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Lack of Education Equity for Indigenous Students

July 14, 2022



The ACLU Indigenous Justice Working Group recognizes that Indigenous people are impacted by myriad institutions and systems due to lasting and ongoing impacts of colonization. The struggles of Indigenous people are intricately connected. Our Indigenous education equity and advocacy includes ending the use of public education systems as tools of oppression and cultural genocide, addressing disparities in funding, resources, excessive discriminatory school discipline, student outcomes in public schools, advancing curriculum responsive to the unique culture, language, history and tribal-governance systems of native students and to protect students’ rights to practice traditional customs.



South Dakota Education Equity Coalition is a community of stakeholders who are committed to promoting diverse, equitable, and inclusive learning environments for future generations. The SDEEC envisions a day when youth residing in the Indigenous territory of the Lakota, Dakota and Nakota have access to innovative, equitable, and inclusive educational environments that leverage the diversity of languages and cultural identities represented. SDEEC’s priorities are to pass a school choice bill that focuses on the cultural and academic needs of Native American students in South Dakota, to promote Indigenous education issues and educate policy makers, local leaders and community on those issues as they relate to education equity, statewide Title VI Indian Education Program compliance, to support the South Dakota Office of Indian Education, and to encourage, support and empower Title VI Parent Advisory Committees (PACs) and parents in their educational advocacy efforts on behalf of their children.



4Rosebud is a collective whose purpose is to listen, work, and act to improve educational opportunities for our children. We are community members and educators who have been meeting over six years to hear from students, their families, and others from Rosebud about what matters most to them. Some initiatives led by 4Rosebud include convening learning opportunities around Family Engagement and strengthening Lakota language, culture, and history in our schools in addition to facilitating training opportunities around Implicit Bias for teachers and staff. 4Rosebud has championed Oceti Sakowin Essential Understandings for all and convened school board candidate forums.



Rosebud Sioux Tribe Education Department was established by the tribal government in 1989 to complete the development of the RST Education Code. Its vision is that all children are valued by our communities, schools and tribal governments. Our goal is to provide the opportunity for all tribal students to obtain their high school education and become self-supporting citizens of the Rosebud Sioux Tribe. We offer higher education scholarships and assistance for a post-secondary education and/or training. The Education Department staff are committed to assisting students, families, and schools in obtaining a quality education for our tribal citizens. In 2007, the Rosebud Sioux Tribe implemented a Lakota Language Preservation Project for the development of a community language education program that is vital to the preservation of the Sicangu Lakota Language, History and Culture.



The American Civil Liberties Union (ACLU) is the largest and oldest civil liberties organization in the United States which for decades has been combating racial discrimination and injustice. It was founded in 1920 to defend and preserve the individual rights and liberties guaranteed by the Constitution, laws and treaties of the United States. With more than 4 million members, activists, and supporters, the ACLU is a nationwide organization that fights in courts, legislatures, international fora, and communities in all 50 states, Puerto Rico, and Washington, D.C., to safeguard everyone’s rights in the United States.

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Lack of Education Equity for Indigenous Students

I. Issue Summary

For over a century and a half, the United States (U.S.) used the Federal Indian school system to assimilate Native Americans in an attempt to destroy ties with their Indigenous culture, traditions, language and families. Native American parents who did not send their children to U.S. schools were denied monetary support and rations.¹ The goal of the U.S. Indian education policy was to erase the Indigenous way of life and language, in order to eventually take Native American territories,² using boarding schools to accomplish this.

The U.S. operated or supported 408 boarding schools across 37 states between 1819 through 1969.³ The Department of the Interior's Bureau of Indian Education Boarding School Report released in March 2022 details the atrocities Native American children suffered while attending boarding schools, which included physical and sexual abuse and sometimes death.⁴ Fifty-three unmarked burial sites at boarding schools for Native American children have been identified thus far⁵ with more expected to be located. At the boarding schools, the federal government "deployed systematic militarized and identity-alteration methodologies" to assimilate Native Americans.⁶ These tactics included, but were not limited to, renaming Indian children from Indian to English names; cutting children's hair; prohibiting and preventing the use of Native American languages, religions, and cultural practices; and forcing Native American children to learn military drills.⁷ Native American children were also required to perform forced manual labor in trades that were "irrelevant to the U.S. economy."⁸

