra* note 18, at 373.

approved involvement of Christian religious groups in Indian education. Additionally, some missionaries' teaching of Anglo-European agricultural and trade skills foreshadowed the emphasis on vocational education and the reliance on uncompensated Indian labor of nineteenth-century American educational programs. Such efforts sought implicitly to prepare Indians for the subordinate role that they were to play in the system being established by the new dominant society and its government. These early Indian education programs in North America thus reflected a colonialist pattern set by European colonial powers around the world, described by one commentator as follows: "The purpose of Western schooling as it was instituted around the world was to make people useful in the new hierarchy [of perpetual Eurocentric domination]."[42]

B. The New American Government and Indian Education

As the American colonists sought to assert their independence from Great Britain, their new national government wasted no time in becoming involved in Indian education. Like the English and Europeans before them, the new government's leaders focused on imposing educational programs that supported their own agenda and goals. In 1775, for example, the Continental Congress appropriated five hundred dollars for the education of Indians at Dartmouth College.[43] Congress also began to include educational provisions in treaties entered into with various tribes. Of the almost 400 Indian treaties entered into by the United States between 1778, when the first Indian treaty was approved, and 1871, when treaty-making with tribes was ended, 120 contained educational provisions.[44] The provisions for educational and civilization purposes increased as more treaties were negotiated.[45] These provisions typically addressed matters such as teachers' salaries, construction of school buildings, and school supplies.[46] By entering into these treaties, the U.S. government bound itself to provide educational services to the signatory tribes, thus making a legal commitment, bolstered by the developing trust relationship between Indian tribes and the federal government, to Indians with respect to education.[47]

In addition to including educational provisions in treaties with specific tribes, in 1793 the government began enacting trade and intercourse acts that made

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42. *Id.* (quoting MARTIN CARNOY, EDUCATION AS CULTURAL IMPERIALISM 18 (1974)).

43. *See* Reyhner & Eder, *supra* note 19, at 37. Funds were also appropriated for the education of Indians at the College of New Jersey (which later became Princeton University). *See* Noriega, *supra* note 18, at 376.

44. *See* Reyhner & Eder, *supra* note 19, at 37. The first treaty was with the Delaware Indians. *See id.* at 37. The first treaty to contain educational provisions was the treaty with the Oneida, Tuscarora, and Stockbridge Indians of 1789. *See id.*; *see also* Cross, *supra* note 16, at 950–52 (discussing the treaty-based origins of the federal government's Indian education obligations).

45. *See* Reyhner & Eder, *supra* note 19, at 37–38.

46. *See id.* at 37.

47. *See, e.g.*, *infra* note 345 and accompanying text.

provisions for civilizing the Indians through educational and social services.[48] Much of the money appropriated under these provisions was given to Christian missionary groups, with the largest amount going to the American Board of Foreign Missions, a Protestant missionary organization.[49] In 1819, Congress established a so-called "Civilization Fund," with an annual appropriation of $10,000,[50] to introduce among the Indians "the habits and arts of civilization,"[51] and authorized the President "to employ persons of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic...."[52] In September 1819, the War Department (under whose aegis the Office of Indian Affairs existed at the time[53]) issued a circular, addressed to organizations that were engaged in or about to engage in Indian education, providing that the educational plans of entities that applied for money from the fund should include not only reading, writing and arithmetic, but also instruction for the boys in agriculture and "'such of the mechanic arts as are suited to the condition of the Indians,' and for the girls in 'spinning, weaving, and sewing.'"[54] The government thus indicated that Indian educational programs should not only require students to perform labor in addition to academic study, but also should ensure that the labor performed followed the gender-based labor divisions of white American society.[55] Although the circular did not specifically address Christian missionary groups, because they were the only groups then engaged in Indian educational work, the Secretary of War must have had them in mind when issuing the circular.[56] The Civilization Fund, which lasted until 1873,[57] provided the authorization for the government and Christian

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48. *See* Reyhner & Eder, *supra* note 19, at 37. Congress appropriated $20,000 per year for this purpose in 1793. *See* Noriega, *supra* note 18, at 377. In 1803, the appropriation amount was reduced to $15,000 per year, but was supplemented by funding from other sources. *See id.* at 396 n.31.

49. *See* Reyhner & Eder, *supra* note 19, at 37.

50. *See* Civilization Fund Act, 3 Stat. 516–17 (1819), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 33 (Francis Paul Prucha, ed., 2d ed., 1990).

51. *Id.*

52. *Id.*

53. The Office of Indian Affairs, headed by the Commissioner of Indian Affairs, was created within the Department of War in 1832 and was transferred to the Department of the Interior in 1849. *See* Reyhner & Eder, *supra* note 19, at 39.

54. R. PIERCE BEAVER, CHURCH, STATE, AND THE AMERICAN INDIANS: TWO AND A HALF CENTURIES OF PARTNERSHIP BETWEEN PROTESTANT CHURCHES AND GOVERNMENT 69 (1966) (quoting AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 201 (Walter Lowrie & Walter S. Frank eds., Class 2, II, Gales & Seaton, 1836–61) (n.d.)).

55. *See* Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 680–683, 688–707 (1999) (discussing the farm-based labor deemed appropriate for Indian men and women and the efforts made to instruct Indian women as to their proper role).

56. *See* BEAVER, *supra* note 54, at 68.

57. *See* Reyhner & Eder, *supra* note 19, at 38.

groups to form a partnership to educate and Christianize, and thus "civilize," the Indians.[58]

In the 1830s, teaching Indians to engage in certain kinds of labor became an even greater focus of Indian education with the development of the first schools focused on vocational training, variably referred to as manual training, manual labor, or industrial training schools. The first of these training schools, the Choctaw Academy, was established in 1834 in Kentucky by a Baptist minister,[59] and by 1838, the government was operating six manual training schools, enrolling about 800 students, along with eighty-seven boarding schools, enrolling about 2,900 students.[60] By 1848, sixteen manual training schools were in existence, with seven more under construction.[61] The labor assigned to the students once again reflected the gender roles assigned to men and women by the contemporary dominant society—male students engaged in agricultural labor and learned skills such as blacksmithing and woodworking, while female students practiced skills appropriate to housewives, such as cooking and sewing.[62] By relying on Indian students' uncompensated labor, some manual training schools were able to generate sufficient revenues, such as from the sale of surplus crops, to support themselves.[63] The government expected that combining academic instruction with labor would have a transformative effect on Indian children. As a nineteenth century congressional report explained:

> Put into the hands of their children the primer and the hoe, and they will naturally, in time, take hold of the plow; and, as their minds become enlightened and expand, the Bible will be their book, and they will grow up in habits of morality and industry, leave the chase to those whose minds are less cultivated, and become useful members of society.[64]

If, on the other hand, the reasoning went, Indians were given academic instruction without vocational training, the result could be dangerous, as such an Indian would "resume the barbarism of his original condition," but with a "more

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58. *See* BEAVER, *supra* note 54, at 68.

59. *See* Noriega, *supra* note 18, at 377–78.

60. *See* Reyhner & Eder, *supra* note 19, at 39.

61. *See* Noriega, *supra* note 18, at 379.

62. *See* MICHAEL C. COLEMAN, AMERICAN INDIAN CHILDREN AT SCHOOL, 1850–1930, at 40 (1993). For further discussion of the efforts of the government and its partner organizations to impose particular gender roles on Indians, see Dussias, *supra* note 55, at 707.

63. *See* Noriega, *supra* note 18, at 378. At the Methodist Episcopal Society's school at Leavenworth, Kansas, for example, which was established in 1839, the students worked the school's 400 acres of agricultural land in order to have food to eat, and surplus crops were sold to cover the school's overhead. *See id.* The students spent six hours of each school day in the classroom and six hours working. *See id.* The male students worked on the farm and in the school's two shops, while the female students performed domestic labor and learned spinning and weaving. *See id.*

64. BEAVER, *supra* note 54, at 67–68 (quoting AMERICAN STATE PAPERS, *supra* note 54, at 150–51 (House of Representatives Committee)).

refined cunning, and a greater ability to concoct and perpetrate schemes of mischief and violence."[65]

C. Assimilation Through Confinement: Reservations and Boarding Schools

In the 1850s, the government turned increasingly to the policy of creating reservations—generally small parcels of land "reserved" out of tribes' original land—for individual, or for several, tribes.[66] The reservation policy furthered the process of imposing American-style education on Indians by concentrating them together into areas in which the government and missionary groups could establish schools that aimed to denigrate and devalue Indian culture and religion and coercively assimilate Indian students into the dominant American society.[67] By the 1860s, forty-eight day (as opposed to boarding) schools had been established on the reservations.[68] The reservation day schools allowed children to live with their families while attending school. In the eyes of Indian education policy makers, these schools held two advantages over boarding schools: first, they were less likely to be opposed by Indian parents (who were reluctant to send their children to boarding schools)[69] and, second, they gave Indian children the opportunity to serve as positive influences on their parents by becoming "daily messenger[s] of civilized ways."[70] It was hoped that Indian parents would come to see the value of the education that their children were receiving and seek to share in their children's new-found knowledge.[71]

Christian religious groups continued to play an important role in Indian education, particularly after the 1869 launching of President Grant's so-called "Peace Policy," under which the government assigned Indian reservation agencies to different religious groups for proselytization purposes[72] and greatly increased aid to Indian schools and missions.[73] Religious groups entered into increasing numbers of contracts with the government to operate reservation schools.[74] This role continued unabated until the end of the nineteenth century, when anti-Catholic politicians' opposition to the Indian educational efforts of Roman Catholic groups

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65. KENNEDY REPORT, *supra* note 2, at 145 (quoting statement of Commissioner of Indian Affairs Lea *in* 1852 COMM'R OF INDIAN AFFAIRS ANN. REP. 6).

66. *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 235–36 (1994); Reyhner & Eder, *supra* note 19, at 39.

67. *See* Reyhner & Eder, *supra* note 19, at 40.

68. *See* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928, at 28 (1995).

69. *See id.* at 28–29.

70. *Id.* at 29.

71. *See id.* at 29.

72. For a discussion of the assignment of the agencies to religious groups, see Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 781–82 (1997).

73. *See* ROBERT H. KELLER, JR., AMERICAN PROTESTANTISM AND UNITED STATES INDIAN POLICY, 1869–1882, at 17 (1983).

74. *See id.* at 208.

(who had come to play a larger role in Indian education as Protestant groups had lost interest) led to objections to, and eventually the end of, direct government funding of schools run by religious groups.[75]

After the repeal of the Civilization Fund in 1873, the federal government became more directly involved in the operation of schools for Indians.[76] In 1877, Congress began to appropriate funds expressly for Indian education,[77] which rose for the remainder of the century, from $20,000 in 1877 to over $2.9 million in 1900.[78] The increased funding was accompanied by increases in the number of government schools, from 150 in 1877 to 307 in 1900,[79] and increased school enrollment, from under 4,000 in 1877 to over 21,000 in 1900.[80]

By the late 1870s, government officials and others involved in Indian education had become disenchanted with the reservation day schools and looked to reservation boarding schools as a more reliable means of educating Indian children and divorcing them from their community and culture. Allowing Indian children to return to their homes at the end of the school day exposed them to influences that were deemed negative. As one reservation agent commented in 1878: "to place these wild children in a teacher's care for but four or five hours a day, and permit them to spend the other nineteen in the filth and degradation of the village, makes the attempt to educate and civilize them a mere farce."[81] The reservation boarding schools were under the reservation agent's direct supervision and, following the model developed for manual training schools, provided for the students to spend half of the day in the classroom and half of the day working.[82] Students were kept in the school for eight to nine months of the year.[83] It was hoped that, when they saw their children during school vacations, parents would

75. *See* Dussias, *supra* note 72, at 784–85; *see also* ADAMS, *supra* note 68, at 66 (noting that, out of a total appropriation to schools run by religious groups of $530,905 in 1889, Catholic-run schools received $347,672). After direct funding for sectarian contract schools ended, the government itself continued to provide Christian religious instruction (of a generally Protestant character) in the schools that it operated. *See* Dussias, *supra* note 72, at 786–87.

76. *See* Reyhner & Eder, *supra* note 19, at 45.

77. *See* ADAMS, *supra* note 68, at 26. *But see* Noriega, *supra* note 18, at 380 (stating that, in 1870, Congress authorized a $100,000 annual appropriation "for the support of industrial and other schools among tribes not otherwise provided for"); Reyhner & Eder, *supra* note 19, at 44 (stating that Congress appropriated $100,000 to support industrial and other Indian schools).

78. *See* ADAMS, *supra* note 68, at 26–27. The exact figure for 1900 was $2,036,080. *See id.* at 27. The appropriations for some other years were as follows: $75,000 in 1880, $992,800 in 1885, $1,364,568 in 1890, and $2,060,695 in 1895. *See id.* at 26–27.

79. *See* COLEMAN, *supra* note 62, at 41.

80. *See* ADAMS, *supra* note 68, at 27 (enrollment was 3,598 in 1877 and 21,568 in 1900). The enrollment figures for some other years are as follows: 4,651 in 1880, 8,143 in 1885, 12,232 in 1890, and 18,188 in 1895. *See id.*

81. *Id.* at 29 (quoting 1878 COMM'R OF INDIAN AFFAIRS ANN. REP. 649).

82. *See* ADAMS, *supra* note 68, at 30. For discussion of the manual training schools, see *supra* text accompanying notes 59–65.

83. *See id.* at 30.

be impressed with the effects that the schools had had upon them and would support the schools and their goals.[84]

Eventually, some began to view even the reservation boarding schools as providing too many opportunities for Indian children to continue to be "contaminated" by their proximity to their families and communities.[85] Many educators began to see off-reservation boarding schools as the solution.[86] The prototype off-reservation boarding school was the Carlisle Indian School, established in 1879 in Carlisle, Pennsylvania by Richard H. Pratt, an army officer whose assimilationist views were summed up in his guiding principle for dealing with Indians: "[k]ill the Indian in him and save the man."[87] At the off-reservation boarding schools, students could be confined for extended periods of time at a potentially great distance from their families and communities and could therefore, it was believed, be more effectively assimilated.[88] Once Indian children were in the custody of boarding school officials, their parents' access to them could be limited. For example, in an 1887 federal district court case, *In re Can-ah-couqua*,[89] the court rebuffed the attempt of a Native Alaskan woman to regain custody of her eight-year-old son, who was enrolled in a government-funded Presbyterian school.[90]

The off-reservation boarding schools, which reached a high of twenty-five in 1902,[91] supplemented the day schools and on-reservation boarding schools that continued to exist. The boarding schools, both on and off the reservation, came to account for increasingly greater percentages of the enrollment in Indian schools for the remainder of the nineteenth century. In 1885, for example, there were 114 boarding schools, with an average attendance of 6,201, and 86 day schools, with an average attendance of 1,942. In 1900, the boarding schools, now numbering 153, had an average attendance of 17,708, and the day schools,

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84. *See id.* at 31.

85. *See id.*

86. *See id.* at 55.

87. *Id.* at 52 (quoting Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, 1892 PROC. ANN. NAT'L CONF. OF CHARITIES AND CORRECTION 46). Pratt had previously been in charge of Indians who had been imprisoned by the army in Fort Marion, near St. Augustine, Florida. For a description of this part of Pratt's career, see *id.* at 36–46. For Pratt's own views on his experience in Indian education, see RICHARD HENRY PRATT, BATTLEFIELD AND CLASSROOM: FOUR DECADES WITH THE AMERICAN INDIAN, 1867–1904 (Robert M. Utley ed., 1964).

88. *See* ADAMS, *supra* note 68 at 55.

89. 29 F. 687 (D. Alaska 1887).

90. *See id.* at 689. Can-ah-couqua was given the right to visit her son "for a reasonable length of time," under the supervision of school officials. *Id.* at 690.

91. *See* ADAMS, *supra* note 68, at 56. For a list of the off-reservation boarding schools and their opening dates, see *id.* at 57. All of the off-reservation boarding schools that were established after Carlisle were located in the West, apparently in order to reduce transportation costs, to prevent the students from being too far removed from their origins, and to benefit the economies of developing frontier communities. *See id.* at 56–58.

numbering 154, had an average attendance of 3,860.[92] Moreover, an increasing percentage of the attendance became attributable to off-reservation boarding schools, so that by 1900, over one-third of boarding school students attended off-reservation schools, and by the late 1920s, nearly half of all boarding school students attended off-reservation schools.[93] Well aware of the reluctance of Indian parents to send their children to boarding schools (particularly those off the reservation), Congress enacted legislation in the 1890s to make school attendance compulsory and to authorize the withholding of treaty-guaranteed rations, clothing, and other treaty benefits from parents who did not force their children to comply with the compulsory attendance policy. Reservation agents also sometimes enforced the policy by rounding up students and locking up recalcitrant parents.[94]

Whether day or boarding schools, whether run by the government or by Christian groups, and whether located on or off a reservation, the schools established to educate Indians shared the same aims: providing a rudimentary academic education, including instruction in English, which was formally established as the only language of instruction in 1885[95] and was intended to wholly replace tribal languages; indoctrinating Indians in the dominant society's belief in the importance of possessive individualism, with its accompanying focus on individual labor and the virtue of accumulating wealth; converting Indians to Christianity (a process dubbed Christianization); and preparing Indians for citizenship by instilling in them patriotic feelings and belief in U.S. national myths, along with a basic knowledge of the workings of American democracy.[96] Stated in broadest terms, the goal of Indian education was the full-scale transformation of Indians, from supposed savages to civilized Americans, without any consideration of the views of Indians themselves on the subject. This required, it was believed, an eradication of all things Indian,[97] in order to preserve Indians from possible extinction in the face of ever-advancing Euro-American society. As one Commissioner of Indian Affairs put it, "To educate an Indian in the ways of

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92. *See id.* at 58, tbl. 2.2. Thus, the number of boarding schools and day schools was virtually the same, but over eighty percent of the average attendance was attributable to boarding schools. *See id.* (Author's computation).

93. *See id.* at 58–59. The government continued to build off-reservation boarding schools during the 1890s; seventeen schools were built between 1890 and 1898. *See id.* at 57, tbl. 2.1.

94. *See id.* at 63–64, 211; *see also id.* at 212–14 (discussing reasons for parental opposition, including awareness of the assimilationist goals of the schools, harsh treatment of students, and high death rates among students).

95. An 1885 B.I.A. regulation provided that all instruction and conversation between teachers and students in all Indian schools had to be in English. *See* 1887 COMM'R OF INDIAN AFFAIRS ANN. REP. xx. For further discussion of the preeminence of English in the Indian schools, see Dussias, *supra* note 17, at 909–28.

96. *See* ADAMS, *supra* note 68, at 21–24. For further discussion of the boarding schools, including students' experiences in particular schools, see Cross, *supra* note 16, at 952–60. For an insightful account of students' experiences in one boarding school, see K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL (1994).

97. *See* ADAMS, *supra* note 68, at 24.

civilized life,...is to preserve him from extinction, not as an Indian, but as a human being."[98] Moreover, the kind of vocational training that was provided to the children of these newly transformed people, who (according to the Commissioner) were being magnanimously preserved from the threat of extinction and elevated to human status, indicated that they were not expected to assume leadership roles within the dominant society and its economy. The boarding schools in particular played an important role as "an institutional training ground for the subservience of the colonized" and sought to train the students "to accept their proper place in society as a marginal class."[99] As historian David Wallace Adams has aptly put it, Indian educators sought to use "schooling as an instrument for furthering the process of white political and ideological hegemony."[100]

III. THE KENNEDY REPORT OF 1969: DOCUMENTING A NATIONAL TRAGEDY

> *The "Indian problem" raises serious questions about this Nation's most basic concepts of political democracy. It challenges the most precious assumptions about what this country stands for—cultural pluralism, equity and justice, the integrity of the individual, freedom of conscience and action, and the pursuit of happiness.*[101]

In 1969, the U.S. Senate released the Kennedy Report, the result of an extensive examination of Indian education in the United States. The Kennedy Report revealed an Indian educational program, described as tragic and disgraceful, that was falling far short of meeting the needs of the students whom it was supposed to serve. This was not, however, the first time that a comprehensive analysis of Indian education had reached such a conclusion. The 1928 Meriam Report had painted a disturbingly similar picture of the educational programs operated for Indian children. By examining in detail the Kennedy Report, against the backdrop of the Meriam Report and its aftermath, it is possible to gain an understanding of the continuing effects of past Indian education policies on Indian students and their educational experiences and of the difficult Indian education issues that need to be addressed in the twenty-first century.

A. The Historical Backdrop to the Kennedy Report: The Meriam Report of 1928

In 1926, the Secretary of the Interior requested the Institute for Government Research (later known as the Brookings Institution)[102] to survey and report on the economic and social condition of American Indians.[103] Prepared under the direction of Lewis Meriam, the report, entitled *The Problem of Indian Administration* and commonly known as the Meriam Report, was transmitted to

98. *Id.* at 21 (quoting 1903 COMM'R OF INDIAN AFFAIRS ANN. REP. 2).
99. LOMAWAIMA, *supra* note 96, at xiv, 99.
100. ADAMS, *supra* note 68, at 24.
101. KENNEDY REPORT, *supra* note 2, at 10.
102. *See id.* at 153.
103. *See* MERIAM REPORT, *supra* note 1, at vii. For a more detailed discussion of how the Report came about, see *id.* at 56–58.

the Secretary of the Interior in February 1928.[104] The Report focused on a number of subjects, including Indian health, economic conditions, family life, women's activities, and education,[105] and found conditions in many of these areas to be bleak. Health conditions, for example, were bad, and the infant mortality rate and general death rate were high.[106] Indian housing conditions were generally poor and contributed to Indians' bad health.[107] Family income was low,[108] as the economic basis of Indian societies largely had been destroyed by white encroachment,[109] and illiteracy rates were high.[110] In short, the Meriam Report presented a distressing picture of the lives of early twentieth century Indians and their communities.

Given the documented failure of the federal government to provide adequately for the most basic needs of people who were supposedly its wards, the Meriam Report's conclusion that the educational opportunities made available to Indians were also seriously lacking was not surprising. Of the nearly 70,000 Indian children reportedly enrolled in school in 1926, slightly less than forty percent were in boarding schools operated by the Bureau of Indian Affairs (B.I.A.). or others.[111] The Report noted, however, that these figures on Indian children's access to education were somewhat overly optimistic because they reported enrollment rather than attendance, which was irregular in some Indian tribes[112] and would improve only if bonds were built between schools and Indian parents to replace the existing "police methods" used to promote attendance.[113] Of the over 26,000 students enrolled in B.I.A. schools, over eighty percent were in boarding schools, with roughly half in on-reservation and half in off-reservation boarding schools.[114] Thus, although more Indian children were enrolled in public schools than in B.I.A. schools, boarding schools, both on and off the reservation,

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104. *See id.* at vii–x. Meriam was a regular staff member of the Institute. *See id.* at vii. For a description of the methodology used in gathering information for and preparing the Report, see *id.* at 66–79.

105. *See id.* at vii–x.

106. *See id.* at 3. Health conditions and the Report's health-related recommendations are discussed in detail in *id.* at 189–345.

107. *See id.* at 4.

108. *See id.* at 4.

109. *See id.* at 6.

110. *See id.* at 357. The Indian illiteracy rate (among all Indians over age ten) was 36% in 1920 in sixteen states with large Indian populations (compared to 6% for the entire United States); it was over 60% in some of these states. *See id.* In the sixteen states, the illiteracy rate for Indians aged ten to twenty was 17%. *See id.*

111. *See id.* at 402. There were reportedly over 84,000 Indian children of school age, although the Report noted that no accurate count had been made and a school census was needed. *See id.* at 355; *see also id.* at 356 (noting that "the total number of children is really not known"). These figures meant that about eighty three percent of known Indian children aged five to seventeen were in school, compared to about ninety percent of the general population. *See id.* at 356.

112. *See id.* at 356.

113. *See id.* at 358.

114. *See id.* at 403.

were the dominant form of school maintained by the federal government for Indians.[115]

The Report described and made recommendations as to some of the problems discovered in the B.I.A. educational program overall. The teachers in the schools received considerable criticism. Their qualifications were low and their teaching was not up to the standards of white communities.[116] Instead of taking the lead in raising national standards by setting high standards in its own schools, there was some evidence that the government had hired teachers who had been forced to leave their own states' school systems because they could not meet the systems' raised standards.[117] Most teachers lacked an understanding of modern, less formal teaching methods.[118] The Report concluded that hiring properly trained personnel was the "most urgent immediate need" in the B.I.A. educational system[119] and recommended a program of pre-service training to prepare B.I.A. school personnel for their jobs.[120]

The uniform curriculum in the schools, which did not allow for adjustments to meet the needs of students with limited English proficiency, worked badly.[121] The standard course of study in the B.I.A. schools, which was prepared in 1915,[122] and the schools' examination system were outdated and were no longer accepted by other U.S. schools.[123] A proper course of study, in contrast to the one used in the B.I.A. schools, was "suggestive rather than prescriptive," needed to be constantly revised to reflect student needs, aptitudes, and interests, and should not have been uniform in details "over a vast territory of widely differing conditions."[124] The Report noted the importance of teaching Indian geography, history, and arts in the schools and of using good reading materials that related to Indian interests and contemporary Indian experiences.[125] Elementary schools in particular were faulted for their almost exclusive focus on learning

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115. *See id.* at 11. As noted above, in 1926, nearly 70,000 Indian children were enrolled in school and, of these, over 26,000 were in B.I.A. schools, meaning that over 40,000 were enrolled in public schools. *See also supra* note 111 and accompanying text.

116. *See id.* at 13. The Report noted that the B.I.A. regularly hired teachers whose credentials would not be acceptable in good public schools. *See id.* at 347. Government personnel hiring was handicapped by low salaries, which led to low standards. *See id.*; *see also id.* at 360 (noting that salaries were abnormally low and this led to high personnel turnover in some schools).