The legacy of the U.S. Indian boarding school policy lives on today through education inequity, racism and discrimination that Native American students encounter within public schools. Ninety-two percent of Native American students attend public schools,⁹ experience disproportionate rates of discipline compared to non-Native American students, and are more than twice as likely to face disciplinary actions and out-of-school suspensions than their white counterparts.¹⁰

The Native American community comprises only one percent of the student population in the U.S., however, they represent two percent of total school arrests and three percent of incidents reported by school staff to law enforcement.¹¹ Native Americans make up a disproportionate number of the prison population in states like South Dakota where 55.3% of overall federal cases involve a Native American, demonstrating the school-to-prison pipeline is still a significant problem.¹²

States in the U.S. have a responsibility to educate all students who live within the state's borders, including students who are members of Indian Tribes.¹³ Native American students, however, have drop-out rates of 34% and represent the lowest graduation rate of any demographic across all schools.¹⁴ Much of this phenomenon is because "Native Americans are invisible to most Americans."¹⁵

Seventy-two percent of Americans rarely encounter or receive information about Native Americans or have access to information concerning Native Americans leading to the lack of visibility of Native American issues, culture and needs within the U.S.¹⁶ Invisibility is frequently experienced by Native American students in school settings that are not responsive to their unique cultural needs through curriculum and content standards.¹⁷ Eighty-seven percent of state history standards do not mention Native American history after 1900 and 27 states make no mention of a single Native American in their K-12 curriculum.¹⁸ The erasure of Native Americans' contributions, innovations, and accomplishments in K-12 education "fuels harmful biases in generation after generation of Americans who grow up learning a false, distorted narrative about Native Americans."¹⁹

Teaching students contemporary Native American issues, about tribal nations, tribal sovereignty, culture, the accomplishments of Native Americans and an accurate history of Native Americans and colonization efforts will serve to break through the invisibility and stereotypes that perpetuate bias and racism toward Native Americans. This requires availability, access to and acceptance of Native American culture within the school settings. "A growing amount of research has found that despite challenges, Native youth are looking to language, prayer, crafts, dancing, singing, death/mourning traditions, and sharing of history through stories as sources of strength and helpful to build resilience."²⁰

Despite empirical data demonstrating the actions needed in U.S. schools to overcome education inequity, more needs to be done to eliminate discriminatory policies and affirmatively require the types of education, curriculum and content standards that Native American students need to succeed. The U.S. Department of Education Tribal Consultation Policy's mission is "helping to improve the educational outcomes of all American Indian and Alaska Native (AI/AN) students, including those attending public schools, who constitute over 90% of all Native students."²¹ However, there is lack of effective enforcement and implementation of policies.²²

In October 2021, President Biden declared in an Executive Order that to fulfill the U.S. treaty obligations to Native Americans, "executive departments and agencies must help advance educational equity, excellence, and economic opportunity for Native American students," in all schools.²³ As part of this, agencies are required to develop a Memorandum of Agreement within 180 days including measurable actions each agency will take.²⁴

The Departments of the Interior, Education, Health and Human Services jointly issued a Memorandum of Understanding to "ensure the viability of Native Languages," which included identifying statutory or regulatory barriers that impede federal implementation of Native language activities in school settings.²⁵ In addition to these proactive steps, oversight and enforcement actions by the U.S. Department of Justice's Civil Rights Division and other Offices of Civil Rights in other departments are also needed

In 2022, South Dakota, along with other states, enacted a law that prohibits teaching students anything that causes an individual to "feel discomfort, guilt, anguish, or any other form of psychological distress...,"²⁶ which is a law prohibiting "divisive concepts" from being taught in

schools.²⁷ In 2021, South Dakota's Department of Education and governor rejected a committee's recommendation to include 20 Native American topics in social studies content standards to be taught in public schools.²⁸ In 2019, the South Dakota governor moved the Office of Indian Education out of the South Dakota Department of Education.²⁹ These laws and agency actions serve as barriers to meeting unique cultural needs of Native American students.

Another area of concern to Indigenous educators is the lack of recognition of tribal sovereignty for routine decisions affecting Indigenous students. For example, Tribal Schools in South Dakota successfully fill teacher vacancies due to Covid under a Filipino Teacher Cultural Exchange Program. The Filipino teachers are permitted to teach in the U.S. for two years under a J-1 work visa which can be extended another two years under a waiver. The U.S. State Department designates an agency to sign the work visa waiver rather than recognizing the Tribe's sovereign authority to make that determination.

Many educators and Native Americans believe that the ongoing disparity in the rates of discipline, arrest and criminal prosecution of Native American students, and low graduation rates of Native American students, reflect both intentional and unintentional racism in public schools. For example, a class action lawsuit filed by the ACLU in 2006, which was settled and had been monitored by South Dakota federal judge Charles B. Kornman until the consent decree was terminated in 2017, alleged that the Winner School District used discriminatory practices against Native American students who comprised 20% of the students. The lawsuit alleged that the school district disproportionately targeted Native American students for disciplinary action, maintained an educational environment hostile toward Native American families, and forced students to write out confessions for school misconduct to be used in juvenile and criminal prosecutions.

After more than a decade of organizing and advocacy, including a class action lawsuit and consent decree which was monitored for 11 years, Winner school district reported to the ACLU that the number of suspensions of Native American students were reduced from 101 to 11 between 2006 and 2015.³⁰ During the 2015-2016 school years, the school district reported no arrests of students were made by the school district.³¹ In the 2021-2022 school year, Winner School District reported 75% of their Native American students graduated high school and in the prior school year, 92% of the Native American students graduated from Winner high school.³²

II. Human Story



Deidrick Old Lodge is a member of the Rosebud Sioux Tribe, residing in Winner, South Dakota where he attended public school as a child. Deidrick is physically disabled and learning disabled. He received special education services until age nine when the Winner School District decided he no longer qualified for these services. At age 11, following a scuffle with a white student, Deidrick was required to write a “confession,” then he was arrested by police and jailed for three hours. The family was served a Petition charging Deidrick with Disorderly Conduct and Disturbance of School. Deidrick was not provided a lawyer at the court hearing and was sentenced to 90 days probation. Deidrick and his mother filed a civil rights lawsuit with other Native American children seeking to require the Winner School District to provide them with equitable education opportunities.³³

III. Committee on Racial Discrimination Position

The situation of Indigenous Peoples “has always been a matter of close attention and concern” to the UN Committee on the Elimination of Racial Discrimination. The Committee “has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.”³⁴ The Committee called on countries that ratified the ICERD to “[r]ecognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation” and “[e]nsure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity.” The Committee has also stressed that governments should “[e]nsure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.” The Committee has made recommendations on the need for achieving and promoting education equity for Indigenous students and regarding obtaining free, prior and informed consent of Tribes prior to implementing actions that affect Native Americans.

Measures to guarantee, in law and in practice, the free, prior and informed consent of Indigenous Peoples in policy-making and decisions that affect them.... Adopt a national action plan to combat structural racial discrimination, and to ensure that school curricula, textbooks and teaching materials are informed by and address human rights themes and seek to promote understanding among racial and ethnic minority groups.... Guarantee, in law and in practice, the right of indigenous peoples to effective participation in public life and in decisions that affect them, based on their free, prior and informed consent....³⁵

IV. U.S. Government Response

In its September 2012 Common Core report to the UN CERD, the U.S. “announced its support for the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”).”³⁶ but defined its interpretation of “free, prior and informed consent” as “meaningful consultation” with tribal leaders but not necessarily requiring the Tribe’s agreement.