117. *See id.* at 359.

118. *See id.* at 378. These methods focused on individual children and meeting their needs and took into account the role of emotional behavior and reactions in students. *See id.* at 380–81.

119. *Id.* at 359.

120. *See id.* at 366–67.

121. *See id.* at 13.

122. *See id.* at 371.

123. *See id.* at 346–47.

124. *Id.* at 371–72.

125. *See id.* at 372.

English, a longstanding key component of government assimilation efforts,[126] and for the antiquated methods that they used in teaching the language.[127] The Report recommended abandoning the standardized curriculum and prescribed textbooks, and freeing teachers to draw materials from the lives of the Indian students themselves.[128]

The education offered in the schools, particularly the so-called "industrial" (i.e., vocational) training, failed to aid Indian students in finding employment after graduation.[129] The available industrial training was of a limited range—particularly for girls, who were largely trained for domestic service[130]—and often was unrelated to the actual work that students would do upon graduation.[131] In some schools, students were trained in vanishing trades like harness-making.[132] The so-called "outing" system, in which boarding school students worked outside of the school, failed to provide real vocational training, as it was "mainly a plan for hiring out boys for odd jobs and girls for domestic service,"[133] and thus provided a supply of presumably cheap labor for non-Indians living near boarding schools without providing many real educational benefits to the Indian students themselves. The Report recommended that students in the first six grades attend school all day, and that proper vocational training be made available for older students.[134] Indian students who were interested in pursuing

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126. *See* Dussias, *supra* note 17, at 909–28; *supra* note 95 and accompanying text. *See generally* Dussias, *supra* note 17 (examining past and present government policy toward Indian languages).

127. *See* MERIAM REPORT, *supra* note 1, at 349.

128. *See id.* at 33.

129. *See id.* at 14.

130. *See id.* at 386–87.

131. *See id.* at 372. The Report noted:

> [V]ery little of the work provided in Indian boarding schools is directly vocational in the sense that it is aimed at a specific vocation which the youngster is to pursue, or based upon a study of known industrial opportunities, and vocational direction in the form of proper guidance, placement, and follow-up hardly exists at all.

Id. at 383. The Report recommended that a survey be performed to determine what Indians were doing when they left school and what their occupational opportunities were. *See id.* at 382–83. Also, although agriculture was the occupation of most Indians, agriculture was rarely taught in B.I.A. schools in a way that would help Indian students when they graduated. *See id.* at 384. Much of the agricultural activity was simply focused on production to meet the schools' needs for agricultural products. *See id.* at 385.

132. *See id.* at 14, 384.

133. *Id.* at 389.

134. *See id.* at 376. The Report recommended that the junior or middle school period should last about three years and should provide students with choices for industrial or vocational training, and that the senior high school period should also last about three years and should provide students with either vocational training or general education "to leave the way clear for further education in college and university for students who show that they could profit by it." *Id.* While hardly a ringing endorsement of the idea of higher education for Indians, this approach did at least admit the possibility and did not want it to be ruled out for individual Indians.

higher education were seriously handicapped by the lack of adequate secondary school facilities and by the lack of scholarships and other funding.[135] The Report recommended that industrial education programs be "materially improved" and be made responsive to employment opportunities after graduation[136] and that the government encourage and financially support students who showed promise for higher education.[137]

The shortcomings in the teaching and curriculum were accompanied, unsurprisingly, by disappointing outcomes for students, many of whom were behind the appropriate grade level. Most of these students, however, were behind in school not because of any lack of intelligence or effort on their part, but because they had not had the opportunity to attend school in the past and therefore started out in a grade lower than their age justified.[138]

In addition to failing to adequately serve Indian children, the educational program also failed to provide adequately for the education of Indian adults,[139] who had an abnormally high rate of illiteracy.[140] Moreover, the government's failings in education were related to the adverse effects that its past policies had had on Indians in general. The Report noted that the government had "destroyed Indian tribal and community life without substituting anything valuable for it."[141] The Report advocated increased Indian involvement in community organizations such as agriculture-related groups, parent-teacher associations, school boards, and community centers.[142]

The Report also commented specifically on the different types of schools available to Indian students: boarding schools (both on- and off-reservation), mission schools (i.e., schools run by religious groups), day schools, and (in some areas) public schools. As noted above,[143] boarding schools were dominant in the B.I.A. education program—a dominance that was very unfortunate, given the many inadequacies of the boarding schools that were identified by the Meriam Report. The care provided for boarding school students was termed "grossly inadequate."[144] The food was deficient,[145] dormitories were overcrowded and

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135. *See id.* at 419–21.

136. *Id.* at 34.

137. *See id.* at 35.

138. *See id.* at 356–57. Of 16,527 students studied in detail for the report, 1,043 (6%) were at normal grade level and 264 (under 2%) were ahead of normal grade level; the rest were one or more years behind. *See id.* at 356–57. Thus, 15,220 students (92%) were behind normal grade level. Of the 16,527 enrolled students, however, 4,192 (25%) had reached the grade appropriate for the number of years they had been in school, and 6,199 (over 37%) were two or fewer years behind where their number of years of enrollment would usually have put them. *See id.* at 357.

139. *See id.* at 349–50; *see also id.* at 399–402 (discussing adult education).

140. *See id.* at 399.

141. *Id.* at 400.

142. *See id.* at 401–02.

143. *See supra* note 114 and accompanying text.

144. MERIAM REPORT, *supra* note 1, at 11.

145. *See id.*

lacked adequate sanitary facilities,[146] discipline was restrictive[147] and included "[p]unishments of the most harmful sort,"[148] medical care was inadequate,[149] and excessive routinization was the rule.[150] The schools continued to be supported in part by student labor,[151] under the so-called "half-time plan" (inspired by nineteenth century manual training school programs[152]) in which students—including very small, malnourished children[153]—spent half of the day in classes and the remainder of the day at work in the school facility,[154] in some cases performing heavy labor that might well have been in violation of child labor laws.[155]

The removal of Indian children from their homes to attend these boarding schools also caused the disintegration of Indian families[156]—an outcome that earlier Indian education personnel, who believed in the necessity of removing Indian children from their home environments in order to eradicate their ties to traditional ways,[157] might have welcomed. Modern educational theory, on the other hand, stressed the importance of bringing up children in their natural home environment.[158] Boarding schools, of course, directly contradicted this modern approach. The Report recommended that non-reservation boarding schools be used only for students above sixth grade, and, eventually, only for students in ninth grade and above,[159] while voicing the hope that they would ultimately be eliminated entirely.[160]

Boarding schools located on the reservations, while allowing students to be somewhat nearer to their homes, were subject to the same kinds of criticisms that were made of the off-reservation boarding schools.[161] Although the number of

146. *See id.* at 12; *see also id.* at 404 (noting that many off-reservation boarding schools enrolled one-fifth more than their capacity).

147. *See id.* at 13.

148. *Id.* at 382.

149. *See id.* at 12. Medical attention given to students in B.I.A. day schools was also judged inadequate. *See id.* at 13; *see also id.* at 392–96 (describing the inadequate health conditions in B.I.A. schools in general).

150. *See id.* at 351. The excessive routinization stifled "initiative and independence." *Id.*

151. *See id.* at 12–13.

152. *See supra* notes 59–65 and accompanying text.

153. *See* MERIAM REPORT, *supra* note 1, at 375.

154. *See id.*

155. *See id.* at 376. The Report noted, "The question may very properly be raised as to whether much of the work of Indian children in boarding schools would not be prohibited in many states by the child labor laws...." *Id.* at 13.

156. *See id.* at 15.

157. *See id.* at 346.

158. *See id.* at 346, 403.

159. *See id.* at 403. The Report noted that the schools might also be used as special schools for certain groups of students, such as those who were ill or who were "mentally defective." *Id.* at 405.

160. *See id.* at 404.

161. *See id.* at 407. The Report noted that these schools had recently become as "large and unwieldy" as the off-reservation schools, but that they were even more lacking in

these schools had decreased, the number of students attending them had increased, which had led to overcrowding and bad dormitory and health conditions.[162] The Report recommended elimination of these schools as soon as day schools could replace them.[163]

The Meriam Report expressed a more positive view of some of the still operating schools sponsored by religious groups, which (as discussed above) had a long history in Indian education.[164] The continued existence of these so-called mission schools could be justified, the Report concluded, on the grounds that they supplemented other existing facilities[165] and engaged in worthwhile experimentation that could not be expected from public schools.[166] Also, possibly the schools were preferred by some Indian parents, who had the right to choose the school that their children attended.[167]

The Report also commented on B.I.A. day schools, which enrolled between 4,000 and 5,000 students[168] and offered the best available opportunity, outside of areas in which good public schools enrolled Indians, to educate Indian students within their home environment.[169] These schools, the Report noted, could have the same transformative effect on Indian students that public schools had had on the children of immigrants,[170] while still leaving room for "a contribution from Indian life that...needs to be safeguarded and not sacrificed to unnecessary standardization."[171] The day schools, however, suffered from some of the same problems as the boarding schools, such as lack of qualified, well-trained teachers.[172] The Report recommended that the number of day schools be increased and that they be improved.[173]

Finally, the Report commented on the government's plan to transfer Indian children to public schools. Over half of all school age Indian children were

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competent personnel. *Id.* Also, on large reservations like the Navajo Reservation, the schools were so far from students' homes that it was as difficult to maintain a family life as it was when students were at off-reservation schools. *See id.* at 408.

162. *See id.* at 408. The number of schools had dropped from eighty-five in 1916 to fifty-nine in 1926. *See id.*

163. *See id.* at 409. The Report noted that it might be appropriate to preserve some of the schools for students who were handicapped or underprivileged. *See id.* at 408.

164. *See supra* notes 72–75 and accompanying text.

165. *See* MERIAM REPORT, *supra* note 1, at 409.

166. *See id.* at 409–410.

167. *See id.* at 409, 410.

168. *See id.* at 414.

169. *See id.* at 411, 412.

170. *See id.* at 412.

171. *Id.* The Report identified this as a lesson learned from schools serving immigrant children. *See id.* ("We have learned, in the case of children from foreign homes, that there are values in the customs of other peoples that ought to be preserved and not destroyed....").

172. *See id.* at 413. The Report also noted that the day schools' opportunity to work with Indian homes was wasted if the teachers lacked understanding of Indian society and of how home and school could be related. *See id.* at 413.

173. *See id.* at 37.

already attending public schools.[174] The Report endorsed the transfer plan in general,[175] but also offered some important caveats: the transfers should not be made too hastily;[176] the government should retain the ability to ensure that Indian students' needs were being met by the public schools;[177] health supervision and other services should be available;[178] and adult education should be provided.[179]

In addition to the specific recommendations noted above, the Meriam Report also offered some more overarching recommendations. The "first and foremost need," it maintained, was "a change in point of view," to recognize that education succeeded most when children were brought up in "the natural setting of home and family life."[180] The Report also recommended a substantial increase in the money spent on Indian education,[181] noting that the government faced a serious policy choice: "The real choice...is between doing a mediocre job thereby piling up for the future serious problems in poverty, disease, and crime, and spending more money for an acceptable social and educational program that will make the Indian cease to be a special case in a very short time."[182]

The Meriam Report, in short, uncovered a number of serious deficiencies in the education, which was in many ways still reflective of its nineteenth century antecedents, that was provided to Indian children—deficiencies in facilities, teacher qualifications and methodologies, curriculum, funding, and the basic way in which the schools treated Indian children. The Report made a number of recommendations aimed at addressing these deficiencies, such as hiring qualified personnel and providing proper teacher training, reforming the curriculum, increasing the role of Indian parents and communities in education, reducing the dependence on boarding schools, and increasing government financial support.

The apparent thoroughness of the Report's examination of Indian education and the sweeping nature of its recommendations for change may have raised hope among those who sought to improve Indian education, and to see the U.S. government fully honor its treaty obligations to provide education to Indians, that meaningful change would soon flow from it. Moreover, the support voiced for what might be termed decolonizing Indian education, by increasing the Indian role in shaping it, and the recognition of the important role of Indian family life in educational outcomes, seemed to indicate a long overdue departure from the paternalism and assimilationist tendencies of past policies. Finally, the Report's recognition that the failure to improve educational opportunities would have serious negative repercussions may well have led at least some readers to predict that rational policy makers would immediately devote significant resources to

174. *See id.* at 11, 416.
175. *See id.* at 36, 415.
176. *See id.* at 415, 416–17.
177. *See id.* at 415, 417.
178. *See id.* at 415, 418. The Report recommended that there be school social workers who would visit Indian homes. *See id.* at 418.
179. *See id.* at 415.
180. *Id.* at 32.
181. *See id.* at 347–48, 427–29.
182. *Id.* at 347–48.

carrying out the Report's recommendations. Only time would reveal the extent to which the Meriam Report failed to live up to these expectations.

B. The Legislative Backdrop to the Kennedy Report: The Johnson-O'Malley Act and Other Responses to the Meriam Report

In the years following the release of the Meriam Report, the federal government responded in a number of ways to the Report's call for educational improvement. The B.I.A., under the leadership of new Commissioner of Indian Affairs John Collier, sought to move more students from boarding schools to day schools, began efforts with regard to the providing of bilingual education, sought to recruit and train Indian teachers, initiated the publication of bilingual curriculum materials, and made efforts to bring Indian cultural heritage into the schools.[183] Congress enacted several statutes related to Indian education that, while not dealing comprehensively with Indian education, at least in part addressed some of the concerns, particularly with respect to educational funding, that the Report had raised. The Indian Reorganization Act of 1934[184] authorized loans to Indians for tuition and other expenses in vocational schools and colleges.[185] Also in 1934, Congress passed the Johnson-O'Malley Act (JOM Act),[186] which provided for the contracting out by the federal government of Indian educational services to states, territories, and their subdivisions, to state universities, colleges, and schools, and to other appropriate state or private entities,[187] and allowed for the expenditure under such contracts of funds appropriated by Congress for Indian education.[188]

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183. *See* KENNEDY REPORT, *supra* note 2, at 154–55. For an analysis of Indian education policy in the wake of the Meriam Report, see MARGARET CONNELL SZASZ, EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928, at 24–150 (3d ed. 1999).

184. Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–79 (1994)).

185. *See* § 11, 48 Stat. 986 (codified as amended at 25 U.S.C. § 471 (1994)).

186. Johnson-O'Malley Act of April 16, 1934, ch. 147, 48 Stat. 596 (codified as amended at 25 U.S.C. §§ 452–57 (1994)).

187. *See* § 1, 48 Stat. 596 (codified as amended at 25 U.S.C. § 452 (1994)). As originally enacted, the statute allowed for contracting with states and territories only. *See* § 1, 48 Stat. 596. The statute was amended in 1936 to extend the contracting provision to the other entities now covered by the provision. *See* Act of June 4, 1936, ch. 490, 49 Stat. 1458.

188. *See* § 1, 48 Stat. 596 (codified as amended at 25 U.S.C.A. § 452). The services were to be provided in accordance with minimum standards of service established in rules and regulations of the Secretary of the Interior. *See* § 3, 48 Stat. 596 (codified as amended at 25 U.S.C. § 454 (1994)). These minimum standards could not be "less than the highest maintained by the States or Territories within which said contract or contracts, as herein provided, are executed." *Id.* The Act also allowed the Secretary to agree with a contracting party for the use of existing school buildings and related equipment. *See* § 2, 48 Stat. at 596 (codified as amended at 25 U.S.C. § 453 (1983)). The current regulations for the use and transfer of government property under the JOM Act are at 25 C.F.R. § 273.44 (2001). The Secretary was required to report to Congress annually on the contracts made and the monies expended under the Act. *See* § 4, 48 Stat. 596, *repealed by* Act of June 29,

The JOM Act was intended to have an impact in areas in which Indians were believed to be already partly assimilated, and thus were enrolled in public schools, and in rural areas in which it was difficult for the federal government to provide adequate educational services.[189] The JOM Act was, in effect, an acknowledgment by the federal government that it still was responsible for providing educational services to Indian children even in areas where past assimilation policies had succeeded in largely destroying tribal life.[190]

The JOM Act provided considerable flexibility in terms of the entities that could be awarded contracts. Until the 1970s, however, when Congress gave the Secretary of the Interior express authority to enter into JOM contracts with tribal organizations,[191] the government made contracts only with state education departments.[192] Thus, at the time that the next comprehensive government report on Indian education, the Kennedy Report, was prepared, only state education departments received JOM funds.

In 1950, Congress enacted the Impact Aid Act, which was originally designed to provide funding assistance to public school districts that had a reduced tax base due to the presence of federal installations, such as military bases.[193] The Impact Aid Act was later amended to allow districts that encompassed Indian reservations to qualify for funding made available under it as well as under the JOM Act.[194] The Impact Aid Act provided basic educational support funds, based

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1960, Pub. L. No. 86-533, § 1(15), 74 Stat. 248; *see also* KENNEDY REPORT, *supra* note 2, at 38–47 (discussing the history of the JOM Act and experience under it).

189. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 147 (Bobbs-Merrill 1982) (citing S. REP. NO. 511, 73d Cong., 2d Sess. (1934) [hereinafter COHEN'S HANDBOOK]. Current regulations provide that the students who are eligible for benefits under the JOM Act are Indian students from age three through twelfth grade who are of one-quarter or more Indian blood and are recognized by the Secretary of the Interior as eligible for B.I.A. services. *See* 25 C.F.R. § 273.12 (2001). They are not eligible if they are enrolled in B.I.A. or sectarian-operated schools. *See id.* Indian is defined as "a person who is a member of an Indian tribe." 25 C.F.R. § 273.2(j) (2001).

190. *See* Dean Chavers, *Indian Education: Failure for the Future?*, 2 AM. INDIAN L. REV. 61, 74 (1974).

191. *See* Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-368, tit. I, § 102, 88 Stat. 2206 (1975) (codified as amended at 25 U.S.C. § 450f (1994)).

192. *See* COHEN'S HANDBOOK, supra note 189, at 695.

193. *See* Impact Aid Act of 1950, ch. 1124, 64 Stat. 1100 (codified as amended at 20 U.S.C. §§ 236–46 (Supp. 1990), *repealed by* Improving America's Schools Act of 1994, Pub. L. No. 103-382, tit. III, § 331(b), 108 Stat. 3965 (1994); *see also* KENNEDY REPORT, *supra* note 2, at 33–34. The Improving America's Schools Act of 1994 established its own impact aid program, which replaced the Impact Aid Act's provisions. *See* § 101, 108 Stat. 3749–73 (codified as amended at 20 U.S.C. §§ 7701–14 (1994)).

194. In 1953, the Act was amended to permit the inclusion of Indian children. *See* Act of Aug. 8, 1953, ch. 402, § 11, 67 Stat. 530, 537. The amendment also established a procedure whereby a governor could seek Impact Aid Act funding for Indian children. *See id.*; *see also* 25 U.S.C. § 644. The B.I.A., however, still interpreted JOM Act funds and Impact Aid Act funds to be mutually exclusive. *See* COHEN'S HANDBOOK, *supra* note 189, at 685 n.67. Congress amended the Impact Aid Act in 1958 to explicitly permit districts to

on a statutory formula, to school districts educating Indian children whose parents lived or worked on Indian lands.[195] The Act was amended in 1978 to ensure that tribes and Indian parents were afforded the opportunity to take part in the planning, development, and operation of the educational programs assisted by the Impact Aid Act funds.[196]

Like the Impact Aid Act, another post-Meriam Report federal statute, the School Facilities Construction Act of 1950, as amended in 1953,[197] was designed to provide assistance for school districts affected by increased Indian enrollment. It authorized federal funding for the construction of schools in districts experiencing increased enrollment because of the presence of Indian students.[198]

Thus, in the years after the release of the Meriam Report, both the B.I.A. and Congress took some actions designed to address at least some of the inadequacies in Indian education that the Report had uncovered. The statutes that were enacted, however, focused on supporting the education of Indian students in public schools, rather than on developing a comprehensive approach to addressing the overall problems in Indian education that the Report had identified. Moreover, as the years passed, Congress's appropriations under the School Facilities Construction Act declined,[199] along with funding requested by the B.I.A. for Indian education in general,[200] and funding under the Impact Aid Act was often late, presenting serious planning problems for affected schools.[201] The government became increasingly focused on pushing Indian children into public schools as quickly as possible, as part of the latest incarnation of the assimilation policy, known as the termination period.[202] While states were eager to obtain federal funds earmarked for Indian education, they were less interested in providing the support services that would have met the educational needs of Indian students and given

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qualify for both kinds of funding. *See* Act of Aug. 12, 1958, Pub. L. No. 85-620, § 201(b), 72 Stat. 559 (formerly codified as amended at 20 U.S.C. § 237 (1988).

195. *See* 20 U.S.C. § 238 (Supp. 1990). The statute referred to residing and working on "Federal property," which was defined to include "real property held in trust by the United States for individual Indians or Indian tribes, and real property held by individual Indians or Indian tribes which is subject to restrictions on alienation imposed by the United States...." *See id.* § 244(1) (1988).

196. *See* Education Amendments of 1978, Pub. L. No. 95-561, § 1101, 92 Stat. 2143, 2313 (codified at 20 U.S.C. § 240(b)(3)(B) (1990)).

197. Pub. L. No. 81-815, ch. 995, 64 Stat. 967 (1950) (codified as amended at 20 U.S.C. §§ 631–647 (1988)), *repealed by* Improving America's Schools Act of 1994, Pub. L. No. 103-382, tit. III, § 331(a), 108 Stat. 3965 (1994). *See also* KENNEDY REPORT, *supra* note 2, at 32–33. Like the Impact Aid Act, this act was repealed by the Improving America's Schools Act of 1994. *See* § 331(a), 108 Stat. 3965.

198. *See* KENNEDY REPORT, *supra* note 2, at 32, 34.

199. *See id.* at 34–36 (discussing the funding problems). Appropriations declined from a high of $195,000,000 in 1953 to a low of $14,745,000 in 1969. *See id.* at 35.

200. *See id.* at 159 (noting that Congress had begun to cut funds requested by the B.I.A. for education by 1948, leading to the elimination of children from federal schools and the closing of some schools).

201. *See id.* at 37.

202. *See id.* at 161; *see also id.* at 156–65 (discussing the termination period).

them the opportunity to succeed in the public schools in which they were increasingly enrolled.[203] Thus, the response of the federal government to the Meriam Report ultimately proved to fall far short of a sustained, committed effort to take the serious measures that the Report had suggested were needed.

C. The 1969 Kennedy Report on Indian Education

In 1967, the Senate authorized the establishment of a Subcommittee on Indian Education, initially chaired by Senator Robert F. Kennedy, to investigate the education of Indian children.[204] The Subcommittee held public hearings, conducted field investigations in Indian communities and in schools enrolling Indian students, including federal boarding schools, and commissioned studies by consultants.[205]

At the outset of the investigation process, Senator Kennedy had highlighted the failure of the government's Indian education activities by reviewing the then available statistics on Indian education. About 16,000 Indian children were not enrolled in school at all and dropout rates were twice the national average.[206] Indians' level of formal education was half the national average.[207] These statistics were coupled with equally grim information about Indian students' self-image. Indian children, more than any other group, believed themselves to be of "below average" intelligence, and twelfth grade Indian students had the poorest self-concept of all minority groups tested.[208] Indians' abysmal educational opportunities were reflected in an average income that was seventy-five percent below the national average and in an unemployment rate that was ten times the national average.[209] These statistics bore out the Meriam Report's dire predictions of the serious poverty and other problems that could be expected to continue if Indian education were not improved substantially.[210] The statistics, Senator Kennedy concluded, revealed "a national tragedy and a national disgrace."[211] The Subcommittee's report, entitled *Indian Education: A National Tragedy—A National Challenge*, was submitted in 1969,[212] and, like the Meriam

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203. *See* Cross, *supra* note 16, at 961.

204. *See* KENNEDY REPORT, *supra* note 2, at 197. The Subcommittee was authorized by Senate Resolution 165, which was passed on August 31, 1967. *See id.* at 2, 4. The time span of the Subcommittee's work was extended several times. *See id.* at 1, 4. Following Senator Kennedy's assassination, Senators Wayne Morse and Edward M. Kennedy served as subcommittee chairmen. *See id.* at 5. *Cf. id.* at x (indicating Senators Robert F. Kennedy, Wayne Morse, Ralph Yarborough, and Edward M. Kennedy had chaired the Subcommittee).

205. *See id.* at 5–7.

206. *See id.* at 3

207. *See id.*

208. *See id.*

209. *See id.*

210. *See supra* note 182 and accompanying text.

211. KENNEDY REPORT, *supra* note 2, at 3.

212. *See id.* at 1 (indicating that the Report was filed on November 3, 1969).

Report before it,[213] painted a dismal picture of Indian educational opportunities in the United States. The analysis of the Kennedy Report that follows reveals the serious consequences that had resulted from the government's failure to take action, on a large enough scale, along the lines of what the Meriam Report had indicated was needed.

1. Documenting the Failure of National Indian Education Policy

The Kennedy Report began with an overview of the history of Indian education in the United States, highlighting the historical links between education and the policy of coercive assimilation, under which education was perceived as a means of "emancipating" Indian children from their homes, parents, extended families, and cultural heritage.[214] As a Ponca who testified before the Subcommittee noted, the experience of dealing with white educational programs led Indian students to conclude that "[s]chool is the enemy!"[215] The "assimilation by education" policy was also shaped, the Report noted, by the federal government's nineteenth century Indian land policy as embodied in the Dawes Act, under which funds received from the sale of "surplus" Indians lands were made available to be appropriated by Congress for educating and civilizing the tribe whose land was sold,[216] thus ensuring that "proceeds from the destruction of the Indian land base were to be used to pay the costs of taking Indian children from their homes and placing them in Federal boarding schools, a system designed to dissolve the Indian social structure."[217] The policy was ultimately rooted in a desire to exploit and appropriate Indian land and resources and in "[a] self-righteous intolerance of tribal communities and cultural differences."[218]

The coercive assimilation policy had produced a number of deleterious results, including the destruction and disorganization of Indian individuals and their communities and severe and self-perpetuating poverty for most Indians.[219] More particularly, the policy had disastrous effects on Indian children's education, leading to such results as "[a] dismal record of absenteeism, dropouts, negative self-image, low achievement, and, ultimately, academic failure for many Indian children."[220] The policy had also negatively affected national attitudes, resulting in widespread ignorance and misinformation about Indians and serious and

213. *See supra* notes 102–82 and accompanying text (discussing the Meriam Report).

214. *See* KENNEDY REPORT, *supra* note 2, at 9.

215. *Id.*

216. Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388.

217. KENNEDY REPORT, *supra* note 2, at 150–51.

218. *Id.* at 21.

219. *See id.* at 21.

220. *Id.* The Report also identified several other negative results: the classroom becoming a battleground in which children tried to protect their identity; schools failing to understand, and often denigrating, cultural differences; schools blaming their own failures on Indian students; schools failing to recognize the importance of the Indian community; and the perpetuation of a cycle of poverty that undermined the success of other government programs. *See id.*

widespread prejudice, intolerance, and discrimination toward Indians.[221] In short, the history of the federal government's Indian education programs as revealed by the Kennedy Report was indeed a tragic one.

2. The Failure of Public Schools to Adequately Serve Indian Students

The Report evaluated education provided to Indians in public schools and in federal boarding schools, and concluded that both kinds of schools had failed their Indian students. The Report faulted public schools (in which about two-thirds of all Indian students were then enrolled[222]) for lack of Indian participation and control, for their curriculum, and for teachers' and administrators' attitudes toward Indian students.[223]

Lack of Indian participation and control in public schools was demonstrated by a variety of evidence, including the fact that Indians rarely served on public school boards and were sometimes even subjected to threats when they sought election to school boards.[224] Thus, Indians largely were excluded from having a voice in the bodies that had often made decisions that adversely affected Indian students.[225] Forty years earlier, the Meriam Report had identified this lack of a relationship between Indian parents and the schools as a problem, and recommended increased Indian involvement in community groups like school boards.[226]

Indian powerlessness with respect to the public schools and widespread lack of respect by whites for Indians led to discrimination against Indian students in the public schools.[227] In some schools, Indian students were automatically retained for a year or placed in classes of slow learners and in the lowest levels in school tracking systems.[228] Thus, as was the case at the time of the Meriam Report,[229] many Indian students were behind in school. Indian students also suffered from discrimination with regard to language, yet another issue that had been raised by the Meriam Report.[230] The B.I.A. believed that one-half to two-thirds of Indian children entered school with limited or no knowledge of English, yet most teachers were not trained to teach English as a second language[231] and bilingual materials were seriously lacking.[232] The rejection of their native

221. *See id.*

222. *See id.* at 39. At the time that the Meriam Report was written, over half of school age Indian children were in public schools. *See also supra* note 174 and accompanying text.

223. *See* KENNEDY REPORT, *supra* note 2, at 52–53.

224. *See id.* at 24–25.

225. *See id.* at 25.

226. *See supra* note 142 and accompanying text.

227. *See* KENNEDY REPORT, *supra* note 2, at 26.

228. *See id.*

229. *See supra* note 138 and accompanying text.

230. *See supra* notes 126–27 and accompanying text.

231. *See* KENNEDY REPORT, *supra* note 2, at 27. Lack of familiarity with English caused many Indian students to immediately fall behind. *See id.*

232. *See id.* at 53.

languages, together with the inaccurate and disparaging way in which Indians were portrayed in public schools' textbooks[233] and the schools' ignoring of Indian culture,[234] led to Indian students experiencing feelings of "alienation, hopelessness, powerlessness, rejection, depression, anxiety, estrangement, and frustration"[235] and of inferiority.[236] These feelings contributed to low levels of achievement[237] and extraordinarily high dropout rates (as high as ninety percent in some places).[238]

This failure of public schools to adequately serve Indian students clearly could not be blamed on the schools' lack of experience with Indian students. Even public schools in which Indians had been enrolled for decades had abysmal graduation rates,[239] and some had even regressed in terms of Indian educational achievement.[240]

The federal government, the Report concluded, shared in the blame for the failure of the public schools. Insufficient funding had left many schools with Indian students to educate but no federal funding to cover the costs of their education.[241] Funding problems existed under both the School Facilities Construction Act and the Impact Aid Act.[242] Problems also existed under the JOM

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233. *See id.* at 23.

234. *See id.* at 27. The Report noted that the school curriculum and the teachers sought to impose "American" values such as competitiveness, acquisitiveness, rugged individualism, and (material) success, while Indian culture valued cooperation and good interpersonal relations. *See id.*

235. *Id.* at 28.

236. *See id.* at 29. Many children described themselves to subcommittee staff members as "dumb Indians." *Id.*

237. For example, many Eskimo students in Nome, Alaska public schools took two to three years to complete the first grade, twenty-one of twenty-eight Indian students in a Washington state eighth grade class could not read, and in a public school serving Yakima Indians, the average grade for Indian senior high school students was "D." *See id.*

238. For example, there was a 90% dropout rate in Nome, Alaska public schools; there was an 87% dropout rate by the sixth grade for students in an all-Indian public school near Ponca City, Oklahoma; and there was a 70% Indian dropout rate in parts of California. *See id.*

239. For example, Indians had been attending Klamath, Oregon, public schools for twenty-seven years, but the dropout rate was ninety percent. *See id.* at 30. A western Oklahoma public school with a twenty-five percent Indian enrollment had been educating Indians for forty years, and only eleven Indians had graduated. *See id.*

240. In a high school near Warm Springs, Oregon, for example, Indians graduating between 1956 and 1965 had showed regression in grade point averages compared to white students. *See id.*

241. *See id.* at 34.

242. Appropriations for the section of the School Facilities Construction Act applicable to Indians had decreased, and requests for 1968 and 1969 had not been funded. *See id.* (discussing funding under the School Facilities Construction Act, Pub. L. No. 81-815, Sept. 23, 1950, as amended by Pub. L. No. 82-276, Aug. 8, 1953). Under the Impact Aid Act, late funding and partial funding of entitlements placed school districts serving Indian students in the awkward position of possibly having to reduce their faculties or services in the middle of the academic year. *See id.* at 37 (discussing funding under the

Act.[243] Although the JOM funds were intended to address the needs of Indian students, school districts had used the funds to supplement their general operating budgets[244]and only occasionally used the money to fund instructional services.[245] In addition, some school districts received duplicate payments under the JOM Act and under the Impact Aid Act;[246] others had JOM funds replaced by Impact Aid Act funds, and there was no way to guarantee that the latter funds would benefit Indian children directly.[247] The Report also objected to the lack of opportunities for Indians to participate in making decisions on how JOM funds should be spent.[248]

Finally, the Report found fault with the B.I.A.'s policy of transferring Indian students to public schools in spite of the schools' failure to provide an adequate education to Indian students.[249] Between 1930 and 1969, the proportion of Indian students enrolled in public schools had increased from one-half to two-thirds.[250] The Meriam Report had endorsed the transfer policy, but had included some caveats[251] that apparently had been ignored. The B.I.A. lacked a clear transfer policy and arbitrarily determined when a public school was "ready" to accept Indian students and when Indian students were "ready" to be transferred,[252] rather than evaluating a school's educational quality or consulting affected Indians before approving transfers.[253] In response to this B.I.A. highhandedness, the

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Impact Aid Act, Pub. L. No. 81-874, Sept. 30, 1950). Each year, the statute had been funded between 90% and 100% of the full entitlement amount. *See id.*

243. *See id.* at 33 (discussing funding under the Act of April 16, 1934, ch. 147, 48 Stat. 596). The JOM Act provided funds to public school districts for the needs of Indian students in their schools. *See supra* notes 186–92 and accompanying text.

244. *See* KENNEDY REPORT, *supra* note 2, at 39.

245. *See id.* JOM money that was not used to support general operations was also used to provide lunches and transportation and to cover administrative costs. *See id.*

246. *See id.* at 40.

247. *See id.* at 41. Also, JOM funds did not benefit Indians who had left the reservation and were being educated in urban public schools, which generally were not eligible for JOM funds because the Indian students' parents did not live or work on reservations or other tax-exempt lands. *See id.* The schools were generally not eligible for Impact Aid Act funds either. *See id.* The JOM program was also hampered by poor accountability for funds and by the B.I.A.'s lack of creativity in using the contracting authority under the JOM Act for educational projects involving entities other than state education departments. *See id.* at 43.

248. *See id.* at 44.

249. *See id.* at 47. In 1926, about 37,700 Indian students attended public schools; there were about 90,000 in 1968. *See id.* Nine states (California, Idaho, Michigan, Minnesota, Nebraska, Oregon, Texas, Washington, and Wisconsin) had assumed complete responsibility for the education of Indians within their borders. *See id.*

250. *See id.*

251. *See supra* notes 176–79 and accompanying text.

252. *See* KENNEDY REPORT, *supra* note 2, at 48.

253. *See id.*

Report recommended that Indian approval be required before students were transferred to public schools.[254]

In sum, education in public schools had failed Indian students in a number of ways. Indian parents and tribes had little or no influence or control over the education of their children in the schools. Public schools' curricula rarely included materials recognizing Indian culture, history, or language, while often using materials and approaches that were derogatory toward Indians. Many school administrators had negative attitudes toward Indian students, whom they considered inferior and bound to fail. Finally, the federal government compounded the public schools' problems through a flawed transfer policy and through lack of funding and other support of public schools enrolling Indian students.[255] None of these problems, however, was new; indeed, they had all been identified over forty years before in the Meriam Report.

3. The Failure of Federal Schools to Adequately Serve Indian Students

In 1928, when the Meriam Report was submitted, over eighty percent of B.I.A. school students were enrolled in boarding schools.[256] By comparison, at the time the Kennedy Report was prepared, the B.I.A. operated 226 schools in seventeen states; seventy-seven of the schools were boarding schools, in which sixty-nine percent of the Indian students attending B.I.A. schools were enrolled.[257] Boarding schools thus still played an important role in the B.I.A. system, although not to as great an extent as in the past. The growth rate of the number of Indian students in the federal school system was high, with high school enrollment, for example, doubling from 1959 to 1967.[258] Like the public schools, the B.I.A. schools failed to provide adequate educational opportunities to their students, and shared many of the same problems.

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254. *See id.* at 134. Furthermore, the Report recommended that public schools be required to prove that they had developed programs to meet Indian students' needs and thus were ready to accept transfers, and that they be held accountable for the performance of transferred Indian students. *See id.* at 134–35.

255. These findings are summarized in *id.* at 52–54.

256. *See supra* note 114 and accompanying text.

257. A total of 34,605 Indian students were enrolled in boarding schools, while 15,450 were enrolled in B.I.A. day schools. *See* KENNEDY REPORT, *supra* note 2, at 55. In addition, 3,854 students were housed in dormitories while attending public schools. *See id.* An additional 62,676 students attended public schools supported by JOM funds administered by the B.I.A. *See id.*

258. *See id.* The Indian population on reservations was growing at the rate of 3.3% per year, which was three times the rate for the entire U.S. population. *See id.* In some areas, the B.I.A. had failed to keep up with the increased growth rate by constructing more schools, which had led to inadequate classroom space for thousands of Navajo and Native Alaskan students. *See id.* at 56. On the Navajo Reservation, for example, the school age population increased by 48% from 1960 to 1966, and a substantial proportion of the children were not in school. *See id.* at 55. Although the percentage of enrolled children had increased from 52% in 1950 to 81% in 1955, the enrollment percentage increased only slightly by 1966. *See id.* at 55–56.

The first problem noted with the B.I.A. schools was the great inadequacy of the federal Indian education budget.[259] The B.I.A. budgeted $1,000 per student annually, but this amount also had to cover the boarding expenses of approximately half the students.[260] Moreover, the amount of real dollars spent per capita had actually decreased between 1958 and 1966,[261] and the B.I.A. spent less than the appropriate national standard on educational materials like books.[262] To makes matters even worse, the B.I.A. had diverted money appropriated for education to other purposes, such as covering general administrative expenses.[263] Given the obstacles facing Indian students because of poverty and cultural barriers, the inadequate budget undoubtedly made it extraordinarily difficult for the students to enjoy educational opportunities that were equal to those of their non-Indian peers.

The academic performance of B.I.A. school students demonstrated the profound inadequacy of the B.I.A. schools. Only 60% of B.I.A. high school students graduated (in contrast with a national graduation average of 74%),[264] and graduating Indian students averaged at least two years behind non-Indian students in achievement test scores.[265] Only 28% of B.I.A. school graduates entered college (in contrast with a national average of 50%),[266] and only 28% of those students graduated.[267] In fact, in 1969, only about 150 Indians were expected to receive bachelors degrees.[268] The B.I.A. had not developed any plans to close the educational achievement gaps existing between Indians and the rest of the population.[269]

Indian students' educational achievement prospects were hampered by the great disparity between the Indian students' own educational goals and teachers' and administrators' expectations for the students.[270] While seventy-five percent of Indian students wanted to attend college, only about ten percent of teachers questioned about how schools could serve students identified educational

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259. *See id.* at 56.

260. *See id.*

261. *See id.* at 58. Apparently B.I.A. education program appropriations had not taken into account inflation or the accelerated rate of growth of the student population. *See id.*

262. *See id.* The school management cost of education index indicated that an appropriate expenditure for textbooks, supplies, and other materials was $40 per child, but the B.I.A. spent approximately $18 per child. *See id.*

263. *See id.* at 59.

264. *See id.*; *see also id.* at 61 tbl. ("Percentage of Ninth Grade Enrollment That Graduates From High School").

265. *See id.* at 60; *see also id.* at 62 tbl. ("Achievement Lag Behind National Norms of About 22,000 Indian Pupils in B.I.A. Schools"), 63 tbl. ("Comparison of Levels of Educational Achievement of Indian and Non-Indian Students").

266. *See id.* at 59–60.

267. *See id.* at 60. Less than one percent of Indian graduate students received a master's degree. *See id.*

268. *See id.*

269. *See id.*

270. *See id.*

achievement as an important goal.[271] Instead, teachers stressed such goals as citizenship, personality development, and socialization, thus seemingly casting themselves in the role of "civilizers of the Indians" that nineteenth century educators and missionaries had embraced.[272] Like the educators who were faulted in the Meriam Report,[273] most of the teachers studied tended to focus on an obsolete form of occupational preparation,[274] while students wanted a firm grounding in English, mathematics, and science.[275] The Report concluded that the vocational education provided to Indian students needed a thorough review that would include significant Indian involvement.[276] Another deficiency noted was school personnel's belief that Indian students had to choose between total "Indianness"—whatever that might be—and complete assimilation.[277] As a result, the B.I.A. educational program sought to direct students toward an urban life, while utterly failing to prepare them in any way—"academically, socially, psychologically, or vocationally"—for such a life.[278]

The quality and effectiveness of instruction in the B.I.A. schools were highly unsatisfactory, and this inadequate teaching was identified as the primary in-school cause of Indian students' low achievement levels.[279] Most teachers lacked the training needed to teach students suffering from the economic and other disadvantages that Indian students faced.[280] Few of them were Indians and virtually none of them spoke Indian languages,[281] despite the fact that approximately ninety percent of their students had little or no English language facility when they entered the first grade.[282] Both the teaching techniques and the curriculum of the schools failed to take into account the students' special linguistic needs and culture.[283] Again, the criticisms of the B.I.A. schools' teachers, teacher training, teaching methodologies, and curriculum echoed the criticisms of B.I.A. schools in the 1928 Meriam Report.[284] To target these problems, the Kennedy Report recommended that the Department of Health, Education, and Welfare, the Department of the Interior, and the National Council on Indian Opportunity pool

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271. *See id.* Most of the students had a "reasonable" understanding of what college work involved, the Report noted. *See id.* Administrators' views generally matched those of teachers. *See id.*

272. *See id.* at 60–61.

273. *See supra* notes 129–32 and accompanying text.

274. *See* KENNEDY REPORT, *supra* note 2, at 61.

275. *See id.* at 60.

276. *See id.* at 124. The Report stated that the vocational training program should prepare students for employment both on and off the reservation, and should dovetail with reservation economic development programs. *See id.*

277. *See id.* at 61–62.

278. *See id.* at 62.

279. *See id.*

280. *See id.*

281. *See id.* at 62–63.

282. *See id.* Eighty-two percent of the students were "full blood," and over ninety-seven percent were of one-half or more Indian blood. *See id.*

283. *See id.*

284. *See supra* notes 116–37 and accompanying text.

their expertise to develop a comprehensive plan of action to establish a high quality educational program to benefit Indian students in federal schools, as well as in public schools,[285] and that bilingual education be bolstered, by increasing funding under the Bilingual Education Act[286] and expanding bilingual education programs.[287] The Report also recommended the development of culturally sensitive educational materials[288] and the immediate launching of efforts to recruit and train Indian teachers.[289]

The basic school environment, which the Report termed "sterile, impersonal and rigid, with a major emphasis on discipline and punishment,"[290] was also identified as a topic of much concern. Boarding schools deprived their students of privacy, subjected them to inspections, strict discipline, and rigid curfews,[291] and in general appeared to have maintained the routinized, discipline-obsessed environment for which they were criticized in the Meriam Report.[292] Not surprisingly, the students deeply resented the school environment.[293]

The Report faulted the B.I.A. itself for the "unusually ineffective" organization and management of the school system,[294] for its seriously deficient personnel system,[295] and for its failure to implement its own stated goal of

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285. *See* KENNEDY REPORT, *supra* note 2, at 120. The Report noted that the B.I.A. had direct responsibility for Indian students in federal schools and the Office of Education had responsibility for public school programs, in some of which Indian students participated, but they did not share ideas and resources to help solve common Indian education problems and to pursue their common goal of high quality education. *See id.*

286. *See id.* at 115. Only $306,000 out of a total of $7.5 million appropriated for the Bilingual Education Act (which was Title VII of the Elementary and Secondary Education Act) was being spent on Indian bilingual programs, which benefited only 733 Indian students. *See id.* at 116. The Report termed the amount spent on Indian programs "vastly inadequate." *Id.* A good bilingual program would not only help Indian students learn English through their native languages, but would also emphasize their history and culture, provide Indian classroom aides, and improve the relationship between the schools and students' families through a system of home-school coordinators. *See id.*

287. *See id.* at 116.

288. *See id.* The Report noted that the Subcommittee had been shocked by the absence of culturally sensitive materials in federal and public schools. *See id.* at 117. Materials completely ignored Indian contributions, included derogatory stereotypes of Indians, or were irrelevant to the students' life experience. *See id.* at 117.

289. *See id.* at 116.

290. *Id.* at 64.

291. *See id.* These curfews forced some students to read by flashlight in order to complete their assignments. *See id.* At Haskell Institute, electrical power to the dormitories was even cut off at night. *See id.*

292. *See supra* notes 147–48, 150, and accompanying text.

293. *See* KENNEDY REPORT, *supra* note 2, at 64.

294. *See id.* at 65.

295. *See id.* at 66. The Report found fault with the high teacher turnover rate, the ineffective centralized recruitment system, and the civil service status of the teachers and staff. *See id.* In particular, the civil service system made it "difficult if not impossible" for tribes and communities to have at least some authority over teacher hiring and training. *See id.*

maximizing parental and community participation.[295] Although the B.I.A. had approved increased Indian participation in the school system, a recommendation that had been made by the Meriam Report,[297] in reality, Indians participated little or not at all in planning and developing new education programs.[298]

The Report offered particularly harsh criticism of B.I.A. elementary-level boarding schools and off-reservation boarding schools. The separation of elementary school students from their families was deemed particularly destructive to Indian children, because of the complexity and importance of their extended family relationships and their crucial role in the development of children's sense of identity.[299] In short, elementary boarding schools were disastrous for both the children who attended them and for their families and communities, and the damage lasted well beyond the years spent at the schools.[300] These conclusions were not, however, new; the Kennedy Report itself noted that the Meriam Report had included the same criticisms of elementary boarding schools, yet the schools were still in operation.[301] The Report recommended replacing the elementary boarding schools with day schools.[302]

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296. *See id.* at 65. In spite of a two-year-old presidential directive, only a few schools were governed by elected school boards. *See id.* School staff members and parents had a distant, formal relationship, and parents who visited the schools were often made to feel unwelcome. *See id.*

297. *See supra* note 142 and accompanying text.

298. *See* KENNEDY REPORT, *supra* note 2, at 65.

299. *See id.* at 67. Over 7,000 Navajo children attended forty-eight elementary boarding schools on the Navajo Reservation and thus were separated from their families during the school year. *See id.* The Meriam Report had remarked on the Navajo boarding school situation but apparently regarded it as a necessary evil. *See* MERIAM REPORT, *supra* note 1, at 408. A teacher in the Tuba City Boarding School, which housed 1,200 elementary school students, wrote to the Subcommittee about the vast problems created by the schools. Children were taken from their homes at age six, and during nine months of the year saw their parents only on occasional weekends, if at all. *See* KENNEDY REPORT, *supra* note 2, at 68. On weekends, parents generally were "allowed to check out their children," if the school administration decided that the child's conduct warranted it. *Id.* Some schools did not allow parents to check out their children. *See id.* Two young students actually froze to death after they ran away from a boarding school to try to return to their homes over fifty miles away. *See id.* Family ties were severely strained and children were denied the "social relationships and interaction which brings about stability and contentment." *Id.* at 69. Starved for attention, the children faced boredom and meaningless activities after school hours. *See id.* at 70. The teacher wrote: "The children search everywhere for something—they grasp most hungrily at any attention shown them, or to any straw, that might offer escape from boredom...." *Id.*

300. Psychiatrists testified to the Subcommittee that elementary boarding schools had long-lasting negative effects on family and social structure and should be abolished. *See id.* at 71.

301. *See id.* The Meriam Report had noted that "Indian parents nearly everywhere ask to have their children in the early years, and they are right." *Id.* (quoting the MERIAM REPORT). Both the Meriam Report and the Kennedy Report also noted the adverse effects of the boarding schools on Indians' parenting skills. *See id.*

302. *See id.* at 123.

The B.I.A.'s nineteen off-reservation boarding schools, also the target of particularly strong criticism, enrolled over 12,000 students,[303] who were admitted on the basis of two types of criteria: educational (such as the lack of an accessible day school) and social (such as alleged behavior problems).[304] In practice, many schools had a majority of their students admitted under the social criteria, and as a result had student bodies with "special social and emotional problems."[305] Although teachers' negative attitudes toward, and apparent lack of understanding of, their students may raise some questions about the reliability of these assessments, school officials believed in the existence of these problems, yet failed to tailor the schools' programs to meet the students' supposed special needs,[306] and actually themselves contributed to student mental health problems.[307] The

303. *See id.* The schools were located in the following states: Alaska (Mt. Edgecumbe and Wrangell), Arizona (Phoenix), California (Sherman Institute), Kansas (Haskell Institute), Nevada (Stewart), New Mexico (Albuquerque Indian School and the Institute of American Indian Arts), North Dakota (Wahpeton), Oklahoma (Chilocco, Concho, Fort Sill, Riverside, Seneca, and Sequoyah), Oregon (Chemawa), South Dakota (Flandreau and Pierre), and Utah (Intermountain). *See id.* at 79.

304. *See id.* at 72. Other students who were eligible for admission under the education criteria included "[t]hose who need special vocational or preparatory courses, not available to them locally, to fit them for gainful employment" and "[t]hose retarded scholastically 3 or more years or those having pronounced bilingual difficulties." *Id.* Other students who were eligible for admission under the social criteria included "[t]hose who are rejected or neglected for whom no suitable plan can be made[,]...[t]hose who belong to large families with no suitable income and whose separation from each other is desirable[,]" and "[t]hose whose health or proper care is jeopardized by illness of other members of the household." *Id.* B.I.A. social workers determined whether students were eligible for admission under one of the social criteria, although at least formal approval of parents and the relevant reservation superintendent was also required. *See id.* A critical assessment of one of the schools noted the antiquated nature of the use of social criteria for admitting students to off-reservation boarding schools: "Social workers and educators 'use' the outmoded idea that sending people far from the scene of their social and emotional problems will somehow, almost miraculously, solve the problems." *Id.* at 75 (quoting John Bjork).

305. *Id.* at 72. In addition, the B.I.A. estimated that at least twenty-five percent of the students had dropped out or been pushed out of public schools. *See id.*

306. *See id.* at 73 (noting the "lack of appropriate response to social problems"). At the Phoenix Indian School, for example, out of a student body of approximately 1,000, over 200 students came from broken homes, at least 60 came from families where there was a serious drinking problem, sixteen cases of glue-sniffing were reported in a three-month period, and the school was often pressured to take students with histories of juvenile delinquency and emotional disturbance. In addition, 580 of the students were considered retarded scholastically. Nonetheless, the school had not added skilled workers or trained existing staff to cope with the problems. *See id.*

307. *See id.* One witness testified that "the students' 'frequency of movement and the necessity to conform to changing standards can only lead to confusion and disorganization of the child's personality. The frequency of movement further interferes with and discourages the development of lasting relations in which love and concern permit adequate maturation.'" *Id.* at 77 (quoting Dr. Thaddeus Krush). Another noted that even the Indian personnel working in schools could have difficulty meeting students' psychological and social needs because they themselves had been damaged by the

evaluators of one school offered the following conclusion as to the experience of the school's students: "That they remain vibrantly alive human beings at Stewart is neither an excuse for the schools' existence nor a negation of the tragedy. They remain children confused and threatened by White America, deprived of an adequate education and subjected to inhumane rules restricting every aspect of their lives."[308]

In addition to failing to deal properly with their students' emotional and social challenges, the off-reservation boarding schools also failed to adequately address the students' academic needs. Programs operated in "complete oblivion" of the needs of the students, many of whom entered the schools with learning difficulties.[309] School personnel were lacking both in quantity and quality.[310] Some schools offered a college preparatory, rather than employment-oriented, curriculum despite the fact that many of their students were assigned to the school because of academic difficulties, and students who needed intensive remedial work were simply given a watered down, easier curriculum.[311] Unsurprisingly, boarding school students' academic performance fell at least two and one-half to three years below grade level.[312] The Report recommended, in conclusion, thoroughly examining the off-reservation boarding schools and their distribution and location.[313]

Like the Meriam Report before it,[314] the Kennedy Report also faulted the B.I.A. educational system's programs for vocational education and preparation for higher education. B.I.A. policy indicated that high schools were supposed to provide prevocational education, and established a goal of fifty percent of graduates pursuing higher education and fifty percent attending vocational schools,[315] but the actual academic and prevocational programs were inadequate to meet these goals.[316] Thus, the Report concluded, the schools failed to prepare

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separation from parents and oppressive atmosphere that had been part of their own boarding school experiences. *See id.* at 76 (citing Dr. Robert Leon).

308. *Id.* at 77 (quoting the evaluation of the Stewart School).

309. *Id.* at 74.

310. *See id.*

311. *See id.* At the Stewart School, for example, eighty percent of the students were assigned to the school because they were considered low achievers, but the school was operated as if this were not the case. *See id.*

312. *See id.* This conclusion was based on students' performances on standardized tests. *See id.*

313. *See id.* at 123.

314. *See supra* notes 129–37 and accompanying text.

315. *See* KENNEDY REPORT, *supra* note 2, at 80–81. The prevocational education was supposed to include preparatory courses that would give students basic knowledge and experience in different occupational fields. *See id.*

316. *See id.* at 81. An evaluation of one school, for example, indicated that students "'graduate from the school with a high school diploma and a 9th grade education and expect to compete with other Indians as well as non-Indians in post-graduate vocational schools and the job market.'" *Id.* at 82 (quoting an evaluation report on the Stewart Indian School). The B.I.A. had set a graduation rate goal of 90% for 1970, but in 1967 there was a

students for off-reservation employment, and their programs had no relevance to the Indian community's actual manpower needs or economic development.[317]

The B.I.A.'s preparation of Indian students for higher education was equally inadequate. Despite the fact that seventy-five percent of students in B.I.A. schools wanted to attend college,[318] most teachers did not consider college preparation their primary objective,[319] and some even discouraged students from aspiring to higher education simply because they were Indians.[320] Many Indians who did enter college found that their education had not adequately prepared them to handle college work,[321] and some also suffered from social adjustment problems as they tried to make the traumatic transition to the college environment's different customs and values.[322] Finally, lack of funds seriously hampered the ability of Indians to enter college and to continue their studies once there.[323] Available loan and grant programs did not even begin to meet the need for college funds.[324] In sum, Indian students' college prospects continued to be adversely affected by the racist attitudes of their teachers, by the inadequacy of their academic preparation and of the assistance available in making the transition from high school to college, and by a lack of financial assistance. Echoing concerns and recommendations that had been voiced forty years earlier in the Meriam Report,[325] the Kennedy Report recommended improving higher education financial aid,[326] student recruitment and support,[327] and programs.[328]

40% dropout rate for students entering high school, and only 28% of high school graduates entered college. *See id.*

317. *See id.* at 83. The Meriam Report had recommended that vocational programs be linked to reservation economic opportunities. *See supra* note 136 and accompanying text.

318. *See* KENNEDY REPORT, *supra* note 2, at 83.

319. *See id.* at 83–84.

320. *See id.* at 84. One Makah student, for example, who had hoped to attend college and then medical school, was told that this was out of the question because no Makah had ever applied before and he could not be expected to succeed. *See id.* He was instead counseled to become a cook. *See id.*

321. *See id.* The Report noted that most Indians graduated from high school about two years behind the average non-Indian graduate. *See id.* Some Indians were also hampered by language differences. *See id.*

322. *See id.* at 84–85 (discussing Indians' emotional and social adjustment problems), 86 (noting that the transition from high school to college could be traumatic). Some studies had suggested that Indians' adjustment to college was hampered by differences in values between Indian groups and the American educational system. *See id.* at 85.

323. *See id.* at 85. Financial difficulties were greatest for students who had attended college for at least a year. *See id.*

324. *See id.*

325. *See supra* note 139 and accompanying text.

326. *See* KENNEDY REPORT, *supra* note 2, at 124–26. The specific recommendations related to B.I.A. scholarships and fellowships, scholarship programs for graduate studies, need-based financial aid, dissemination of information on loans, scholarships, and special programs. *See id.*

327. *See id.* at 127.

In short, the B.I.A. educational system failed to adequately serve Indian students. The B.I.A.'s educational budget was grossly inadequate and educational program personnel showed gross deficiencies in quantity and quality. Many teachers and administrators still saw their role as "civilizing the Indians." The quality and effectiveness of instruction were very unsatisfactory, leading to the seriously deficient performance of Indian students. Students suffered from B.I.A. schools' rigid, punitive, and impersonal environments. Indian parents and communities had practically no input into the B.I.A. schools responsible for their children's education. Elementary boarding schools destroyed students and their families emotionally and culturally, and off-reservation boarding schools had become dumping grounds for students considered to have serious social and emotional problems that the schools did little to address and even exacerbated. Federal Indian schools, like the public schools enrolling Indian students,[329] thus continued to exhibit the same shortcomings that had characterized Indian education at the time of the Meriam Report.

4. The Need to Improve Indian Education by Increasing Indian Input and Control

Because both public schools and federal schools were failing miserably in providing Indian students with adequate educational opportunities, the Kennedy Report concluded that developing effective educational programs for Indians, both in public and federally operated schools, "must become a high priority objective."[330] Although the costs of improving Indian education would be high, perhaps requiring even a doubling or tripling of the current per student costs, these costs could be expected to be more than offset by the reductions in Indian unemployment and welfare participation rates and by the increases in Indian incomes that were bound to follow.[331] Thus, the Kennedy Report, like the Meriam Report before it,[332] advocated a "stitch in time saves nine" approach to the problems of Indian education and economic status. Moreover, also in keeping with the Meriam Report,[333] the Kennedy Report recognized the links between inadequate educational opportunities and achievement and entrenched social problems such as poor nutrition and health care,[334] discrimination against Indians

328. *See id.* at 126–27. The Report recommended that higher education institutions develop programs to help meet Indian students' special needs (pursuant to B.I.A. contracts) and include courses dealing with Indian needs and culture in their teacher- and counselor-training curriculum. *See id.* at 126. The Report also recommended continuing support for community colleges on or near reservations and increasing ties between institutions of higher education and federal schools. *See id.* at 127, 130.

329. *See supra* notes 222–25 and accompanying text (discussing public schools enrolling Indian students).

330. KENNEDY REPORT, *supra* note 2, at 105.

331. *See id.* at 105.

332. MERIAM REPORT, *supra* note 1, at 347–48.

333. *See supra* note 182 and accompanying text (discussing the social problems that accompanied or followed poor educational opportunities).

334. *See* KENNEDY REPORT, *supra* note 2, at 112.

(in education and elsewhere),[335] and alcoholism.[336] These problems hampered Indian educational efforts, and needed to be addressed in order for Indian educational programs to be fully effective.

Apparent throughout the Report's recommendations was the recognition of Indians' lack of control over the educational programs and the need to remedy this situation in order to improve educational experiences and outcomes. One of the crucial problems underlying the crisis of Indian education that the Report identified was the relationship between Indian communities and white society, which alienated Indians and their communities and lessened their opportunities to control their own affairs.[337] In order to counteract this alienation and lack of control, it was believed essential to involve Indian parents in setting policy, at the national and local levels, for schools in which Indian students predominated[338] and to make maximum Indian participation and control by Indians a key part of national policy.[339] The Report recommended that Indian tribes operate their own schools under contract, with federal assistance, when they so desired.[340] In both federal and public schools in which Indians were enrolled, the curriculum should include materials focused on Indian culture and history and on contemporary Indian life in order to improve the education of both Indian and non-Indian students.[341] The Report called upon the federal Indian schools to become models of excellence by providing outstanding bilingual and bicultural programs, utilizing the most effective educational techniques for disadvantaged students, and providing a supportive, therapeutic environment.[342] Thus, the Kennedy Report echoed the Meriam Report[343] by identifying increased Indian participation in shaping educational programs and the adoption of Indian-related educational materials as being crucial to the improvement of Indian education.

The Report identified "the availability of high-quality programs for all Indian children and their actual achievement in these programs" as the measuring rods for the success of a new educational policy.[344] The efforts to improve Indians' educational opportunities to enable them to meet new achievement goals needed, the Report explained, to be on the scale of the post-World War II Marshall Plan, in keeping with the United States' great "moral and legal commitment to its Indian citizens."[345] It was hoped that by maximizing Indian participation in developing educational programs, as well as by following the Report's other recommendations, it would be possible to meet important goals such as achieving

335. *See id.* at 113.
336. *See id.* at 114.
337. *See id.* at 105.
338. *See id.*
339. *See id.* at 106.
340. *See id.* at 105.
341. *See id.*
342. *See id.* at 106.
343. *See supra* notes 128, 142 and accompanying text.
344. KENNEDY REPORT, *supra* note 2, at 106.
345. *Id.*

parity between national norms and Indian high school dropout rates and achievement levels and Indian college entrance and graduation rates.[345]

In order to foster greater Indian involvement in shaping educational programs, the Report recommended increasing Indian participation on boards of education, at both the national level and the local level,[347] and increasing Indian parental and community involvement in schools in general.[348] The existing lack of Indian participation could also be remedied by encouraging states and local communities to facilitate Indian involvement in developing and operating public school programs for Indians.[349] Finally, in order to facilitate direct tribal involvement in education, the Report recommended that tribes and Indian communities be included on the list of entities with which the B.I.A. could negotiate JOM Act contracts and that the B.I.A. make full use of this authority to permit tribes to develop educational projects and programs.[350] To facilitate the implementation of the changes it had suggested, the Report, acknowledging the importance of adequate funding in improving Indian education, recommended that education funding (including the "grossly inadequate" B.I.A. education budget) be substantially increased[351] and that the provision of funding to public schools with

346. *See id.* at 107. Other specific objectives included the following: full-year preschool programs for all Indians aged three to five; need-focused early childhood services; summer school programs available to all Indian students; bilingual and bicultural educational assistance; practical vocational and technical training; accessible community colleges; expanded work-study programs and financial assistance programs; effective alcohol and drug abuse prevention and treatment programs; high school equivalency programs for all adult Indians; and the elimination of illiteracy among Indian adults. *See id.* at 106–07.

347. *See id.* at 118. This increased participation was expected to take place through a National Indian Board of Education and through Indian boards of education for federal Indian school districts, both of which the Report recommended should be established. *See id.* at 118–19. The National Board would participate in negotiating contracts for tribes and communities to operate Indian school systems and, like state boards of education, would oversee school operations and set standards and policies. *See id.* at 118.

348. *See id.* at 119–20.

349. *See id.* at 135. Indians should be engaged by state educational agencies to advise on Indian issues in states in which a significant number of Indians attend public schools, the Report recommended. *See id.* The Report also recommended increased Indian involvement in education through schools like the Rough Rock Demonstration School, which at the time was the only successful tribally controlled school. *See id.* at 130. The Report recommended that the government provide greater support for the Rough Rock school and encourage the development of more model schools with Indian boards of directors. *See id.* at 129–30.

350. *See id.* at 133. The Report explained that "Johnson-O'Malley contracts with Indian tribes and communities could...place the initiative and responsibility for change and improvement in the hands of those who best understand the problems." *Id.* at 134.

351. *See id.* at 111. The Report noted that the annual per student cost in federal boarding schools needed to be doubled or tripled to provide equal educational opportunity to their students and that the B.I.A. spent only $18 per student on books and supplies (less than half of the national average of $40). *See id.* at 58, 111.

Indian enrollments and other provisions in federal statutes affecting Indian education be improved.[352]

5. Summary

The Kennedy Report recommended fundamental changes in the administration of Indian education in the United States. Indian involvement and the use of educational materials that were meaningful to Indian children needed to be increased. The program and curriculum needed to be overhauled and more Indian teachers needed to be trained. Substantial increases in funding and additional support for higher education were needed. Only large scale changes would make it possible for the federal government to fulfill its legal obligation to provide Indian education.

The problems that the Report uncovered and the means that were recommended to address them were not, of course, new. Rather, the Report demonstrated that many of the problems that existed when the Meriam Report was drafted still limited Indian educational opportunities and achievement, and that experts in the educational field believed that much still needed to be done to implement the same changes that had been recommended over four decades earlier. Indian students continued to be mired in an educational system that seemed designed to consign them to a subordinate socioeconomic role, rather than giving them equal opportunities to pursue higher education or otherwise prepare themselves for the career paths of their choice. Once again, time would show that the federal government's efforts ultimately fell short of ensuring improvement in Indian educational opportunities on the scale that the Kennedy Report indicated was so sorely needed.

D. The Aftermath of the Kennedy Report—Congress Responds

Congressional actions in the wake of the release of the Kennedy Report suggested that the Report did not fall entirely on deaf ears. In 1972, Congress enacted the Indian Education Act (the IEA), which sought to establish a more comprehensive federal aid program for Indian education.[353] The IEA amended the Impact Aid Act[354] to authorize grants to local educational agencies to develop and implement elementary and secondary school programs to meet the special

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352. *See id.* at 131–34. The Report made specific recommendations with respect to Public Law 81-74 (the Impact Aid Act), Public Law 81-815 (the School Facilities Construction Act), and the JOM Act. *See id.*

353. *See* Act of Sept. 30, 1950, Pub. L. No. 92-318, §§ 401–453, 86 Stat. 235, 334–45 (codified as amended at 20 U.S.C. §§ 241aa–241ff, 1211a, 1221f–1221h, 3385–3385b), *repealed by* Indian Education Act of 1988 § 5301, 25 U.S.C. § 2601 (which was in turn repealed by the Improving America's Schools Act of 1994, Pub. L. No. 103–382, § 367, Stat. 3976 (1994)).

354. *See* Impact Aid Act of 1950, ch. 1124, 64 Stat. 1100 (codified as amended at 20 U.S.C. §§ 236–244 (1990)), *repealed by* the Improving America's Schools Act § 331(b).

educational needs of Indian students,[355] and amended the Elementary and Secondary Education Act of 1965[356] to authorize grants to state and local agencies, federal Indian schools, Indian tribes and organizations, and higher education institutions for a variety of programs and projects designed to improve Indian students' educational opportunities.[357] An Office of Indian Education, housed within the Department of Health, Education, and Welfare's Office of Education, was established to administer the IEA,[358] and a National Advisory Council on Indian Education was created to advise the Commissioner of Education and carry out other functions related to Indian education assistance and programs.[359] Another section of the IEA authorized grants for education programs for Indian adults.[360] In 1974, Congress added two new grant program authorizations, for training teachers of Indian children[361] and for financing graduate or professional school studies for Indians,[362] to the IEA.

In the decade following the release of the Kennedy Report, Congress also enacted a broader federal statute, the Indian Self-Determination and Education Assistance Act of 1975 (the ISDEA),[363] which included a number of provisions addressing Indian education. Reflecting the conclusions of the Kennedy Report, the statute noted Congress's finding that "the Federal responsibility for and assistance to Indian education has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide" and that Indian parental and community control of education was crucially important.[364] Providing educational services of sufficient "quantity and quality" to Indian children was declared a "major national goal" of the United States.[365] The ISDEA gave explicit authority for the Secretary of the Interior to enter into contracts with, and provide grants to, tribal organizations, upon tribal request, to plan, conduct, and administer JOM Act and other programs that the Secretary is authorized to administer,[366] thus providing

355. *See* § 411, 86 Stat. at 335.

356. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

357. *See* § 421(a), 86 Stat. at 339.

358. *See* § 441, 86 Stat. at 343. The current authorization for the Office of Indian Education, housed within the Department of Education, is codified at 20 U.S.C. § 3423c (2001).

359. *See* § 447, 86 Stat. at 343. The current authorization for the National Advisory Council on Indian Education is codified at 20 U.S.C. § 7871 (2001).

360. *See* § 431, 86 Stat. at 342. The current provision related to grants for adult education is codified at 20 U.S.C. § 7851 (2001).

361. *See* Act of Aug. 21, 1974, Pub. L. No. 93-380, § 632, 88 Stat. at 586 (codified as amended at 20 U.S.C. § 3385a (1988)), *repealed by* Indian Education Act of 1988, § 5352(4), 25 U.S.C. § 2601.

362. *See id.*

363. *See* Act of Jan. 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450–450n, 455–458e (1983 & Supp. 2000)).

364. 25 U.S.C. § 450(b).

365. 25 U.S.C. § 450a.

366. *See* 25 U.S.C. § 450f (authorizing contracts); 25 U.S.C. § 450h(a) (authorizing grants) (1983 & supp. 2000).

authority for tribal organizations to operate federally funded educational programs currently operated by the government.[367] The ISDEA also amended the JOM Act[368] to provide that the Secretary will not enter into any contract without first approving an education plan, submitted by the prospective contractor, containing educational objectives adequately addressing Indian students' educational needs which the contract was capable of meeting.[369] In addition, the JOM Act was amended to provide that if a contracting school district has a local school board that is not composed of a majority of Indians, parents of Indian children shall elect a local committee composed of Indian parents to participate in the development of, and approve or disapprove, programs to be conducted under the JOM Act contract.[370] Finally, the ISDEA provided for increased funding for construction or renovation of schools on or near reservations or other Indian trust lands.[371]

Further support for the expansion of Indian educational opportunity, and for increased Indian control of education, was provided by the Education Amendments Act of 1978.[372] Title XI of the Act amended the Impact Aid Act by adding policies and procedures for school districts to increase Indian parents' and tribes' participation in the schools;[373] directed the Secretary of the Interior to develop basic education standards for B.I.A.-funded schools;[374] reorganized the B.I.A.'s Education Office and directed the B.I.A. to facilitate Indian control of Indian education;[375] and amended the IEA to extend funding eligibility to Indian-controlled schools operating under B.I.A. contracts[376] and to add a program for

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367. The current version of the ISDEA contract provision refers expressly to administering programs provided for under the Act of Nov. 2, 1921, known as the Snyder Act (ch. 115, 42 Stat. 208, codified at 25 U.S.C. § 13 (2001)) and provided for in the Johnson-O'Malley Act (Act of April 16, 1934, 48 Stat. 596, codified as amended at 25 U.S.C. §§ 452–457 (2001)). *See* 25 U.S.C. § 450f(a)(1) (2001)). The Snyder Act provided general authorization for the B.I.A. to expend moneys appropriated by Congress for Indian education and other purposes. *See* 25 U.S.C. § 13 (2001). The Indian Self-Determination Act established a specific procedure to be followed if the Secretary decides to decline to enter a contract requested by a tribal organization. *See* Act of Jan. 4, 1975, Pub. L. No. 93-638, § 102, 88 Stat. 2206, codified as amended at 25 U.S.C. § 450f(a), (b) (2001).

368. *See supra* notes 186–92 and accompanying text (discussing the JOM Act).

369. *See* 25 U.S.C. § 455 (1983).

370. *See id.*

371. *See id.* § 458.

372. Education Amendments of 1978, Pub. L. No. 95-561, §§ 1101–1152, 92 Stat. 2143, 2313–2333 (codified in scattered sections of 20, 25 U.S.C.).

373. *See id.* Part A. The current parental and tribal involvement policies and procedures under the impact aid program are codified at 20 U.S.C. § 7704 (2001).

374. *See id.* Part B, § 1121(a). These standards were to be developed in consultation with Indian tribes and organizations. *See id.* The current statutory provision is codified at 25 U.S.C. § 2001 (2001).

375. *See id.* §§ 1126, 1130. The current provisions with respect to the carrying out of the B.I.A.'s education functions and the directive to facilitate Indian control are codified at 25 U.S.C. §§ 2006 and 2001 (2001), respectively.

376. *See id.* Part C, § 1141.

very young Indian children.[377] The Secretary was also directed to formulate a plan to recruit Indian educators[378] and to draft rules and regulations to protect B.I.A. school students' constitutional and civil rights.[379]

The 1980s saw the enactment of additional legislation purporting to foster improvement in Indian educational opportunities. The Tribally Controlled Schools Act of 1988[380] acknowledged the shortcomings of the B.I.A.'s administration of the contracting process under the ISDEA and of federal administration of Indian education, and sought to enhance the fulfillment of the principles embodied in the ISDEA.[381] The Act authorized the Secretary of the Interior to provide grants to tribes and tribal organizations that operated schools under B.I.A. contracts, that operated other tribally controlled schools, or that elected to assume operation of B.I.A. schools with B.I.A. assistance.[382] The Indian Education Act of 1988[383] authorized the issuance of grants to local educational agencies for the education of Indian children[384] and sought to improve Indian educational opportunities by authorizing grants for demonstration projects, for the training of teachers for Indian students, and for other services and programs designed to improve Indian educational opportunities.[385]

In short, in the two decades following the release of the Kennedy Report, a number of federal statutes were enacted that were designed to improve Indian educational opportunities. In keeping with some of the recommendations made in the Kennedy Report, the statutes provided for the following improvements: increasing the role contemplated for Indian parents and communities in Indian education; increasing the role of tribes in running educational programs; improving the training of teachers of Indian students and recruiting Indian educators; authorizing school construction and renovation; setting standards for education in B.I.A. schools; and authorizing grants (although not necessarily accompanied by explicit long-term appropriations) to support a variety of programs and other efforts aimed at increasing Indian educational opportunity and achievement. Given the enactment of these various provisions, a reader of the Indian education-related provisions of the U.S. Code at the end of the 1980s might

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377. *See id.* Part C, § 1143. The current version of the early childhood development program is codified at 25 U.S.C. § 2023 (2001).

378. *See id.* Part B, § 1135. The current Indian educator recruitment provision is codified at 25 U.S.C. § 2016 (2001).

379. *See id.* Part B, § 1137. The current provision on Indian students' rights is codified at 25 U.S.C. § 2018 (2001).

380. Pub. L. No. 100-297, tit. V, Pt. B, 102 Stat. 385 (1988) (codified at 25 U.S.C. §§ 2501–2511 (2001).

381. *See id.* § 5202 (codified at 25 U.S.C. § 2501 (1994)).

382. *See id.* § 5204 (codified as amended at 25 U.S.C. § 2503 (1994)).

383. Pub. L. No. 100-297, tit. V, Pt. C, 102 Stat. 130 (1988) codified as amended at 25 U.S.C. §§ 2601–2651, *repealed by* Pub. L. No. 103-382, tit. III, § 367, 108 Stat. 3976 (1994).

384. *See* § 5312, codified as amended at 25 U.S.C. § 2602, *repealed by* Pub. L. No. 103-382, tit. III, § 367, 108 Stat. 3976 (1994).

385. *See* § 5321, codified as amended at 25 U.S.C. § 2621, *repealed by* Pub. L. No. 103-382, tit. III, § 367, 108 Stat. 3976 (1994).

well have felt a certain amount of optimism about the prospects for long overdue improvements in the education provided to Indian students.

IV. INDIAN EDUCATION AT THE TURN OF THE CENTURY: ASSESSING THE PRESENT AND CONTEMPLATING THE NEEDS OF THE FUTURE

> *The children are a gift to us all, to their families, to their Indian Nations, to the United States and to the world. ... [W]hat is lacking in us that we cannot nurture these children?*[386]

Despite the fact that, in the twenty years following the release of the Kennedy Report, Congress enacted statutes that appeared to address a number of the concerns raised by the Kennedy Report and the Meriam Report before it, as the 1990s progressed it became apparent that many shortcomings in the educational opportunities available to Indian students remained. An alarm was sounded as early as 1991, with the publication of *Indian Nations at Risk: An Educational Strategy for Action*,[387] the final report of the Indian Nations at Risk Task Force, which had been chartered by the Department of Education in 1990.[388] The report concluded that some progress toward improvement of Indian education had been made since the release of the Kennedy Report, and that programs developed in the previous two decades had demonstrated that if such programs received adequate funding and other resources, they could significantly improve Indians' educational opportunities.[389] Nonetheless, the general failure of schools to nurture many Indian students' intellectual development and academic performance, coupled with their discouraging of the use of native languages in the classroom, had contributed to Indian tribes being "nations at risk."[390] Indian students faced a number of barriers in their quest for an adequate education, such as unfriendly and even racist school

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386. U.S. DEP'T OF EDUC., INDIAN NATIONS AT RISK: AN EDUCATIONAL STRATEGY FOR ACTION, FINAL REPORT OF THE INDIAN NATIONS AT RISK TASK FORCE 14 (1991) [hereinafter NATIONS AT RISK] (statement of Leonard Haskie, Navajo, in testimony before the Indian Nations at Risk Task Force).

387. *See generally id.*

388. *See id.* at xiii.

389. *See id.* at 11. More specifically, the Task Force found that state and local educational agencies had realized that they had responsibilities to improve the academic performance and dropout rates of, and programs for, Indian students; reservations and communities had developed parent-based early childhood education models; parents had become more involved in educational programs; the number of Indian teachers, administrators, and professors had increased; comprehensive programs had been developed to meet Indian students' linguistic, cultural, academic, health, and social needs; some curriculum materials reflecting an Indian perspective had been developed; the number of Indians enrolled in college and graduate school had increased; tribally controlled schools had been developed; and the number of Indian-controlled public schools had increased. *See id.* at 11–12.

390. *Id.* at 1. Other factors identified as putting tribes at risk were the threats to Indian lands and resources from outsiders who were interested in further reducing tribal holdings and the vulnerability of the political relationships between the tribes and the federal government to fluctuations in the will of Congress and court decisions. *See id.*

environments, a Eurocentric curriculum, inadequately trained teachers, lack of real parental participation, serious socioeconomic problems, and insufficient and unpredictable funding.[391] In other words, they still faced many of the same barriers that had been identified in the Kennedy Report.[392]

This Part of the Article focuses on Indian education in the 1990s, the decade that led to the promulgation of President Clinton's Executive Order on American Indian and Alaska Native Education, and its future in the wake of the release of the Executive Order and the advent of a new presidential Administration. After an examination of the status of Indian students and their schools in the 1990s, as revealed by a Department of Education statistical report, and the Comprehensive Federal Indian Education Policy Statement, developed by Indian leaders, the Executive Order itself and its potential future under the Bush Administration are examined.

A. The Status of Contemporary Indian Students and the Schools They Attend

The Kennedy Report revealed an educational program that was in need of significant changes if it was to provide Indian students with adequate educational opportunities. Almost thirty years later, the preparation of another comprehensive report on Indian education provided the opportunity to assess the progress that had been made in improving Indian education since 1969. The U.S. Department of Education's National Center for Education Statistics' report (the NCES Report) on Indian and Native Alaskan education,[393] released in 1997, provided a snapshot of the contemporary situation in the schools serving Indian students, and thus served

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391. Stated more fully, the barriers identified included limited opportunities for preschool children to enrich their language and other skills; unfriendly school environments; a Eurocentric curriculum; low teacher expectations and relegation to low ability tracks, resulting in poor academic achievement; loss of native language ability; extremely high dropout rates; inadequate teaching; limited library, computer, and other learning and technological resources; lack of Indian educators; socioeconomic problems in their families and communities; lack of opportunities for parents and communities to develop "a real sense of participation"; overt and subtle racism in schools, and inadequate multiculturalism; insufficient funding for higher education, resulting in limited access; and unequal and unpredictable funding for educational programs, including a $193.7 million backlog, dating back to 1973, for seventy-five approved but unfunded school construction applications. *See id.* at 7–10.

392. *See generally supra* notes 204–352 and accompanying text (discussing the Kennedy Report).

393. NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., CHARACTERISTICS OF AMERICAN INDIAN AND ALASKA NATIVE EDUCATION: RESULTS FROM THE 1990–91 AND 1993–94 SCHOOLS AND STAFFING SURVEYS (1997) [hereinafter NCES REPORT]. Because the Report was based on surveys of teachers and principals, it does not provide as full an evaluation of Indian education as could have been presented if the assessments of Indian parents had been included. It is difficult to imagine that Indian parents would have had a more positive view of the schools that their children attended than the predominantly non-Indian educators whose views are reflected in the Report, so the Report nonetheless provides a useful baseline indicator of the problems confronting Indian education today.

as the basis for the issuance of President Clinton's 1998 executive order on Indian education.

1. The Basic Characteristics of the Schools Educating Indian Students

Like the Kennedy Report, the NCES Report examined both schools operated specifically for Indian students and public schools in which Indian students were enrolled. During the period examined by the Report,[394] the B.I.A. and federally recognized tribes and tribal organizations receiving B.I.A. funding operated 170 schools, referred to as "B.I.A./tribal schools."[395] About half of the schools were administered by the B.I.A., with the remainder being operated under B.I.A. grants and contracts by tribes,[396] which were much more directly involved in providing educational services than they generally had been at the time of the Kennedy Report.[397] The proliferation of tribally operated schools was consistent with the Kennedy Report's recommendation that tribes be granted contracts to develop their own educational programs[398] and was fostered by legislation enacted in the years following the release of the Report.[399] In addition, over 1200 schools (termed "high Indian enrollment schools")[400] had Indian enrollments of at least 25%; schools with less than 25% Indian enrollment were termed "low Indian enrollment schools."[401] Indian children thus continued to attend school in a variety of settings, both in terms of Indian involvement in running the educational programs and of the prominence of the Indian student body in the programs.

Over 50% of Indian students attended low Indian enrollment schools, almost 40% attended high Indian enrollment schools, and under 10% attended B.I.A./tribal schools.[402] In 1969, by comparison, roughly one-third of all Indian

394. Unless otherwise noted, the data in the discussion that follows relates to the 1993–94 academic year, which (along with the 1990–91 academic year) was the focus of the NCES Report. *See id.*

395. *See id.* at iii, 7; *see also id.* at B-1, tbl. B1 ("Distribution of Schools and Students by Indian School Type, School Level, School, Size, Community Type, and Region: 1993–94") [hereinafter Table B1]. The B.I.A. Office of Indian Education Programs' education directory listed 184 schools and dormitories for 1993, but the Schools and Staffing Survey used a more restrictive definition of schools. *See id.* at 7 n.7, A-2 to A-3.

396. *See id.* at 2.

397. *See* KENNEDY REPORT, *supra* note 2, at 55. At the time of the Kennedy Report, the B.I.A. itself operated 226 schools. *See id.*

398. *See supra* note 340 and accompanying text.

399. *See supra* notes 366–67 and accompanying text.

400. *See* NCES REPORT, *supra* note 393, at iii; *see also id.* at B-1, tbl. B1. The remaining 79,479 public schools had an Indian enrollment of less than 25%. *See id.* at B-2, tbl. B1.

401. *See id.* at iii.

402. *See id.* at 9, fig. 1. Specifically, 41,911 (8.5%) of Indian students attended B.I.A./tribal schools, 187,365 (38.1%) attended high Indian enrollment schools, and 262,660 (53.4%) attended low Indian enrollment schools. *See id.* Percentages cited in the text have been rounded.

students had attended B.I.A. schools.[403] Although Indian students accounted for only about 1% of the total U.S. student population,[404] they were a significant proportion of the student body in nearly half of the schools that they attended.[405] B.I.A./tribal and high Indian enrollment schools tended to be located in rural areas and small towns,[406] and their students' families tended to suffer from challenges such as poverty and low adult educational attainment.[407] Most of the schools had enrollments of fewer than 500 students.[408]

2. The Limited Availability of Special Programs to Meet Student Needs

B.I.A./tribal schools were more likely than the other schools to offer programs to serve the special needs of particular groups of students, such as programs focused on English as a second language, bilingual education, remedial reading, remedial math, disabled students, and gifted and talented students.[409] This

403. *See* KENNEDY REPORT, *supra* note 2, at 39.

404. *See* NCES REPORT, *supra* note 393, at iii.

405. *See id.* at 6. Forty-seven percent of Indian students enrolled in B.I.A./tribal or public schools attended schools with Indian enrollments of twenty-five percent or more. *See id.* at 8.

406. *See id.* at iii; *see also id.* at B-1, tbl. B1. Over ninety-two percent (157 out of 170) of the B.I.A./tribal schools were located in rural areas and small towns. *See id.* at B-1, tbl. B1.

407. *See id.* at 6.

408. *See id.* at iii; *see also id.* at B-1, tbl. B1. Only 10.2% of the schools had enrollments of 500 or more. *See id.* at B-1, tbl. B1. These schools were concentrated most heavily in the Southwest and in the Northern Plains. *See id.* at iii; *see also id.* at B-1, tbl. B1. Ninety-one (53.8%) of the B.I.A./tribal schools were located in the Southwest and forty-seven (27.5%) were located in the Northern Plains. *See id.* at B-1, Table B1. The high Indian enrollment schools were concentrated most heavily in the South Central United States (399, or 32.1%) and in Alaska (248, or 19.9%). *See id.* at iii, B-2, tbl. B1. No B.I.A./tribal schools were operated in Alaska. *See id.* at B-1, tbl. B1.

409. *See id.* at B-5, tbl. B3 ("Percentage of Schools Offering Specific Programs and Services, by Indian School Type, School Level, School Size, Community Type, and Region: 1993–94") [hereinafter Table B3]. Among B.I.A./tribal schools, 43.3% offered English as a second language programs, 67.9% offered bilingual education programs, 89.3% offered remedial reading programs, 83.3% offered remedial math programs, 95.2% offered disabled student programs, and 75.5% offered gifted and talented programs. *See id.* The comparable percentages for high Indian enrollment schools were as follows: 29.8%, 38.1%, 86.5%, 73.6%, 91%, and 73.6%. *See id.* The comparable percentages for low Indian enrollment schools were as follows: 42.9%, 17.5%, 80.8%, 60.7%, 89.1%, and 70.7%. *See id.* at B-6. In B.I.A./tribal schools, 8.7% of Indian students participated in gifted and talented programs, 8% took advantage of remedial education programs, and 31.5% participated in English as a Second Language or bilingual programs. *See id.* at B-77, tbl. B38 ("Percentage of Students Receiving Academic Support Services from Their Schools, by Indian School Type, and Selected Race-Ethnicity: 1993–94") [hereinafter Table B38]. In high Indian enrollment schools, the percentage participation of Indian and Native Alaskan students in these programs was lower than in B.I.A./tribal schools except for remedial education programs, in which 10.9% of these students participated. *See id.*

suggests that public schools might not be meeting all of the needs of Indian students, a concern that had already been raised in the Kennedy Report.[410]

The status of bilingual education programs was a significant issue given the fact that many Indian students had extensive exposure to languages other than English. In B.I.A./tribal schools, over one-third of the Indian students lived in homes in which a language besides English was spoken, and almost thirty percent had limited English proficiency.[411] In high Indian enrollment schools, a significant portion of the students had exposure to other languages or had limited English proficiency.[412] In 1969, by comparison, the B.I.A. had estimated that one-half to two-thirds of Indian children had limited or no knowledge of English at the time they entered school.[413] Limited English proficiency thus continued to be an issue facing Indian students, although not on the same scale as at the time of the Kennedy Report.

The NCES Report indicated that smaller percentages of Indian students than of other groups were participating in advanced classes. In secondary schools, smaller percentages of Indian students than of non-Hispanic white students were enrolled in specialized and advanced, as opposed to general, mathematics and science courses.[414] These statistics suggest that the schools may not be providing the support and preparation needed to enable Indian students to reach their full potential. They also raise the question of whether school personnel have low expectations for Indian students and, therefore, are tracking them into low-ability

410. *See supra* notes 222–55 and accompanying text.

411. *See* NCES REPORT, *supra* note 393, at B-76, tbl. B37 ("Linguistic Characteristics of Students, by Indian School Type, and Selected Race-Ethnicity: 1993–94") [hereinafter Table B37].

412. Sixteen percent of the Indian students in these schools lived in homes in which a language besides English was spoken, and 21% had limited English proficiency. *See id.* at B-76, Table B37. In low Indian enrollment schools, however, only .6% of Indian students (as compared to 28.8% of students in the "all other races" category, meaning students who were not Indians, Native Alaskans, or non-Hispanic whites) lived in homes in which a language besides English was spoken, and only 2.4% of Indian students (as compared to 17.0% of students in the "all other races" category) had limited English proficiency. *See id.*

413. *See* KENNEDY REPORT, *supra* note 2, at 27.

414. *See* NCES REPORT, *supra* note 393, at B-80, tbl. B41 ("Among Secondary School Students from Selected Race-Ethnic Groups, the Percentage Currently Enrolled in Particular Mathematics and Science Courses in Their Schools: 1993–94"). For example, 58.5% of Indian students (as opposed to only 18.9% of non-Hispanic white students) were enrolled in general or regular math courses, and 47.2% (as opposed to only 23.5% of non-Hispanic white students) were enrolled in general science courses. *See id.* No Indian students were enrolled in pre-calculus or calculus courses, and only 11% were enrolled in algebra or trigonometry. *See id.* Thus, very few Indian students were enrolled in the most advanced mathematics courses.

tracks within the curriculum,[415] or are otherwise failing to identify Indian students who should be participating in advanced programs.

3. The Problems of Absenteeism, Dropping Out, and Retention

Absenteeism was a problem in many secondary schools enrolling Indian students,[416] where both principals[417] and teachers[418] viewed student absenteeism as a serious problem. The student dropout rate was identified as a serious problem in the schools surveyed, just as it had been in 1969 (although the severity of the problem seemed to have lessened).[419] During the period studied by the Report, ten percent of Indian students in B.I.A./tribal schools and over five percent of those in high Indian enrollment schools dropped out or withdrew.[420] Students dropping out was cited as a serious problem by significant percentages of principals and substantial percentages of teachers in B.I.A./tribal secondary and combined schools.[421]

Significant percentages of Indian students were held back in school. Low Indian enrollment schools in particular had a high rate of retention in grade of Indian students—twenty-four percent.[422] Thus, as was the case at the time of the

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415. *See* NATIONS AT RISK, *supra* note 386, at 8 (stating that low expectations and relegation to low ability tracks resulted in poor academic achievement among up to sixty percent of Indian students).

416. The average percentage of students who were absent on any given day was over five percent in all three categories of schools. *See* NCES REPORT, *supra* note 393, at 11–12.

417. In particular, significant percentages of school principals in B.I.A./tribal secondary schools (44.5%) and in high Indian enrollment secondary schools (21.6%) cited student absenteeism as a serious problem, while it was less of a concern in low Indian enrollment secondary schools (11.4%). *See id.* at B-45–47, tbl. B20.

418. Teachers were even more likely than principals to see student absenteeism as a serious problem, with 67.9% of teachers in B.I.A./tribal secondary schools, 43.8% in high Indian enrollment schools, and 27.2% in low Indian enrollment schools, citing it as a serious problem. *See id.* at B-49 to B-50, tbl. B21 ("Percentage of Teachers Who View Certain Issues as Serious Problems in Their Schools, by Indian School Type, School Level, School Size, Community Type, Region, Race-Ethnicity, and Sex: 1993–94") [hereinafter Table B21].

419. *See* KENNEDY REPORT, *supra* note 2, at 3 (noting that Indian students' dropout rates were twice the national average), 29 (noting that dropout rates were as high as ninety percent in some places).

420. *See* NCES REPORT, *supra* note 393, at B-79, tbl. B40 ("Percentage of Students Dropping Out or Withdrawing from School or Retained in Grade, by Indian School Type, and Selected Race-Ethnicity: 1993–94") [hereinafter Table B40]. By contrast, less than one percent of Indian students in low Indian enrollment schools dropped out or withdrew. *See id.*

421. In secondary schools, 27.7% of principals cited the dropout rate as a serious problem, as did 22.2% of principals in combined schools. *See id.* at B-45, tbl. B20. The comparable percentages for teachers were 48.9% and 45.6%. *See id.* at B-49, tbl. B21.

422. *See id.* at B-79, tbl. B40. By contrast, only 4.6% of non-Hispanic white students were retained, and only 10.2% of students of all other races were retained. *See id.* The grade retention rate for Indian students was 12% in B.I.A./tribal schools and over 7%

Kennedy Report,[423] the fact that students were not being enrolled at the proper grade level raised concerns.

4. Educational Achievement and Outcomes

The NCES Report also indicated that there was reason for concern about the educational outcomes of Indian students. Only 9% of Indian students in the ninth and higher grades had grade point averages of 3.1 or above; the remainder were almost evenly divided between the 2.1-3.0 range and the 2.0 or below range.[424] Only 2.5% were identified for gifted and talented programs (as opposed to 7% of the student body as a whole).[425] Taken as a whole, this data raises the question of whether Indian students received adequate support to enable them to reach their full potential in school.

During the academic year for which the most recent statistics were available, fourteen percent of the seniors in B.I.A./tribal schools failed to graduate.[426] Smaller percentages of Indian students than of other students took advanced placement courses[427] or requested that their transcripts be sent to colleges.[428] Similarly, the Kennedy Report had revealed that Indian student achievement levels were of great concern and that Indian college attendance

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in high Indian enrollment schools. *See id.* at B-79, tbl. B40. In high Indian enrollment schools, only 3.3% of non-Hispanic white students were retained, while 10.8% of students of all other races were retained. *See id.*

423. *See supra* note 228 and accompanying text.

424. *See* NCES Report, *supra* note 93, at B-83, tbl. B45 ("Percentage of Students with Selected Educational Outcomes: 1993–94") [hereinafter Table B45]. Grade point averages were somewhat higher for students who were enrolled in recognized tribes: 19.2% with 3.1 and higher, 43.3% with 2.1–3.0, and 37.5% with 2.0 or below. *See id.* By contrast, the corresponding figures for non-Hispanic white students were 31.8%, 35.6%, and 32.6%, and the corresponding figures for all students were 25.7%, 34.6%, and 39.6%. *See id.*

425. *See id.* at B-83, tbl. B45.

426. *See id.* at B-10 to B-11, tbl. B6 ("Of Schools that Served 12th Graders, Percentage that Had Job Placement Services and 'Tech-Prep' Programs, and Graduation and College Application Rates of 1992–93 12th Graders, by Indian School Type, School Size, Community Type, and Region: 1993–94") [hereinafter Table B6]. The Report also indicates, in the same table, that roughly ten percent of seniors in high and low Indian enrollment schools failed to graduate, but the table does not indicate what percentage of these students were Indian. *See id.*

427. Less than 5% of Indian students took one or more advanced placement courses. *See id.* at B-83, tbl. B45. By comparison, 11.4% of all students and 13.5% of non-Hispanic white students took one or more AP courses. *See id.*

428. Only 9.5% requested that one or more transcripts be sent to colleges. *See id.* at B-83, tbl. B45. By comparison, 11.2% of all students and 13% of non-Hispanic white students made one or more transcript requests. *See id.* The college application rates for all students in B.I.A./tribal schools, high Indian enrollment schools, and low Indian enrollment schools were 47.1%, 44.7%, and 58.3%, respectively. *See id.* at B-10 to B-11, tbl. B6.

needed strong encouragement,[429] although the NCES Report demonstrated that there had been some improvement since 1969.

5. Poverty and Other Problems Affecting Students' Educational Outcomes

As was the case in 1969, poverty and other social problems continued to present serious challenges to the education of many Indian students. The poverty level of students in schools attended by Indian students was suggested by the number of students who were eligible to participate in the free and reduced-price lunch program. In B.I.A./tribal schools, 85% of the students were eligible for the lunch program, as were 56% and 32% of the students in high and low Indian enrollment schools, respectively.[430] Many of the principals and teachers in these schools, and especially those in B.I.A./tribal and high Indian enrollment schools, viewed poverty as a serious problem facing their schools.[431]

Substantial percentages of principals in B.I.A./tribal schools also viewed parental alcohol and drug dependency and lack of parental involvement—two problems that might well be connected—as serious problems,[432] as did even greater percentages of teachers.[433] Significant percentages of principals[434] and

429. *See, e.g.*, KENNEDY REPORT, *supra* note 2, at 59–60 (discussing high school graduation rates and achievement test scores and noting that only twenty-eight percent of B.I.A. school graduates entered college, compared to a national average of fifty percent).

430. *See* NCES REPORT, *supra* note 393, at B-7 to B-8, tbl. B4 ("School Enrollment and Percentage of Students Eligible for Free or Reduced-Price Lunches, by Indian School Type, School Level, School Size, Community Type, and Region: 1993–94") [hereinafter Table B4].

431. *See id.* at B-45, tbl. B20 ("Percentage of Principals Who View Certain Issues as Serious Problems, by Indian School Type, School Level, School Size, Community Type, Region, Race-Ethnicity, and Sex: 1993–94") [hereinafter Table B20]; *id.* at B-49, tbl. B21. Among principals in high Indian enrollment schools, 44.3% viewed poverty as a problem, as did 15.8% of principals in low Indian enrollment schools. *See id.* at B-46 to B-47, tbl. B20. In B.I.A./tribal schools, the problem of poverty appears to have been of particular concern among principals in schools with 500 or more students (in which 80.3% of principals cited it as a serious problem) and in urban schools (cited by 87.6% of principals). *See id.* at B-45.

432. *See id.* at B-45, tbl. B20. Lack of parental involvement was of particular concern in urban schools, in which it was cited as a serious problem by 62.3% of principals. *See id.*

433. *See id.* at B-49, tbl. B21. Parental substance abuse was of particular concern to teachers in schools in the East, Northern Plains, and Northwest regions, in which 61.8%, 65.2%, and 73.6% of teachers, respectively, cited it as a serious problem. *See id.* Lack of parental involvement was of particular concern in urban schools, in which it was cited as a serious problem by 81.2% of principals. *See id.*

434. *See id.* at B-46, tbl. B20. In these schools, 33.9% of principals cited parental substance abuse, and 30.6% cited lack of parental involvement, as serious problems. *See id.* By contrast, only 6.8% and 12.6%, respectively, of principals in low Indian enrollment schools cited these problems as being serious. *See id.* at B-47, tbl. B20.

teachers[435] in high Indian enrollment schools were also concerned about these problems. Use of alcohol by students themselves was seen as a serious problem by significant percentages of principals in B.I.A./tribal schools.[436] Thus, Indian students continued to suffer from, and have their educational opportunities adversely affected by, some of the same social problems with which they had been burdened when the Kennedy Report was released in 1969.[437]

6. Shortcomings of School Personnel

The NCES Report also explored the issue of diversity among school personnel in schools serving Indian students. In B.I.A./tribal schools overall, 38% of the teachers were Indians,[438] compared to only 15% of teachers in high Indian enrollment schools and less than 1% of teachers in low Indian enrollment schools.[439] Ninety-five percent of B.I.A./tribal schools had at least one Indian teacher, as opposed to 70% of high Indian enrollment and 5% of low Indian enrollment schools.[440] Thus, only B.I.A./tribal schools seemed to have made a successful effort to recruit and hire Indian teachers, one of the recommendations of the Kennedy Report.[441] Very few of the teachers, however—for example, only 2% of teachers in B.I.A./tribal schools—had either majored or minored in Indian education.[442] Thus, as had been the case in 1969,[443] few teachers had specialized training for addressing the unique educational needs of Indian students.[444]

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435. *See id.* at B-49 to B-50, tbl. B21. In these schools, 41.4% of teachers cited parental substance abuse, and 46.5% cited lack of parental involvement, as serious problems. *See id.* By contrast, only 12.8% and 27.4%, respectively, of teachers in low Indian enrollment schools cited these problems as being serious. *See id.*

436. *See id.* at B-45, tbl. B20. Student use of alcohol was cited as a serious problem by principals in 28% of high Indian enrollment secondary schools and in 11.9% of high Indian enrollment combined schools. *See id.* at B-46, tbl. B20. The comparable percentages for low Indian enrollment schools were 13.1% and 5.3%. *See id.*

437. *See* KENNEDY REPORT, *supra* note 2, at 3 (noting that Indian income was 75% below the national average and that the Indian unemployment rate was ten times the national average), 112–14 (discussing problems from which Indians suffered, including poor nutrition and health care, and alcoholism).

438. *See* NCES REPORT, *supra* note 393, at B-22, tbl. B10 ("Percentage Distributions of Teachers by Sex, Race-Ethnicity, and Enrollment in Recognized Tribe, by Indian School Type, School Level, School Size, Community Type, and Region: 1993–94") [hereinafter Table B10].

439. *See id.* at B-22 to B-23, tbl. B10. The highest percentage of Indian and Native Alaskan principals was in the B.I.A./tribal schools, in which roughly half (77 of 164) of the principals were Indians. *See id.* at B45, tbl. B20.

440. *See id.* at B-65, tbl. B29 ("Percentage of Schools with American Indian and Alaska Native Teachers and Students, by Indian School Type, Community Type, and Region: 1993–94") [hereinafter Table B29].

441. *See* KENNEDY REPORT, *supra* note 2, at 116. The report noted that few teachers were Indian. *See id.*

442. *See* NCES REPORT, *supra* note 393, at B-24, tbl. B11 ("Percentage of Teachers Who Majored or Minored, or Are Certified in Their Main Teaching Assignment, and Majored or Minored in Indian Education, by Indian School Type, School Level, School Size, Community Type, and Region: 1993–94") [hereinafter Table B11].

7. Summary

The NCES Report revealed a number of difficult issues facing schools in which Indian students were enrolled, such as poverty, parental and student substance abuse, and students' limited English proficiency. High absenteeism and dropout rates were reported. Grade retention rates were high and grade point averages and other indicators of educational achievement were low enough to raise concern. The majority of school personnel were not Indians and, as a result, might have difficulty in fully understanding and addressing the needs of Indian students.

The Report thus revealed that, despite some improvements in certain areas, many of the problems that had plagued Indian education in the 1960s still were matters of significant concern in the 1990s. The educational systems that were supposed to be serving Indian students' needs continued to fail to provide them with an environment in which they could thrive and learn. Although a more complete picture of Indian schools would have been provided by surveying the views of Indian parents on the schools in which there children were enrolled, it is difficult to imagine that Indian parents overall would have a rosier view of the education provided to their children than the NCES Report revealed. It was this disturbing picture of Indian education that provided the backdrop for two documents aimed at addressing the issues that were facing Indian educational programs in the 1990s: the Comprehensive Federal Indian Education Policy Statement and President Clinton's 1998 Executive Order on American Indian and Alaska Native Education.

B. The Comprehensive Federal Indian Education Policy Statement of 1994

The Comprehensive Federal Indian Education Policy Statement (CFIEPS) was developed in the aftermath of an April 29, 1994, meeting at the White House involving President Clinton and tribal leaders.[445] After a series of White House meetings, participants agreed that a comprehensive federal Indian education policy, defined by Indians rather than by the federal government, would assist tribes and government agencies in collaborating to improve Indian education.[446] Tribal leaders and educators conducted research and gathered comments in Indian communities over a two-year period, and developed the

443. *See* KENNEDY REPORT, *supra* note 2, at 27 (noting that teachers were not trained to teach English to students whose first language was not English), 62 (noting that most B.I.A. school teachers lacked the training needed to teach students suffering from the disadvantages faced by Indian students).

444. *See generally* HAP GILLILAND & JON REYHNER, TEACHING THE NATIVE AMERICAN (1988); Arthur J. More, *Native Indian Learning Styles: A Review for Researchers and Teachers*, 27 J. AM. INDIAN EDUC. 1 (1987), *available at* http://jaie.asu.edu/v27/V27S1nat.htm.

445. *See* Preface to the Comprehensive Federal Indian Education Policy Statement ¶ 16, *at* http://www.niea.org/POLICYSTM.htm (last visited Dec. 15, 2001) [hereinafter CFIEPS–Preface].

446. *See id.* ¶ 17.

CFIEPS under the leadership of the National Advisory Council on Indian Education (NACIE), the National Congress of American Indians (NCAI), the National Indian Education Association (NIEA), and the Native American Rights Fund (NARF).[447] The policy was intended to set national Indian education guidelines for federal agencies,[448] to provide direction for new congressional and executive Indian education initiatives,[449] and to help ensure the academic success of Indian students "in an environment of increased tribal involvement and control."[450] In a number of ways, the CFIEPS echoed concerns that had been identified in the Kennedy Report and that the NCES Report had indicated were still matters of serious concern, thus reflecting the CFIEPS drafters' awareness of the failure of federal and state educational programs to deal adequately with longstanding problems. Examination of the CFIEPS provides insight into the views of prominent contemporary Indian education leaders and organizations on Indian education today, and on what needs to be done to bring about significant improvement.

1. The Essential Starting Point: Tribal Sovereignty and the Right to Self-Determination

The CFIEPS set out as its starting point the sovereignty of Indian tribes, confirmed by the Constitution, treaties, and other federal laws.[451] This sovereignty embraces, as an inherent element, education rights (as Congress has affirmed), as well as being part of the government-to-government relationship and the trust relationship between Indian nations and the United States.[452] The CFIEPS thus firmly grounded Indian students' right to adequate educational opportunities in the basic principles of Indian law and tribal legal status.

Moreover, the CFIEPS observed, treaties, statutes, and executive orders give the federal government the responsibility to provide education to Indians and to transfer control over education to those Indian nations who desire it,[453] and therefore all educational systems that serve Indian students must "incorporate tribal involvement, allow tribal decision-making, and be accountable to tribes."[454] It thus acknowledged that it is the tribes that have the greatest stake in Indian education "because their children are their future."[455] The CFIEPS highlighted the importance of, and recommended an increase in, Indian participation in and

447. *See id.* ¶ 18.
448. *See id.* ¶ 4.
449. *See id.* ¶ 5.
450. *Id.* ¶ 6.
451. *See* Comprehensive Federal Indian Education Policy Statement—Introduction ¶ 1, *at* http://www.niea.org/POLICYSTM.htm (last visited Dec. 15, 2001) [hereinafter CFIEPS—Introduction].
452. *See id.* ¶ 2.
453. *See id.*
454. *Id.* ¶ 4.
455. *Id.*

control of the education of Indian students, as the Kennedy Report had done[455] and as important federal statutory provisions require.[457]

The CFIEPS called upon federal agencies to recognize tribal sovereignty, self-determination, native languages and cultures, and tribal education laws as key components of Indian education, and to provide support in these areas. In furtherance of this directive, the CFIEPS provided that federal agencies should consult with tribal governments on issues affecting Indian students through the development of institutional knowledge of the retained sovereignty of tribes, which includes authority over education, and of the diversity, uniqueness, and "unparalleled status" of native languages, cultures, and traditions.[458] In addition, the CFIEPS stated, agencies should develop an institutional capacity to identify and address Indian educational concerns and assign specific employees to address the agency's work with tribal governments and federal-tribal partnerships.[459] Secondly, agencies were urged to support self-determination by assisting tribes to assume control of education programs through a number of actions: negotiating with tribal governments to transfer education programs and related matters to them; providing funding; allowing tribes to develop their own curricula and education and teacher certification standards; providing staff and technical assistance for developing and implementing education codes and administration capabilities; and implementing procedures to provide direct funding "without excessive accountability" and to assist with administration and education governance.[460] Thus, the CFIEPS provided some more concrete suggestions for increased tribal involvement in education than the Kennedy Report had done. In addition, the overlap between some of these recommendations and existing statutory provisions purporting to foster increased Indian control over education suggested that agencies had not done as much as they could to facilitate implementation of the statutes.

Thirdly, the CFIEPS urged agencies to support the preservation, protection, and promotion of native languages and cultures, upon tribal request, by providing funding, staff, and technical assistance for native language and culture curricula and programs; transferring to tribes native language and cultural programs;[461] encouraging non-tribal governments and entities to recognize native languages and cultures' unique status and to include them in the curriculum and programs upon tribal request;[462] and encouraging states to provide for appropriate

456. *See supra* notes 337–50 and accompanying text (discussing the Kennedy Report's recommendations for increased Indian participation).

457. *See supra* notes 370, 373 and accompanying text

458. Comprehensive Federal Indian Education Policy Statement–Policy § A(1)–(2), *at* http://www.niea.org/POLICYSTM.htm (last visited Dec. 15, 2001) [hereinafter CFIEPS–Policy].

459. *See id.* § A(3)–(4).

460. *Id.* § B.

461. *See id.* § C(1)–(3).

462. *See id.* § C(4). Federal agencies were also supposed to encourage granting of "full academic credit and fulfillment of entrance or degree requirements to native language and culture courses." *Id.*

certification of native language and culture instructors.[463] Here again, the CFIEPS mentioned a concern that was voiced in the Kennedy Report[464] but provided more specific suggestions to address it.

Finally, in order to support the development of tribal education laws, the CFIEPS provided that agencies should work with tribal education departments to support the establishment and development of tribal education codes.[465] The CFIEPS urged the agencies to work to ensure that all other governments and entities complied with the codes to help make them effective.[466]

2. Indian Involvement in Educational Decision Making

The CFIEPS underscored the importance of a strong tribal role in federal decision making with regard to Indian education in its provisions on the federal-tribal consultation process. Federal agencies were directed to improve the tribal consultation process with the goal of obtaining tribal government consent whenever proposed federal actions and decisions affect Indian education.[467] The CFIEPS also sought to bolster the role of school boards, educators, and parents in educational decision making by requiring federal agencies to recognize their key roles in tribal and non-tribal education programs.[468] Agencies were also directed to involve tribal governments and committees of Indian parents outside of Indian communities in future planning.[469] Once again, the CFIEPS evidenced a belief in

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463. *See id.* § C(5). Appropriate certification was to include "allowing/accepting tribal certification of native language and culture instructors." *Id.*

464. The Kennedy Report noted the discrimination with respect to language that Indian students suffered and included some recommendations with regard to increasing bilingual education. *See supra* notes 231–32, 281–88 and accompanying text; *see also* NATIONS AT RISK, *supra* note 386, at 22 (recommending that establishing promotion of native languages as a responsibility of schools be emphasized as a national priority).

465. *See* CFIEPS–Policy, *supra* note 458, § E.

466. *See id.* § E(1)–(2). This goal was to be achieved by requiring compliance by regulation and by assisting in the development of enforcement capabilities and cooperative plans and agreements. *See id.*

467. *See id.* § D. This would require timely consultation for all proposed actions and decisions, prompt reporting to tribes on actions being taken to implement tribal recommendations received in the consultation process, encouragement of tribal representatives to meet with agencies, and organizing federal/tribal partnerships to improve the consultation process. *See id.*

468. *See id.* § F. This recognition was to take two forms:

> (1) upon tribal request, facilitating discussions and planning among tribal governments, boards, educators, and parents that clarify the important roles of each in Indian education; and (2) upon tribal request, using the results of discussions and planning to enhance the important roles of tribal governments, boards, educators, and parents in Indian education.

Id. § F(1)–(2).

469. *See id.* § L. This direct involvement was to take place through the following mechanisms:

> (1) following consultation requirements and tribal priorities when planning, budgeting, and administering programs and when identifying

the need for a very strong role for tribes and Indian communities in Indian education, thus echoing the Kennedy Report's earlier recommendations,[470] as well as suggesting that existing statutory provisions calling for tribal and parental roles in educational decision-making had proved inadequate.

Other provisions focused on the role of non-tribal entities in Indian education, an important area of focus given the large percentage of Indian students who attend public schools rather than B.I.A. or tribal schools.[471] Federal agencies were directed to carry out statutory obligations to Indian students who reside outside of reservations by implementing Indian parent committees' and boards' decisions on programs and funding and by supporting tribal decisions regarding tribal members who are students residing elsewhere.[472] Federal agencies were also directed to foster, upon tribal request, the development of cooperative and reciprocal education agreements between tribal and non-tribal governments and entities[473] and to assist tribal governments in the setting of educational standards in programs serving Indian students.[474]

3. Educational Research and Reporting

The CFIEPS called for research and reporting with respect to its provisions and to Indian education in general. Federal agencies were urged to compile research databases and assist tribal governments in conducting research;[475] to facilitate a national center for Indian education research;[476] and to

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program needs; and (2) implementing Indian education policies when planning, budgeting, and administering programs and when identifying program needs.

Id. § L(1)–(2).

470. *See supra* notes 347–50 and accompanying text.

471. *See supra* note 402 and accompanying text (indicating that over ninety percent attended public schools).

472. *See* CFIEPS–Policy, *supra* note 458, § G(1)–(2).

473. Federal agencies were to foster education agreements by facilitating discussions and planning to clarify responsibilities; providing funding, staff, and technical assistance to support such agreements; implementing federal incentives for such agreements; and requiring a transition of Indian education to tribal control, for tribes that seek such control, and assisting such tribes in making a successful transition. *See id.* § H(1)–(4). Similarly, the *Nations at Risk* report had advocated the development of partnerships among schools, parents, tribes, universities, businesses, and social service agencies, and made recommendations for the roles that specific partners could play. *See* NATIONS AT RISK, *supra* note 386, at 22–31.

474. *See* CFIEPS–Policy, *supra* note 458, § I. The agencies were to recognize tribes' primary authority, pursuant to inherent sovereignty, to set standards; document education standards and policies that affect Indian students and make this information available to tribal governments; assist tribal governments in establishing and enforcing standards, through funding and otherwise; assist tribal governments in incorporating tribal standards in programs; and involve tribal governments in future federal decision making that affects education standards for Indians. *See id.* § I(1)–(5).

475. *See id.* § J. The research was to focus on such matters as Indian students' and Indian education programs' performance, needs and progress, and research and

establish a national center of information on distance learning opportunities for remotely located Indians.[477] The CFIEPS thus acknowledged the need to gather information and conduct research in order to gain a better understanding of what actions would be most effective in improving Indian educational opportunities.

Finally, the CFIEPS directed federal agencies to consult with and report regularly to both tribal governments and Congress on their activities related to Indian education policies, including providing information on matters addressed by the CFIEPS.[478] The reporting provision implicitly acknowledged the key role played by funding in improving Indian educational opportunities by requiring an analysis of the difference between budgetary needs and the actual level of appropriated funding.[479] Finally, agencies were also directed to report on their success and difficulty in implementing the policy and to provide the separate views of tribes on success and problems in implementation.[480]

4. Assessing the CFIEPS

The CFIEPS stands as a strong statement in favor of improving Indian education. It properly acknowledges the ties between Indian education and federal Indian education policy, on the one hand, and the most important principles of Indian law, such as tribal sovereignty and the government-to-government and trust relationship between tribes and the federal government, on the other. The statement addresses a number of key issues that were raised by the Kennedy Report and, in some cases, the Meriam Report before it, such as Indian participation in developing and administering educational programs, preservation of Indian culture and languages in the context of educational programs, cooperation between tribal and non-tribal governments with respect to education, and federal support, monetary and otherwise, for increasing Indian educational opportunities. In short, it provides a blueprint for thoroughgoing changes in Indian education.

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information were to be made available to evaluate Indian education programs and Indian students' needs and achievement, to identify the best education practices and materials for Indian children, and to identify the improvements and funding that are needed to maintain, renovate, or replace schools serving Indian students. *See id.* § J(3)–(6).

476. *See id.* § J(8). The purposes of the center were "to avoid redundant efforts and increase the accessibility of successful programs, practices, and materials in Indian education." *Id.*

477. *See id.* § J(9). The CFIEPS also contemplated the establishment of a national clearinghouse to address Indians' common educational concerns. *See id.* § J(10).

478. *See id.* § M. Covered items were to include such matters as the transfer of programs to tribes, the establishment of tribal education departments and codes, the establishment of cooperative and reciprocal agreements, and the implementation of improved Indian education standards. *See id.* § M(3), (5), (8), (9).

479. *See id.* § M(12).

480. *See id.* § M(13)–(14).

The CFIEPS has received the endorsement of over 100 tribes and Native Alaskan villages and over a dozen organizations.[481] This response indicates widespread support for the policy statement within Indian communities. Regardless of the support that it has received, the CFIEPS itself is not binding on any of the entities whose conduct it addresses, such as federal agencies and state education authorities. It simply indicates a consensus among several important organizations as to what actions need to be taken to provide, at long last, adequate educational opportunities to Indian students. President Clinton's endorsement of the statement in his 1998 executive order, however, may enable it to play a more important role in Indian educational reform.

C. The 1998 Executive Order on American Indian and Alaska Native Education

On August 6, 1998, President Clinton issued Executive Order No. 13096, entitled "American Indian and Alaska Native Education,"[482] which set the stage for the latest federal government efforts to reform Indian education. The release of the Order raised the hope that the federal government might at last be willing to make a serious, long-term commitment to dealing comprehensively with the problems, and implementing the kinds of recommendations, that had been identified in the Meriam Report, the Kennedy Report, the NCES Report, and the CFIEPS.

1. Renewing the Commitment to Indian Education

The Executive Order began by echoing the CFIEPS's affirmation of the unique relationship between the federal government and tribal governments and its recognition of the "unique educational and culturally related academic needs" of Indians,[483] thus acknowledging the uniqueness of both the federal-tribal relationship and the educational needs of Indian students. Rather than envisioning Indian culture as an obstacle to education, as past government policy had done,[484] the order simply acknowledged that Indian students' education was intertwined with their culture. By referring specifically to American Indians and Alaska Natives, however, the order ignored the needs of Native Hawaiian students, who, the government has elsewhere acknowledged, also face serious educational challenges.[485]

In discussing his Administration's goals for Indian education, President Clinton tied the goals to both the government's historic responsibility for Indian education and its responsibility to the U.S. population as a whole, noting that improving Indians' educational progress and achievement "is vital to the national goal of preparing every student for responsible citizenship, continued learning,

481. *See* Comprehensive Federal Indian Education Policy Statement—Indian Tribes and Organizations Endorsing Comprehensive Federal Indian Education Policy Statement, *at* http://www.niea.org/POLICYSTM.htm (last visited Dec. 15, 2001).

482. Exec. Order No. 13,096, 63 Fed. Reg. 42,683 (Aug. 6, 1998) [hereinafter Indian Education Order].

483. *Id.*

484. *See generally supra* Part II.

485. *See* 20 U.S.C. § 7902(15)–(17) (2001).

and productive employment."[486] The Executive Order committed the government to improving Indian students' academic performance and reducing their dropout rate, and to carrying out this commitment "in a manner consistent with tribal traditions and cultures."[487] By citing the need to improve Indian students' academic performance and increase the percentage of students who completed their education, the Order acknowledged the continuation of two problems that had been highlighted seventy years earlier in the Meriam Report[488] and almost thirty years before in the Kennedy Report,[489] as well as more recently in the NCES Report.[490]

In order to further the overarching goal of fulfilling the government's commitment to improving the education of Indians, the Executive Order directed federal agencies to focus their attention on six specific goals:

> (1) improving reading and mathematics; (2) increasing high school completion and postsecondary attendance rates; (3) reducing the influence of long-standing factors that impede educational performance, such as poverty and substance abuse; (4) creating strong, safe, and drug-free school environments; (5) improving science education; and (6) expanding the use of educational technology.[491]

These goals combined a variety of objectives: improving the curriculum and educational achievement in certain subject areas (namely, reading, mathematics, and science); increasing the number of years that Indian students spend in school (both during and after high school); addressing serious social problems that affect educational achievement; and increasing educational technology usage. The goals focused on several issues, such as educational achievement, drop out rates, access to higher education, and social factors that hamper education, that the Meriam Report and the Kennedy Report had recognized as important,[492] thus implicitly acknowledging the failure of past government efforts to address these issues.

The Executive Order acknowledged that a comprehensive governmental response was needed to meet its enumerated goals because of the fragmentation of the services that were available to Indians and "the complexity of the intergovernmental relationships" affecting their education.[493] The Order provided for a number of activities that were intended to result in the development of a long-term education policy to accomplish its six goals. Given the longstanding nature of the government's involvement in Indian education[494] and the past

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486. Indian Education Order, *supra* note 482, § 1.
487. *Id.*
488. *See supra* notes 137–38 and accompanying text.
489. *See supra* notes 206–07 and accompanying text.
490. *See supra* notes 419–28 and accompanying text.
491. Indian Education Order, *supra* note 482, § 1.
492. *See generally supra* Parts III.A., C.
493. Indian Education Order, *supra* note 482, § 2.
494. *See generally supra* Part II.

recognition in the Meriam Report and the Kennedy Report of the many shortcomings of the education provided to Indians,[495] the fact that no comprehensive education policy yet existed may well have been striking to those who were unfamiliar with Indian education and its history. Indeed, in 1969 the Kennedy Report itself had already mentioned the need for better coordination and recommended the enactment of a comprehensive Indian education act.[496]

A newly created task force, dubbed the Interagency Task Force on American Indian and Alaska Native Education (the Task Force), chaired by the Department of Education's Assistant Secretary for Elementary and Secondary Education and the Department of the Interior's Assistant Secretary for Indian Affairs[497] and to include representatives of a number of government departments, agencies, and other entities,[498] was designated as the chief organization responsible for overseeing the implementation of the Executive Order and the development of a comprehensive policy.[499] In order to ensure Indian input into the Task Force's activities, the Task Force was directed to confer with the NACIE[500] and representatives of Indian tribes and organizations, including the NIEA[501] and the NCAI.[502]

The Task Force's first order of business was to prepare an interagency plan identifying ideas, initiatives, and strategies for interagency action that would support the Executive Order's goals.[503] The Task Force was also charged with preparing and disseminating a guide describing all education-related programs and resources within the participating agencies that supported the Order's goals and how Indians and Native Alaskans could benefit from them.[504] The participating agencies themselves were directed, "to the extent consistent with law and agency

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495. *See generally supra* Parts III.A., C.

496. *See* KENNEDY REPORT, *supra* note 2, at 110.

497. *See* Indian Education Order, *supra* note 482, § 2(b)(3).

498. *See id.* § 2(b)(1). Representatives were to be designated by the Environmental Protection Agency, the Corporation for National and Community Service, and the National Science Foundation, in addition to representatives from each of the following federal departments: Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, Transportation, and the Treasury. *See id.* Other agencies were permitted to participate in the Task Force's activities if the Secretaries of Education and the Interior agreed. *See id.*

499. *See id.* § 2(a). The Task Force was to terminate not later than five years from the date of the executive order. *See id.* § 6.

500. *See supra* note 359 and accompanying text (noting the authorization of the National Advisory Council on Indian Education, or NACIE).

501. For a description of the National Indian Education Association, or NIEA, and its activities, see generally http://www.niea.org.

502. *See* Indian Education Order, *supra* note 482, § 2(a). For a description of the National Congress of American Indians, or NCAI, and its activities, see generally http://www.ncai.org.

503. *See* Indian Education Order, *supra* note 482, § 2(c).

504. *See id.* § 2(e). This interagency resource guide was to be prepared in conjunction with the Department of Education. *See id.*

priorities,"[505] to adopt and implement strategies to maximize the availability to Indian students of the agencies' education-related activities, information, programs, resources, and technical assistance.[506] Each agency was to consult with tribal governments on their educational needs and priorities and on how the agency could better accomplish the Order's goals.[507]

The Secretary of Education was given the special role of supporting the work of the Task Force through research. The Secretary, acting through the Office of Educational Research and Improvement and the Office of Indian Education, and in consultation with the NACIE and participating agencies, was to develop and implement a comprehensive research agenda that would gather baseline data on Indian students' academic achievement and retention, evaluate promising educational practices being used with these students, and evaluate the role played by Indian language and culture in developing educational strategies.[508]

Ultimately, the Task Force's chief responsibility was the development of a comprehensive federal Indian education policy that supported the achievement of the goals set by the Executive Order.[509] Thus, the Order echoed the Kennedy Report[510] by acknowledging the need to coordinate educational efforts and to establish a single policy. More specifically, the Task Force was expected to develop a policy designed to: "(A) improve Federal interagency cooperation; (B) promote intergovernmental collaboration; and (C) assist tribal governments in meeting the unique educational needs of their children, including the need to preserve, revitalize, and use native languages and cultural traditions."[511] The Task Force was directed to consider, in the development of the comprehensive policy, the ideas contained in the CFIEPS[512] and to develop recommendations for its implementation.[513] The Executive Order thus embraced the CFIEPS as a definitive statement on Indian education policy. Acknowledging the need for collaboration among the agencies whose activities had an impact on Indian education, the Order

505. *Id.* § 2(d).

506. *See id.*

507. *See id.* This consultation requirement, the Order noted, was "in keeping with the spirit of" the April 29, 1994, Executive Memorandum on Government-to-Government Relations with Native American Tribal Governments and Executive Order 13,084, dated May 14, 1998. *See id.*

508. *See id.* § 2(f). The Secretary was to submit the research agenda to the Task Force within one year. *See id.* § 2(f). The Department of Education was charged with providing the Task Force with administrative services and staff support. *See id.* § 5.

509. *See id.* § 2(g)(1). This was to take place within two years. *See id.* The policy was to be submitted, and annual progress reports were to be submitted to, the Director of the Office of Management and Budget. *See id.* § 2(h).

510. *See supra* notes 285, 345 and accompanying text.

511. Indian Education Order, *supra* note 482, § 2(g)(1).

512. *See id.* § 2(g)(2); *see also supra* notes 445–86 and accompanying text (discussing the CFIEPS).

513. *See* Indian Education Order, *supra* note 482, § 2(g)(3).

directed the Task Force to include ideas for interagency action in its recommendations for implementation of the new policy.[514]

The Executive Order provided for two additional mechanisms to help accomplish its goals: regional partnership forums and school pilot sites. The Departments of Education and the Interior, together with the Task Force and federal, state, local, and tribal representatives, were to jointly convene a series of regional forums to identify promising approaches to sharing information, assisting schools, developing partnerships, and coordinating intergovernmental strategies in support of the Order's goals.[515] The two Departments were also directed to identify a number of B.I.A.-funded and public schools to serve as models for schools with Indian student populations and to provide them with comprehensive technical assistance that supported the goals.[516] The development of exemplary and demonstration schools had earlier been a recommendation of the Kennedy Report,[517] and some grants for demonstration projects had been authorized by earlier legislation.[518]

2. Assessing the Executive Order

By focusing on the need to improve Indian students' reading, math, and science education, the Executive Order implicitly acknowledged the deficiencies of the curriculum in schools serving Indian students and the resulting shortcomings in the achievement levels of Indian children. The Meriam Report and the Kennedy Report had also criticized the curriculum in schools in which Indian students were enrolled.[519] The Meriam Report had specifically noted high Indian illiteracy rates[520] and the lack of good reading materials for teaching Indian students,[521] and had also criticized the focus on teaching English to the exclusion of other subjects.[522] The Kennedy Report had pointed to teachers' lack of training for teaching students with limited English proficiency[523] and the lack of

514. *See id.* The Order provided that participating agencies could develop interagency memoranda of agreement to enhance tribal and school ability to provide, and to coordinate delivery of, federal, state, and tribal resources to meet Indian students' educational needs. *See id.* § 2(g)(4). The services in question could include social and health-related services. *See id.*

515. *See id.* § 3.

516. *See id.* § 4. A special team of technical assistance providers was to be assembled to provide assistance to the school pilot sites, to disseminate effective and promising school pilot site practices to other local educational agencies, and to report to the Task Force on its accomplishments and recommendations for improving technical support for local educational agencies and B.I.A.-funded schools. *See id.*

517. *See* KENNEDY REPORT, *supra* note 2, at 106.

518. *See supra* note 385 and accompanying text.

519. *See supra* notes 121–28 (Meriam Report), 232–34, 283, 286–88, 311 (Kennedy Report), and accompanying text.

520. *See* MERIAM REPORT, *supra* note 1, at 357.

521. *See id.* at 372.

522. *See id.* at 349.

523. *See* KENNEDY REPORT, *supra* note 2, at 27.

appropriate materials for teaching reading and other subjects to Indian students.[524] More recently, the NCES Report had noted that Indian students tended to receive only basic math and science education[525] and that limited English proficiency continued to present challenges for many Indian students.[526] The Executive Order's goal of improving education in these subject areas thus acknowledged that serious and sustained attention still needed to be given to addressing some of the shortcomings in the curriculum in schools serving Indian students that had been acknowledged as early as 1928 and had been reiterated in 1969.

The goals of increasing Indian students' high school completion rates and postsecondary attendance rates also echoed recommendations that had been made for many years. The Meriam Report had noted the obstacles facing students who wished to pursue higher education.[527] The Kennedy Report had noted the high drop out rate and low graduation rate of Indian students,[528] and discussed the low percentage of Indian students who entered, and graduated from, college, in spite of the high percentage of students who wanted to attend college.[529] The Kennedy Report had also noted that, in B.I.A. schools, teachers discouraged Indian students from pursuing higher education and that the schools failed to prepare students adequately for success in college.[530] Finally, the NCES Report had documented that, in the 1990s, the high drop out rates and low college attendance rates of Indian students continued to be serious problems.[531] The NCES Report and the Executive Order's high school completion and college attendance goals thus indicated an implicit recognition by the government that the schools enrolling Indian students had as yet failed to deal adequately with two problems about which Indian education experts had been concerned for almost seventy years.

Similarly, the goals of reducing the influence of poverty and substance abuse and of creating a safe and healthy school environment reflected a continuing need to address problems that had first been identified many years before. The Meriam Report had commented on the serious social problems affecting Indians, such as poor housing conditions and very low family income.[532] Although it did not comment specifically on substance abuse, it did comment on other health-related issues, such as the poor health of Indians in general,[533] and decried the poor care and unsafe environment to which boarding school and B.I.A. day school students were subjected.[534] Similarly, the Kennedy Report had noted that Indian students suffered from economic and other disadvantages with which teachers

524. *See id.* at 23, 53.
525. *See* NCES REPORT, *supra* note 393, at B-80.
526. *See id.* at B-76.
527. *See* MERIAM REPORT, *supra* note 1, at 419–21.
528. *See* KENNEDY REPORT, *supra* note 2, at 29–30, 59.
529. *See id.* at 59–60, 83.
530. *See id.* at 83–84.
531. *See* NCES REPORT, *supra* note 393, at B-45, B-49, B-79 (drop out rates); B-45 (college application rate).
532. *See* MERIAM REPORT, *supra* note 1, at 3–4.
533. *See id.*
534. *See id.* at 11–13.

were ill-equipped to cope and that the grim environment of B.I.A. schools led to substance abuse by students.[535] It recommended that efforts be made to improve Indian nutrition and health care and to combat alcoholism, because of the positive effect that the success of such efforts could have on Indian education.[536] The NCES Report's inclusion of the aforementioned goals, however, as well as the fact that these issues were included in the Executive Order's goals, indicated that whatever efforts had been made to date to address these problems had proved to be inadequate. The NCES Report indicated that educators viewed poverty, poor nutrition and health care, and parental and student substance abuse as serious problems facing Indian students.[537] Thus, as was the case with the Executive Order's other goals, the goals of combating social problems and making the school environment safer echoed problems that had been recognized in Indian education for many years, but which had not yet been adequately addressed.

Finally, although the goal of expanding the use of educational technology in schools serving Indian students did not mirror any of the specific problems identified or recommendations made in the Meriam Report, the Kennedy Report, or the NCES Report, when stated more broadly, the goal can be understood as being tied to the more general need to modernize Indian education and to improve the educational materials and resources available to Indian students. The Meriam Report had noted that the teaching methods, course of study, and examination system in the B.I.A. schools were outdated[538] and that the educational materials were inadequate.[539] The Kennedy Report also criticized the available teaching materials[540] and B.I.A. school teachers' focus on an obsolete form of occupational preparation that did not serve Indian students well.[541]

In summary, the goals identified in the Executive Order call to mind a number of the problems that were identified and the recommendations that were made in the Meriam Report and the Kennedy Report; the continued existence of many of the same problems was documented in the 1990s in the NCES Report, as well as in the final report of the Indian Nations at Risk Task Force. These problems' continued existence demonstrated the inadequacy of past efforts to cope with them and indicated a continuing need to devote substantial resources to addressing them. The Order indicated a new willingness, however, to develop the kind of comprehensive federal Indian education policy that seemed so sorely needed, in the hope of thus creating a mechanism for fully meeting its goals. Only time will tell whether the Executive Order has provided the impetus to tackle, once and for all, the serious problems that limit Indian students' educational opportunities, or whether the Order will prove to be just one more government acknowledgment of its failure to meet its legal obligations in Indian education that fails to lead to meaningful change.

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535. *See* KENNEDY REPORT, *supra* note 2, at 62, 64.
536. *See id.* at 112–14.
537. *See* NCES REPORT, *supra* note 393, at B-45, B-46, B-47, B-50.
538. *See* MERIAM REPORT, *supra* note 1, at 346–47, 349, 371–72, 378.
539. *See id.* at 423–24.
540. *See* KENNEDY REPORT, *supra* note 2, at 23, 53.
541. *See id.* at 61.

3. Implementing the Executive Order

The release of the Executive Order was, of course, only the beginning. It called for a number of activities to take place, and it is only by monitoring these activities, as well as by examining related congressional actions, such as approval of appropriations for Indian education-focused programs, that it is possible to gain a sense of what progress is being made in meeting its goals, and how much progress is likely to be made in the future.

Among the actions directed by the Executive Order was the formation of the Task Force, which would gather advice from relevant organizations and prepare an interagency plan identifying ideas and strategies for carrying out the Order and a comprehensive federal Indian education policy.[542] The NIEA, like other organizations interested in Indian education, has been monitoring the implementation of the Executive Order and assisting the Task Force in this regard,[543] and has noted a number of important actions that have been taken by the Task Force, including the development of an interagency plan, the drafting of a framework for the comprehensive federal Indian education policy statement, the selection of a number of B.I.A.-funded and public schools to serve as school pilot sites, the establishment of a working group by the Department of Education's Office of Indian Education and Office of Educational Research and Improvement to establish a comprehensive Indian education research agenda, and the signing by the Departments of Education and the Interior, on November 10, 1999, of a memorandum of understanding with regard to research activities.[544] In addition, a number of regional forums, as called for by the Executive Order, were held, beginning on the Navajo Reservation in 1999,[545] to gather ideas from those directly involved in Indian education on strategies to meet the Executive Order's goals.

While these activities tell part of the story of the implementation of the Executive Order to date and its potential for making a real difference in Indian education, more can be learned from considering the amount of support that Congress was willing to provide to Indian education following the release of the Order. In February 2000, when President Clinton released his proposed budget for fiscal year 2001, the final budget proposal of his Administration, it included a

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542. *See supra* notes 499–514 and accompanying text (discussing the role of the Task Force).

543. *See generally The National Indian Education Association's Strategy to Tracking [sic] and Monitor the Executive Order on American Indian [and] Alaska Native Education* (Mar. 23, 2000), *available at* http://www.niea.org/ProjectANA.PDF (last visited June 5, 2000).

544. *See id.* at 2, 8–9. The memorandum of understanding is entitled *Strengthening Coordination of Research Activities Related to American Indian and Alaska Native Education. See id.* at 9.

545. *See Report on the Navajo Partnership Forum, The National Indian Education Association Strategy to Track and Monitor the Progress of the Indian Education Executive Order* (held at the Navajo Nation, Windowrock, Arizona, Aug. 24–25, 1999), *available at* http://www.niea.org/progressreport11.pdf (last visited June 5, 2000). A total of nine regional partnership forums were held between August 1999 and May 2000.

record $9.4 billion to fund existing and newly proposed programs to benefit Indians, Native Alaskans, and Indian reservations, an increase of $1.2 billion over the previous fiscal year.[546] This included a request of $115.5 million for the Office of Indian Education in the Department of Education[547] and a request of over $1 billion for B.I.A. education programs,[548] which included $506 million for school operations[549] and $330.5 million for school construction and repair.[550] In addition, the budget request included initiatives specifically aimed at supporting the implementation of the Executive Order. The Administration requested continuation of the American Indian Teacher Corps (for which Congress had appropriated $10 million in the previous fiscal year) to train 1,000 Indian teachers to work in schools with high concentrations of Indian students, requested $5 million for a new American Indian Administrator Corps, to support the recruitment, training, and professional development of 500 Indians to become administrators in schools with high Indian student concentrations, and requested $50 million for school renovation grants for public schools with high Indian student concentrations.[551] Only $50,000 was requested for the NACIE, which had operated with an annual budget of $500,000 prior to 1997.[552]

Congress, while not fully meeting the Clinton Administration's budget request in all respects, nonetheless provided more funding for Indian education than in any other budget in recent history.[553] The Department of Education's Office of Indian Education was funded at the full requested amount of $115.5 million[554] (a fifty percent increase over the previous fiscal year[555]), which allowed for an almost doubling of per pupil expenditures under the Office of Indian Education's largest public school program.[556] The Department of Education's Impact Aid program was funded at $1.075 billion, which even exceeded the

546. *See* NAT'L INDIAN EDUC. ASS'N, 31ST ANNUAL CONVENTION, INDIAN EDUCATION LEGISLATIVE REPORT, 106th Congress, 2d Sess., *available at* http://www.niea.org., at 1 [hereinafter NIEA CONVENTION LEGISLATIVE UPDATE].

547. *See id.*

548. *See id.* at 5.

549. *See id.* This amount was to fund 185 schools and dormitories serving over 50,000 students in twenty-three states. *See id.*

550. *See id.* at 6. This funding is aimed at repairing or replacing B.I.A.-funded schools on reservations and was to be used to replace six schools, which were at the top of a priority list of thirteen schools. *See id.* at 6–7. The most recent replacement construction priority list added seven more schools, for a total of twenty. *See* 66 Fed. Reg. 1689 (Jan. 9, 2001).

551. *See* NIEA CONVENTION LEGISLATIVE UPDATE, *supra* note 546, at 2.

552. *See id.* at 3.

553. *See* NAT'L INDIAN EDUC. ASS'N, LEGISLATIVE UPDATE, DEC. 31, 2000 (2000), *available at* http://www.niea.org (last visited Feb. 8, 2001) [hereinafter NIEA 12/31/00 LEGISLATIVE UPDATE].

554. *See id.*

555. *See* NIEA CONVENTION LEGISLATIVE UPDATE, *supra* note 546, at 1.

556. *See* NIEA 12/31/00 LEGISLATIVE UPDATE, *supra* note 553, at 2.

President's budget request,[557] as was the case with a number of programs aimed specifically at Indian education.[558]

Although Congress did not fund the B.I.A.'s education-related programs at the level requested by the President (over $1 billion), the $890.6 million appropriation was still $186 million more than the previous fiscal year's appropriation.[559] The $506 million requested for school operations was reduced to $490 million.[560] The $330.5 million requested for B.I.A.-funded school construction and repair was reduced to $293 million, which was still about double the previous year's appropriation.[561]

Of the initiatives aimed specifically at furthering the implementation of the Executive Order, both the American Indian Teacher Corps program and the new American Indian Administrator Corps Program were funded.[562] Congress funded the NACIE at the level requested by the Administration.[563] The NIEA has noted that the low level of funding currently provided to the NACIE and its lack of an office within the Department of Education hamper its fulfillment of its role and its ability to influence policy decisions. The President's requested $50 million program for school renovation grants for public schools with high Indian student concentrations was not funded.[564]

In summary, the fiscal year 2001 budget for Indian education fell short of the amounts requested by the Clinton Administration to support implementation of the Executive Order and thus the improvement of the education provided to Indian students. Nonetheless, the budget still provided more funding for Indian education than had any other budget in recent history, and thus suggested a commitment on

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557. *See id.*

558. For example, programs for Native Hawaiian education ($28 million), Native Alaskan education ($15 million), tribally controlled postsecondary vocational technical education ($15 million), and strengthening Native Alaskan and Hawaiian education ($6 million) were all funded at amounts in excess of the President's request. *See id.*

559. *See id.* at 3.

560. *See* NIEA CONVENTION LEGISLATIVE UPDATE, *supra* note 546, at 5. This included $12 million for early childhood development, $331 million for the Indian School Equalization Program (designed to help meet mandated teacher, counselor, and other staff requirements), $36.3 million for student transportation, $54.6 million for facilities operation, and $43.2 million for administrative cost grants for tribes. *See id.* All told, the budget provided around $545 million to strengthen B.I.A.-funded schools and colleges serving tribes, according to the NIEA. *See id.* at 6.

561. *See id.* at 6. This funding is aimed at repairing or replacing B.I.A.-funded schools on reservations and was to be used to replace six schools, which were at the top of a priority list of thirteen schools. *See id.* at 6–7. The most recent replacement construction priority list added seven more schools, for a total of twenty. *See* 66 Fed. Reg. 1689 (Jan. 9, 2001).

562. *See* NIEA 12/31/00 LEGISLATIVE UPDATE, *supra* note 553, at 2.

563. *See id.*

564. *See* NIEA CONVENTION LEGISLATIVE UPDATE, *supra* note 546, at 2. This amount would have provided grant funding to benefit to approximately 119 local education agencies with at least fifty percent of their students residing on Indian lands. *See id.*

the part of Congress to supporting, in a meaningful way, the improvement of Indian education.

In addition to Congress's financial support for the programs needed to facilitate the implementation of the Executive Order, Indian education supporters from across the country worked to carry out the tasks identified by the Order. For example, between August 1999 and May 2000, nine regional forums were held to discuss the future of Indian education.[565] The first Indian education research conference, attended by Indian researchers and elders, was held in late spring 2000.[566] During the first year of existence of the American Indian Teacher Corps, created to meet the Order's objective of increasing the number of Indian teachers, close to 600 Indians participated in the program.[567] The White House approved a comprehensive federal Indian education policy statement in January 2001.[568] Thus, when President Clinton left office in January 2001, some important steps had been taken, but more still needed to be done to fulfill the promise of the 1998 Executive Order.

D. The Bush Administration and Indian Education: Reading the Early Clues

In January 2001, President Bush announced that his Administration "has no greater priority than education."[569] In the following month, he stated that the Department of Education—which the Republican Party had sought to abolish only five years before—would grow more than any other federal agency in his first budget.[570] Moreover, his blueprint for education reform, entitled *No Child Left Behind*, identified bipartisan education reform as the "cornerstone" of his Administration and stated that "[i]f our country fails in its responsibility to educate every child, we're likely to fail in many other areas."[571] The new President's public pronouncements, then, claim a commitment to supporting and improving

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565. *See* NATIVE AM. RIGHTS FUND, CASE UPDATES, EDUCATION, EXECUTIVE ORDER ON INDIAN EDUCATION (NATIONAL), *available at* http://www.narf.org/cases/index.html (last modified June 29, 2001) [hereinafter NARF CASE UPDATES].

566. *See* NAT'L INDIAN EDUC. ASS'N, LEGISLATIVE UPDATE, AUG. 24, 2000, INDIAN EDUCATION EXECUTIVE ORDER UPDATE (2000), *available at* http://www.niea.org/082500legupdate.pdf [hereinafter NIEA 8/24/2000 LEGISLATIVE UPDATE]. A national research agenda was also developed. *See* NARF CASE UPDATES, *supra* note 565.

567. *See* NIEA 8/24/2000 LEGISLATIVE UPDATE, *supra* note 566.

568. *See* NARF CASE UPDATES, *supra* note 565.

569. White House, Office of the Press Secretary, *Remarks by the President at the Swearing-in Ceremony for Dr. Roderick Paige as Secretary of Education* (Jan. 24, 2001), *available at* http://www.whitehouse.gov/news/releases/20010124-3.html.

570. *See* Marc Lacey, *Education Dept. Will Get Biggest Budget Increase, Bush Says*, N.Y. TIMES (Feb. 22, 2001), *at* http://www.nytimes.com/2001/02/22/politics/22bush.html (last visited Nov. 18, 2001). The proposed increase (eleven percent) was, however, smaller than the increase received by the Department from Congress in four of the last five years. *See id.* (quoting a statement by Rep. George Miller).

571. NO CHILD LEFT BEHIND, *supra* note 4, at i.

the education of all children, which would necessarily include Indian children. Moreover, Indian students' educational needs and inadequate educational opportunities in particular are implicated by the President's professed concern that many of the nation's neediest students are being left behind.[572] By examining the Bush Administration's educational blueprint, *No Child Left Behind*, in comparison with the Executive Order, and in light of the history of Indian education and past efforts to improve it, it is possible to make at least some preliminary observations about what the change in Administration may mean for Indian education and the prospects for meaningful improvement in the educational opportunities available to Indian students.

No Child Left Behind identifies seven priorities: (1) improving disadvantaged students' academic performance; (2) improving teacher quality; (3) moving limited English proficient (LEP) students to English proficiency; (4) promoting parental choice and innovative programs; (5) encouraging safe schools; (6) increasing Impact Aid funding; and (7) encouraging freedom and accountability.[573] These priorities are expected to "increase accountability for student performance[,]...focus on what works[,]...reduce bureaucracy and increase flexibility[, and]...empower parents."[574] Moreover, they are designed to "address a general vision for reforming the Elementary and Secondary Education Act (the ESEA) and linking federal dollars to specific performance goals to ensure improved results."[575] Each one of the priorities, as further detailed in *No Child Left Behind*, and the overarching goals they are designed to accomplish, implicates some of the goals and issues identified in the 1998 Executive Order and apparent in the history and current status of Indian education.

Because so many Indian students face serious socioeconomic challenges, like poverty and poor health care, that inhibit their ability to do their best in school, the blueprint's first priority, improving disadvantaged students' academic performance, particularly with respect to reading ability, clearly relates to them. This priority overlaps with the Executive Order's goals of improving Indian students' reading and increasing their high school completion and postsecondary attendance rates.[576] Moreover, the blueprint's idea of holding schools accountable for disadvantaged students' poor performance is consistent with the concept of holding the schools that educate Indian children responsible for providing them with an educational program that fails to meet their needs, as demonstrated by their often poor educational outcomes. The blueprint's chief way of addressing this priority, however, is more problematic. For example, *No Child Left Behind* focuses on test scores as the basis for accountability, in keeping with President Bush's public statement that "by accountability I mean testing."[577] This approach

572. *See id.*
573. *See id.* at 2.
574. *Id.* at 2.
575. *Id.*
576. *See* Indian Education Order, *supra* note 482, at § 1.
577. *See* White House, Office of the Press Secretary, *Remarks by the President to Students and Faculty at Merritt Elementary School* (Jan. 25, 2001), *available at* http://www.whitehouse.gov/news/releases/20010125.html.

has led one educator to observe that the Bush plan might be better named "leave no child untested."[578] In the city of Houston, in President Bush's home state of Texas, where the kind of test-based accountability advocated by the blueprint was put into effect by new Secretary of Education Roderick Paige during his tenure as superintendent there, gains in state achievement tests have been boosted, according to some observers, by a high dropout rate, as pressured students whose test scores failed to improve dropped out, leading Houston to rank twenty-eighth in school completion out of the thirty-five largest school systems in the United States.[579] One expert on Hispanic education who has children in the Houston district has commented that this kind of "high-stakes testing has come at a significant cost to the community."[580] An intense focus on testing students can thus be counterproductive, as the students whose poor educational outcomes give rise to the perceived need to evaluate their schools' performance by student testing feel compelled to leave their school by dropping out. Moreover, reliance on testing in and of itself, as the measure of the success or failure of students and therefore their schools, raises some serious issues, because of the evidence of biases in standardized tests that have adversely affected the scores of Indians and other groups.[581] Finally, the focus on holding schools accountable for students' poor performances can be simplistic, because it is not only educational institutions that contribute to students' success or failure in school. The very socioeconomic factors that lead to students, including Indian students, being considered disadvantaged can have profound effects on their ability to do well in school, a link which programs like Head Start[582] are designed to target. The 1998 Executive Order had acknowledged this link by establishing the reduction of the impact of social factors on Indian students' education as one of its six goals.[583] The Bush Administration, however, while purporting in *No Child Left Behind* to assign a high priority to improving disadvantaged students' education, has at the same time

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578. Jodi Wilgoren, *Education Plan Comes Under Fire by State Officials*, N.Y. TIMES (July 17, 2001), *at* http://www.nytimes.com/2001/07/17/national/17EDU.html (quoting Elizabeth Burmaster).

579. *See* Rebecca Winters, *Teacher In Chief: At Once Conservative and Conciliatory, Rod Paige Promises an Activist Department of Education*, TIME, Feb. 12, 2001, *available at* 2001 WL 5489239. Less than half of the ninth grade students in many of the Houston district's schools graduate. *See id.*

580. *See id.*

581. *See, e.g.*, Susan Sturm & Lani Guinier, *Rethinking the Process of Classification and Evaluation: The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 992–97 (discussing racial and gender bias in standardized tests) (1996); *see also* Larry P. v. Riles, 793 F.2d 969, 976 (9th Cir. 1984) (noting the district court's finding as to cultural bias in IQ tests).

582. Head Start, a federally funded early childhood development program for low-income preschool children, was established in 1965, originally in the Office of Economic Opportunity. It is currently run by the Department of Health and Human Services' Administration for Families and Children, and provides services aimed at meeting children's education, health, and other social service needs. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., HEAD START: PROMOTING EARLY CHILDHOOD DEVELOPMENT (2001), *available at* http://www.hhs.gov/news/press/2001pres/01fsheadstart.html.

583. *See* Indian Education Order, *supra* note 482, § 1.

shown reluctance to increase the Head Start program's budget and would like to move it from the Department of Health and Human Services to the Department of Education and to change the program's focus to emphasize literacy development.[584] Critics have argued that both of these moves would lessen the program's current focus on social services,[585] a focus which recognizes the need to address the social barriers, like poor nutrition and lack of medical care, to children's learning in order to enable them to do their best in school. In short, while placing a high priority on improving disadvantaged students' academic performance may be a welcome step for the education of Indian and other students, there is reason to be concerned about how this priority will be addressed by the Bush Administration.

The second priority, improving teacher quality, including improving the teaching of math and science in particular by establishing partnerships with higher education institutions,[586] comports well with past efforts to address deficiencies in Indian educational opportunities. Past examinations of Indian education have identified inadequate teaching as an important contributing factor to poor educational outcomes for Indian students,[587] and the Executive Order listed improving Indian students' math and science education in particular among its goals.[588] The Administration's proposals designed to address this priority, such as combining federal programs that support teacher training into performance-based grants to states and localities[589] and holding states accountable for improvement in teacher quality,[590] do not, however, address the concerns with respect to teachers that are specific to Indian education. They do not, for example, address concerns raised in the past over non-Indian teachers' lack of understanding of, and negative attitudes toward, their Indian students and their culture, and the dearth of Indian teachers in most schools serving Indian students. In order to fully address teacher quality where Indian students are concerned, the Bush Administration needs to focus on these issues, but there is no indication in *No Child Left Behind* of any

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584. *See* Jacques Steinberg, *Bush's Plan to Push Reading in 'Head Start' Stirs Debate*, N.Y. TIMES, Feb. 10, 2001, *at* http://www.nytimes.com/2001/02/10/politics/10STAR.html (last visited Feb. 12, 2001). The new focus is to be implemented by a standardized curriculum to be developed by the Department of Health and Human Services. *See id.* The switch of the location of the Head Start program is most likely to be proposed officially in connection with the reauthorization of the program in 2003. *See* Marjorie Coeyman, *Standing Up for Head Start's Strengths*, CHRISTIAN SCI. MONITOR., June 19, 2001, at 13, *available at* 2001 WL 3736136.

585. *See* Steinberg, *supra* note 584. Some developmental psychologists and educators have also argued that the early focus on promoting literacy could also harm the children by causing them so much frustration that they will already feel like failures at a young age. *See id.* A Bush aide scoffingly related this view to "the sensibilities of the developmentally appropriate, Montessoriesque advocates of 'Wait till they're ready.'" *See id.*

586. *See* NO CHILD LEFT BEHIND, *supra* note 4, at 14–15.

587. *See, e.g.*, *supra* notes 279–84 and accompanying text.

588. *See* Indian Education Order, *supra* note 482.

589. *See* NO CHILD LEFT BEHIND, *supra* note 4, at 12.

590. *See id.* at 13.

intention to do so. In fact, the focus in a number of places in the blueprint on reducing the number of specifically focused federal programs in favor of large, more general grants to states and localities, which can then shape their own programs,[591] is contrary to the idea of developing federal programs aimed at addressing teacher quality issues, and other issues, related specifically to the needs of Indian students. Although the states and localities receiving the grants would presumably be free to create programs addressing issues related to Indian students, there is little or no reason to believe that they will do so.

The third priority, moving limited English proficient (LEP) students to English proficiency, is relevant to the education of the many Indian students who enter school with limited exposure to English. *No Child Left Behind* proposes streamlining existing bilingual education programs under the ESEA into performance-based grants to states and local districts, requiring schools to teach children in English after they have been in school for three years, and reducing funding for schools that fail to meet their goals for achieving English fluency for LEP students.[592] Absent from *No Child Left Behind* is any mention of how this priority should be addressed where Indian students are concerned or any recognition of the importance to Indian communities of their native languages, which current federal statutory provisions on bilingual education identify as having "a unique status under Federal law that requires special policies within the broad purposes of this chapter" on bilingual education.[593] The federal commitment to ensuring the survival of Indian languages, which, for many years, were targeted for destruction by federal Indian education policy,[594] is reflected in the Native American Languages Acts of 1990 and 1992.[595] It remains to be seen whether the

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591. *See, e.g.*, NO CHILD LEFT BEHIND, *supra* note 4, at 12 (professional development grants), 18 (innovative program grants), 20 (violence and drug prevention and after-school learning activities).

592. *See id.* at 16–17.

593. 20 U.S.C. § 7402(a)(6) (2001). The Bilingual Education Act contains a number of provisions dealing specifically with Indians. For example, for the purposes of carrying out bilingual education programs for students served by:

> schools operated predominately for Native American or Alaska Native children and youth, an Indian tribe, a tribally sanctioned educational authority, a Native Hawaiian or Native American Pacific Islander native language education organization, or an elementary or secondary school that is operated or funded by the Bureau of Indian Affairs shall be considered to be a local educational agency

and thus eligible for financial assistance for bilingual education programs. 20 U.S.C. § 7404(a) (2001). Furthermore, programs that "serve Native American children...may include programs of instruction, teacher training, curriculum development, evaluation, and testing designed for Native American children and youth learning and studying Native American languages..., except that one outcome of such programs serving Native American children shall be increased proficiency among such children." 20 U.S.C. § 7432 (2001).

594. *See supra* note 95 and accompanying text.

595. Native American Languages Act of 1990, Pub. L. No. 101-477, 104 Stat. 1153 (codified as amended at 25 U.S.C. §§ 2901–06 (2001)); Native American Languages

Bush Administration ultimately will make proposals related to bilingual education that will reflect the native language preservation concerns of Indian communities and the federal commitment to the protection of these languages.

The fourth priority identified in *No Child Left Behind* is promoting parental choice and innovative programs. Increasing Indian parents' role in, and control over, their children's education has been identified time and again as an important goal in past examinations of Indian education. An increased parental role is facilitated by the requirement for Indian parents' committees in a number of federal statutes addressing Indian education. The basic concept of increasing parents' choices with respect to how their children are educated thus comports well with the current approach to Indian education, which is designed to address the legacy of past federal Indian education policy, in which the opinions of Indian parents were ignored, and their influence on their children was seen as a negative force. Moreover, the general idea that parents can function as a force for accountability recognizes the right of parents to be able to hold their children's schools responsible for the programs that they provide. The specific proposals in *No Child Left Behind*, however, such as providing funding to assist charter schools, increasing the amount of funds that can be contributed to education savings accounts and allowing the funds to be used for elementary and secondary education expenses, and consolidating grants to support programs such as those that allow students in persistently failing schools to choose another school (in other words, voucher programs),[596] are difficult to assess for their impact on Indian students without further details. Other provisions to promote parental choice include requirements that schools provide student assessment results (disaggregated by race, gender, English language proficiency, disability, and socio-economic status) to parents,[597] provisions allowing disadvantaged students to use federal money to transfer to a public or private school from schools that have failed to make adequate improvement for three years,[598] and the requirement that, upon request, schools provide parents with information on the quality of their

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Act of 1992, Pub. L. No. 102-524, 106 Stat. 3434 (codified as amended at 42 U.S.C. §§ 2991b-3, 2992d(e) (2001)). For further discussion, see Dussias, *supra* note 17, at 939–51.

596. *See* NO CHILD LEFT BEHIND, *supra* note 4, at 18. Voucher programs have so far proved unpopular in Congress, where both houses have rejected as part of their bills to reauthorize programs under the Elementary and Secondary Education Act. *See* Lizette Alvarez, *Senate Rejects Tuition Aid, a Key to Bush Education Plan*, N.Y. TIMES, June 13, 2001, *at* http://www.nytimes.com/2001/06/13/politics/13EDUC.html (last visited June 13, 2001).

597. *See* NO CHILD LEFT BEHIND, *supra* note 4, at 8. The Bush Administration has since moderated its stance in this area by favoring the Senate's version, in its bill to reauthorize programs under the Elementary and Secondary Education Act, of this accountability provision, which permits states to report test scores as an average of all groups' scores, thus allowing states to escape penalties for poor test results by balancing the superior test scores of some groups against the lower scores of others. *See* Diane Jean Schemo, *Bush Seems to Ease His Stance on Schools' Accountability*, N.Y. TIMES, July 10, 2001, *at* http://www.nytimes.com/2001/07/10/politics/10EDUC.html (last visited July 10, 2001).

598. *See* NO CHILD LEFT BEHIND, *supra* note 4, at 9.

child's teacher.[599] It is difficult to predict precisely how these provisions will be implemented with respect to Indian students, and *No Child Left Behind* makes no attempt to address this issue. All that can be said is that, in general, having as much information as possible about their children's educational experience will better equip Indian parents to oversee that experience. On the other hand, another Bush Administration proposal, which calls for moving the Head Start program to the Department of Education, has been criticized for the negative impact that it may have on the involvement of minority parents, who may be able to wield more power in Head Start centers than in public school systems subject to Department of Education oversight.[600] By reducing parental control over Head Start programs in which Indian children participate, this proposal could have an adverse impact on Indian students in these programs by reducing their parents' role. In short, if the implementation of this priority results in Indian parents having a more meaningful role in their children's education than they have had to date, it will certainly be providing a welcome change. It is difficult to predict, though, if this will be the case, and the proposal to move Head Start may have the opposite effect, by reducing Indian parents' influence at least in this one area of their children's education.

The next priority, "encouraging safe schools for the 21st [c]entury,"[601] encompasses both drug and violence prevention programs and proposals to use technology to enhance education. Both of these areas were also included in the 1998 Executive Order, which urged the creation of safe and drug-free school environments and the expansion of the use of educational technology among its six specific goals.[602] Given that substance abuse was identified as an obstacle to improving the educational experience of at least some Indian students in the Kennedy Report and the NCES Report, additional federal support for addressing this issue seems to be a positive step, although there is no indication of how addressing substance abuse among Indian students in particular might be supported. On the other hand, one of the safe-school related proposals, which provides funding for so-called "character education,"[603] is reminiscent of past policies aimed at imposing on Indian children a Euro-American worldview and set of values, with their emphasis on competitiveness, acquisitiveness, and individualism. Similarly, a proposal allowing funding for before and after school programs to be provided to faith-based organizations[604] brings to mind the past wide scale, government-supported involvement of Christian religious groups in Indian education, and raises concerns about how much religious content will be included in programs in which Indian students, whose families experienced generations of Christianization efforts, participate. The Bush Administration's

599. *See id.* at 13.
600. *See* Steinberg, *supra* note 584.
601. NO CHILD LEFT BEHIND, *supra* note 4, at 2.
602. *See* Indian Education Order, *supra* note 482.
603. NO CHILD LEFT BEHIND, *supra* note 4, at 21.
604. *See id.*

more general faith-based initiative was embodied in a House bill, H.R. 7,[605] which was amended, in light of constitutionality concerns, to allow clients receiving social services from religious groups to opt out of religious activities that are offered as part of federally funded programs.[606] The proposals related to educational technology focus on streamlining and increasing flexibility in government support for technology, such as by consolidating existing technology grant programs, but potentially provide increased benefits to at least some Indian students by providing that funds will be targeted to schools that serve high percentages of low-income students,[607] which, in at least some areas, would include schools attended by significant percentages of Indian students. The sixth priority, increasing Impact Aid funding, is the only one that specifically focuses upon Indian students, to whose schools, the blueprint acknowledges, the federal government has a "special obligation."[608] *No Child Left Behind* acknowledged that this obligation has often not been met, especially with respect to school construction, an area in which shortfalls could be met by increasing funds for construction in both the Impact Aid program and the B.I.A.[609] While enrollment in B.I.A. schools had increased by twenty-five percent since 1987, the children attending these schools were "doing so in environments that are among the worst in the nation."[610] Two specific proposals were made: increasing funding for the impact aid construction program, in order to improve public school buildings and eliminate the repair and construction backlogs for schools serving children from Indian lands (as well as those located on or near military facilities),[611] and establishing a tribal capital improvement fund to help replace schools and eliminate the backlog of school repairs in B.I.A. schools.[612] Given a longstanding repair and construction backlog in B.I.A. schools, facilitating an investment of

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605. H.R. 7, 107th Cong. (2001). H.R. 7 was passed by the House on July 19, 2001 and sent to the Senate, where it was referred to the Committee on Finance.

606. *See* Mary Leonard, *Faith-Based Initiative is Modified; White House Alters Plan on Eve of Vote*, BOSTON GLOBE, June 28, 2001, at A2. The relevant section of H.R. 7 provides that if a religious organization receiving federal funding to operate a program also offers "sectarian instruction, worship, or proselytization," participation in such activities "shall be voluntary for the individuals receiving services and offered separate from the program funded." H.R. 7 § 201. The Bush Administration subsequently agreed to scale back its plans for the faith-based initiative when the Senate version of the bill stalled because of opposition to parts of the bill that would allow religious groups to hire only adherents of their own faith and ignore anti-discrimination laws while receiving federal money. *See* Elizabeth Becker, *Bush is Said to Scale Back his Religion-Based Initiative*, N.Y. TIMES, Oct. 14, 2001, *at* http://www.nytimes.com/2001/10/14/politics/14FAIT.html?todaysheadlines (last visited Oct. 19, 2001).

607. *See* NO CHILD LEFT BEHIND, *supra* note 4, at 22.

608. *Id.* at 24.

609. *See id.*

610. *Id.*

611. *See id.*

612. *See id.* at 25. This proposal was marked with an asterisk to indicate that it was to be described in more detail at a later date, and would be considered separately from the reauthorization of the ESEA. *See id.* at 2, 25.

additional funds in these schools is certainly welcome. Furthermore, the inclusion of this issue as one of the Administration's seven education reform priorities bodes well for at least this issue being addressed in a serious manner, as well as for carrying forward the momentum created by Congress's approval in the fiscal year 2001 budget of a fifty percent increase in the appropriation for B.I.A.-funded school construction.[613] On the other hand, there is no indication of how increased funding will be divided between schools that educate the children of military personnel and those that educate Indian children, raising the possibility that Indian children's schools will receive short shrift.

The last priority, encouraging freedom and accountability, while identified as a separate priority, echoes a theme that runs throughout *No Child Left Behind.* In addition to weaving this theme into a number of other priority areas, the document contemplates establishing "a system for how states and school districts will be held accountable for improving student achievement."[614] Proposals include allowing "charter agreements" under which certain states or school districts would be freed from categorical grant programs' requirements, imposing sanctions on states that fail to meet the performance objectives included in state plans for use of ESEA funds, and providing rewards to schools for progress in closing achievement gaps and improving English proficiency and for early implementation of reading and math assessments.[615] The proposal that seems most directly relevant to Indian students is the providing of incentives to close achievement gaps, which, at least in theory, could encourage schools in which Indian students are enrolled to create programs targeted at meeting the particular needs of Indian students and thus improve their educational outcomes.

Finally, it is worth noting another Bush Administration initiative[616] that is reflected in *No Child Left Behind* but also can be expected to have an impact on other Administration activities as well. By an Executive Order dated January 29, 2001, President Bush created a White House Office of Faith-Based and Community Initiatives (the Faith Office) to establish policies, priorities, and objectives for the Administration's plan to enlist faith-based and other community organizations to act as partners with the government in operating social services programs.[617] For those familiar with the history of Indian education, providing government funding to religious groups to operate social service programs sounds very familiar because of the long-lasting partnership between the federal government and Christian religious groups in Indian education that began early in the history of the United States.[618] President Bush appears determined to have the Faith Office play an important role regardless of any Establishment Clause objections that this may raise, just as nineteenth century Presidents ignored any

613. *See supra* note 564 and accompanying text.

614. NO CHILD LEFT BEHIND, *supra* note 4, at 26.

615. *See id.* at 26–28.

616. *See id.* at 21 (describing the possible involvement of faith-based groups in before and after school programs).

617. *See* Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001), *available at* http://www.whitehouse.gov/news/releases/20010129-2.html.

618. *See, e.g., supra* notes 72–74 and accompanying text.

Establishment Clause concerns that were raised by government support for Christian groups' role in running Indian schools. Moreover, criticism of the Roman Catholic head of the Faith Office by some fundamentalist Protestant groups is reminiscent of the infighting among Christian groups that took place during their partnership with the federal government in Indian affairs in the nineteenth century.[619]

In summary, *No Child Left Behind* offers some hope that the Bush Administration initiatives will have positive effects on Indian education in at least some areas, particularly school construction, and raises some concerns about possible adverse effects in other areas. In other areas it is just too early, given the lack of specific details yet available, to provide a meaningful assessment of the possible effects of the document's priorities and proposals on Indian education. As the reauthorization of the Elementary and Secondary Education Act is completed, more will become known about the current Congress's reaction to the new Administration's education agenda and its willingness to support the priorities identified in *No Child Left Behind.* It can only be hoped that an Administration with a claimed commitment to leaving no child behind will take seriously the federal government's long-recognized responsibility for improving the educational opportunities of Indian students, who have been left behind for far too long.

V. ENVISIONING THE FUTURE: THE ROLE OF TRIBAL EDUCATION DEPARTMENTS

The history of Indian education in the twentieth century revealed a tendency to "discover" the same problems time and again, and to suggest the same kinds of solutions to those problems time and again. The Kennedy Report of 1969 cited many of the same problems that were reported in the 1928 Meriam Report and then suggested some solutions that were similar to those proposed in 1928. While it was not the case that absolutely nothing had improved between 1928 and 1969, many of the same problems still remained and Indian students continued to be subjected to an educational system that had proved grossly inadequate in serving their needs.

President Clinton's 1998 Executive Order on American Indian and Alaska Native Education demonstrated that the federal government had once again identified the need to focus its attention on improving the education provided to Indian children. This was prompted by the recognition that, despite the insights provided in and the recommendations made by the Meriam Report and the Kennedy Report, educational programs serving Indian children and their educational opportunities continued to be inadequate. Again, it was not that there had been no improvement in Indian education and students' educational outcomes since 1969. Rather, some of the problems that plagued Indian education in 1969 and before continued to result in Indian students receiving inadequate educational opportunities as a new century was about to begin.

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619. *See supra* note 75 and accompanying text.

What have the lessons of the past taught, and what still needs to be done to put these lessons to good use? For hundreds of years, educational programs provided for Indian students unabashedly sought to assimilate them into the dominant culture, and to ensure for them a subordinate role in the economy of the nation. In order to begin to undo the damage done by this past policy, more needs to be done to strengthen the role of Indian parents, communities, and tribes in controlling the educational programs in which their children participate. Where programs are already in place, pursuant to federal statutory provisions or otherwise, that purport to require such a role, the actual experience of Indians in trying to provide input needs to be studied in order to determine what barriers exist to meaningful Indian involvement and how best to facilitate it. Tribal operation of schools, both currently existing ones and possible future ones, needs to be supported. If Indian input and control do not become more extensive and more meaningful, then educational programs serving Indian students may continue to be marked by the colonizing, assimilationist tendencies that so dominated them in the past.

To further counter lingering assimilationist pressures, as well as to enrich the educational experience of all students, more respect needs to be shown for, and a place needs to be assured for, Indian students' worldview, culture, history, native languages, and learning styles, in all of the schools in which they are enrolled. A greater understanding needs to be gained of the nature and extent of the socioeconomic and other barriers—the legacy of centuries of being treated as (at best) second-class citizens—that adversely affect Indian students' educational experiences and outcomes, along with knowledge of what kinds of initiatives have been taken, with success or otherwise, to address them. Given the fact that so many Indian students today attend public schools, more cooperative and reciprocal agreements between tribes and school districts need to be developed and implemented.

Finally, experience has shown that inadequate financial and other support by the federal government for Indian education has resulted in the creation and perpetuation of the problems explored above. The government needs to make a serious and sustained commitment to provide the support that is needed to fulfill its legal obligation, based on treaties, statutes, and the trust relationship, to ensure adequate educational services to Indians. The precise details of these Indian education goals and the methods of their implementation must be shaped by those who have the most at stake and whose voices were ignored for so long—Indian parents, communities, and tribes.

In the search for mechanisms to strengthen the Indian role in improving the educational opportunities and outcomes of Indian students, one promising path is suggested by the recent successes of the Tribal Education Department of the Rosebud Sioux Tribe. The Rosebud Sioux Tribal Education Code (Rosebud TEC) was adopted by the Tribe in 1991, following several years of work by the Tribal

Education Committee and the Native American Rights Fund (NARF).[620] The Rosebud TEC established the Tribal Education Department (Rosebud TED) as the tribal government agency responsible for administering and enforcing the TEC, which regulates all school and education programs—tribal, state, and federally funded—on the Rosebud Reservation.[621] The Rosebud TED is charged with developing or overseeing the development of tribal programs in the areas of "curriculum and education standards, parental and community involvement, alcohol and substance abuse education, and staffing and teacher training."[622]

By the time that the Rosebud TED and TEC were evaluated in a report by an outside consultant in 1999, the TED had already launched a number of initiatives to address specific educational needs and goals. The TED developed a Truancy Intervention Project to deal with the issue of truancy in both tribal and public schools.[623] It instituted a Lakota Language Renewal Project to provide technical assistance to schools that were developing Lakota language courses in order to comply with a TEC provision requiring schools to provide Lakota language instruction, and to conduct Lakota Language Immersion Programs to promote Lakota language usage within families.[624] The TED also designed and manages a tribal program, which includes a Tribal Parenting Education Program, to provide prevention and early intervention services to infants and toddlers with disabilities.[625]

The Rosebud TED is funded with tribal revenues, in the absence of direct federal funding for TEDs, but the 1999 evaluation concluded that the level of funding has been insufficient for full implementation of the TEC.[626] Although federal law authorizes the funding of tribal education departments through the Departments of Education and the Interior, Congress has made no appropriations under these authorizations.[627] Moreover, the Rosebud TED's small staff has been

620. *See* RJS & ASSOCS., EXTERNAL EVALUATION FINAL REPORT, ROSEBUD SIOUX TRIBAL EDUCATION DEPARTMENT & TRIBAL EDUCATION CODE 6–7 (1999) [hereinafter 1999 ROSEBUD REPORT].

621. *See id.* at 7.

622. *See id.*

623. *See id.* at 8.

624. *See id.* at 8.

625. *See id.* at 8–9.

626. *See id.* at 10. Over a ten-year period, annual tribal appropriations for the TED ranged from $30,000 to $93,000, with an average annual appropriation of $68,300. *See id.* In addition, during the period from fiscal year 1994 to 1999, the TED obtained an average of about $83,300 per year from the Tribe's federal funds for tribal governmental operations for the Truancy Intervention Project, as well as federal funding under the IDEA for the Tribe's Infants and Toddlers with Disabilities Program, which reached the level of $947,000 in fiscal year 1999. *See id.* at 11. Tribal gaming revenues have also been obtained on a number of occasions for specific purposes, such as school clothing, scholarships, and the Lakota Language Renewal Project. *See id.*; *see also id.* at app., tbl. ("Rosebud Sioux Tribe Tribal Education Department Funding Sources" (in thousands of dollars)).

627. *See* NATIVE AM. RIGHTS FUND, INDIAN EDUC. LEGAL SUPPORT PROJECT, TRIBALIZING INDIAN EDUCATION, FEDERAL AND STATE LAWS REGARDING TRIBAL

stretched to the limit, as its members have had to cope with unforeseen problems and act as troubleshooters in connection with various situations implicating reservation education.[628] Lack of resources has hindered the implementation of TEC provisions on staffing, teacher training, and alcohol and substance abuse prevention.[629] In addition, although the TEC was designed to be implemented in a cooperative manner, and cooperative implementation largely has been effective, legal uncertainties surrounding jurisdiction over Indian education have hindered the implementation of certain TEC provisions, such as those addressing school data reporting and curricula.[630]

Despite funding and human resource problems and legal uncertainties, the Rosebud TED has been accepted by tribal and non-tribal governmental officials, schools, parents, and students as a leader in reservation education,[631] and substantial progress has been made in implementing the Rosebud TEC. By 1999, the TEC's tribal education standards provisions were implemented in the school district that educates sixty percent of tribal students,[632] as the result of a collaborative development process involving the school district, the Rosebud TED, and Sinte Gleska University.[633] The TEC's parental and community involvement provisions were implemented through the tribal parenting education programs and school improvement councils, composed primarily of tribal parents, in the school systems that were the three largest providers of education to tribal students.[634]

The implementation of the Rosebud TEC and the other efforts of the Rosebud TED have already had a substantial impact on tribal students' educational opportunities. Since enactment of the TEC, high school graduation rates have increased and dropout rates have decreased substantially, and some

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EDUCATION DEPARTMENTS 1984–1999, SECTION 3: TRIBAL DEPARTMENTS IN THE 1980S AND 1990S—AN OVERVIEW (2000), *available at* http://narg.org/nill/resources/education/ORANGE/overview.htm (last visited Oct. 12, 2000).

628. *See* 1999 ROSEBUD REPORT, *supra* note 620, at 12.

629. *See id.* at 15.

630. *See id.* at 14. As of the time of the 1999 Rosebud Report, the TED had not sought to enforce TEC provisions against non-members of the Tribe and had instead relied on cooperative implementation, but resolution of the legal uncertainties in favor of tribal jurisdiction would help TEC implementation generally and would be essential if cooperation were to break down. *See id.*

631. *See id.* (attributing this recognition to the TED's efforts to implement the TEC and to the TED Director's attendance at meetings of schools and other educational institutions, along with service as the Chairperson of the NACIE).

632. *See id.* at 9 (referring to the Todd County School District).

633. *See id.* at 14. Sinte Gleska University, founded in 1971, is the Tribe's college. *See id.* at 6.

634. *See id.* at 15. School Improvement Councils were developed in the Todd County School District, which operated ten schools on the reservation; the St. Francis Indian School, a former parochial school that is currently operated by the Tribe as a federal grant school and is the second largest provider of education; and the White River Public School District, the third largest provider. *See id.* at 9–10.

improvements in attendance rates have also occurred, in the two largest providers of education on the reservation.[635] Given the fact that low graduation rates, high dropout rates, and low attendance rates have been identified time and again as serious problems in Indian education, the ability of the Rosebud TED and the Tribe's Truancy Intervention Project to have a positive impact on these problems in a relatively short time, despite limited resources, is truly impressive.[636] Although, as of 1999, the Rosebud TEC and TED had not yet had an impact on education quality, as measured by student scores on achievement tests,[637] the report noted that attendance increases are necessary for achievement improvements and that sections of the TEC that were aimed at raising achievement levels, such as tribal curricula and teacher training provisions, had not yet been implemented.[638]

The Rosebud TED, after only a short time in existence, has already demonstrated the positive impact that a tribal education department can have on the education of Indian students. A TED can institute programs to combat fundamental problems like low attendance rates and high drop-out rates, drawing upon the strength and combined efforts of parents and the community. It can serve as a bridge between public schools and schools that are operated and/or funded by the tribe and federal government, and help to coordinate programs aimed at improving Indian students' educational opportunities. In schools enrolling students from more than one tribe, TEDs could work together and combine their resources to foster the improvement of the education of all tribal students in the school. Finally, TEDs are in an ideal position to foster the development of programs to improve curricula through the addition of tribal cultural and language materials. In recognition of the important role that TEDs can play, NARF has been working with a number of other tribes to develop and implement tribal education codes,[639] and, through its Indian Education Legal Support Project, has drafted education

635. *See id.* at 16. In the Todd County School District's high school, graduation rates increased from 48% to 72% and drop-out rates decreased from 11% to 7.6%. In grades 9 through 12 in the St. Francis Indian School, graduation rates increased from 24% to 69% and dropout rates decreased from 36.5% to 7%. *See id.* High school attendance rates increased from 89% to 97% in the Todd County high school and from 72% to 78% in St. Francis. *See id.* at 17–18. The 1999 Rosebud Report noted that although this data was not limited to tribal students, 90% of the students in the Todd County high school, and 99% of the students in St. Francis, were tribal students. *See id.* at 16. As a result, this data was representative of the graduation, dropout, and attendance rates of tribal students.

636. Data that was collected and interviews that were conducted in connection with the preparation of the 1999 Rosebud Report led the authors of the Report to conclude that "these improvements in educational opportunities are attributable to TED operations and Code implementation." *See id.* at 16.

637. *See id.* at 16.

638. *See id.*

639. *See* NATIVE AM. RIGHTS FUND, CASE UPDATES, EDUCATION, FORT PECK TRIBES (NORTH DAKOTA), JICARILLA APACHE EDUCATION (NEW MEXICO), NORTHERN CHEYENNE TRIBE (MONTANA), THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION (NORTH DAKOTA), *at* http://www.narf.org/cases/index.html (last visited Oct. 22, 2001) (noting that NARF has been working on tribal education codes with the aforementioned tribes).

governance materials for adoption by tribes.[640] If Congress were willing, at last, to provide funding for tribal education departments, the successes that have been enjoyed by the Rosebud Sioux TED might well be duplicated and expanded upon by other tribes.

VI. CONCLUSION

The 1998 Executive Order on American Indian and Alaska Native Education appeared to have set the stage for the federal government to at last deal comprehensively with Indian education policy, and the most recent budget approved by Congress included an unprecedented financial commitment to Indian education. President Bush's blueprint for education reform purports to commit his Administration to no longer leaving behind students whom the educational system has failed in the past, a category that necessarily includes Indian students. The Rosebud Sioux Tribal Education Department has recently demonstrated the positive impact that a well-run tribal education department can have on tribal students' educational opportunities, thus pointing the way toward a new path for fostering the improvement of Indian education. More tribes will be able to follow this path if Congress appropriates funding for tribal education departments.

It can only be hoped that in this new century, the federal government—with guidance from Indian parents, communities, and tribes—will finally fulfill its longstanding responsibility for Indian education by coming to grips with the serious flaws that have existed for many decades in the education provided to Indian students. Indian students would then have access, at long last, to equal educational opportunities in the schools that have failed them for so long.

640. *See* NATIVE AM. RIGHTS FUND, INDIAN EDUC. LEGAL SUPPORT PROJECT, DRAFT MATERIALS FOR TRIBAL GOVERNANCE IN EDUCATION (2000), *available at* http://www.narf.org/nill/resources/education/RED/red.htm (last visited Oct. 12, 2000). The materials include draft tribal ordinances and a draft working agreement between a tribe and a non-tribal government. *See id.* NARF has also compiled and made available a number of voluntary cooperative agreements among federal, state public, and tribal schools, to serve as a general resource for tribal, state, and federal educators. *See* NATIVE AM. RIGHTS FUND, INDIAN EDUC. LEGAL SUPPORT PROJECT, COOPERATIVE AGREEMENTS IN INDIAN EDUCATION (2000), *available at* http://www.narf.org.nil/resources/education/GREEN/green.htm (last visited Oct. 12, 2000).

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