In 2021, the U.S. invoked its qualified endorsement of the UNDRIP and especially the principle of Free, Prior and Informed Consent, and left it to individual states to identify the causes of Indigenous education inequity while also broadening flexibility of individual states. But, the U.S. report does not address educational equity for Indigenous students. This approach only works when the states are actively attempting to achieve education equity. Many states are moving further away from education equity for Indigenous students based on political ideology touted prominently during the past presidential administration.³⁷ The U.S. report, however, fails to directly address educational inequities for Indigenous students and communities and leaves it to states to set their own goals for closing student achievement and graduation rate gaps:

The Every Student Succeeds Act ... increased state flexibility to determine how best to help meet children’s needs, [and] requires states to set ambitious goals for closing student achievement and graduation rate gaps and provides states with flexibility to develop innovative assessments....³⁸

V. Other United Nations and Regional Human Rights Bodies Recommendations

During the universal periodic review in 2020, the United States accepted the recommendations made by Kenya to, [i]mplement deliberate strategies to reduce the gap between African-Americans and the rest of the population, as well as between indigenous and non-indigenous populations, and hence reduce structural and institutional discrimination.”³⁹ It also accepted the general recommendation made by Botswana to “[take further robust and comprehensive measures to promote wider and equitable access to quality education at all levels.”⁴⁰

VI. Recommended Questions

1. What new enforcement methods are being pursued since President Biden's issuance of the October 2021 Executive Order to address states’ actions, policies and laws that censor and suppress Indigenous culture, curriculum, history and language from being taught in public schools?
2. What specific actions does the U.S. plan to take to address ongoing traumas and discrimination that Indigenous students continue to experience as a result of the policies and laws adopted by some states who continue to promote assimilation and discrimination through educational systems?
3. What specific actions does the U.S. plan to take to implement the objectives of UNDRIP and that would broaden its interpretation of Tribal Sovereignty with respect to Indian education

programs, curriculum and content standards, within both public and tribal schools, to advance education equity for Indigenous students?

VII. Suggested Recommendations

1. The U.S. Department of Justice should enter a Memorandum of Understanding that promises to take decisive enforcement action against discriminatory state laws, policies, or agency actions that defeat and undermine Indigenous education equity.
2. The U.S. Department of Education should recognize Tribe's sovereign authority to make routine agency decisions that affect Indigenous students' education including Tribes' authority to approve J-1 Visa Waivers for Filipino teachers who already received initial U.S. State Department approval for a work visa.
3. The U.S. Department of Education should define interpretation of free, prior and informed consent as requiring written agreement from Tribes when Indigenous students are affected by a state or federal policy, law or action.

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¹ Federal Indian Boarding School Initiative Investigative Report, p. 35.

² Letter from the Assistant Secretary of the Interior, April 1, 2022, p. 1, Federal Indian Boarding School Initiative Investigative Report, p. 3.

³ Id.

⁴ Id.

⁵ Letter from the Assistant Secretary of the Interior, April 1, 2022, p. 1, Federal Indian Boarding School Initiative Investigative Report, p. 3.

⁶ Id.

⁷ Federal Indian Boarding School Initiative Investigative Report, p. 7.

⁸ Id. p. 8.

⁹ Report to Congress on the Social and Economic Conditions of Native Americans, p. 53, 2014

https://www.acf.hhs.gov/sites/default/files/documents/ana/final_fy_2014_social_economic_conditions_of_na_report.pdf, last accessed June 28, 2022.

¹⁰ Lost Opportunities, How Disparate School Discipline Continues to Drive Differences in Opportunity to Learn, Daniel J. Losen and Paul Martinez, October 2020, <https://civilrightsproject.ucla.edu/research/k-12-education/school->

[discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn/Lost-Opportunities-REPORT-v17.pdf](#), last accessed June 28, 2022.

¹¹ Report to Congress on the Social and Economic Conditions of Native Americans, 2014

https://www.acf.hhs.gov/sites/default/files/documents/ana/final_fy_2014_social_economic_conditions_of_na_report.pdf, last accessed June 28, 2022.

¹² Quick Facts in the Federal Offender Population, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Native_American_Offenders_FY15.pdf, last accessed June 28, 2022.

¹³ Report to Congress, *supra* at p. 53. “The federal trust responsibility or other obligations ‘do not undermine the independent responsibilities of states and local governments.’” *Id.* quoting, Felix Cohen Handbook of Federal Indian Law §§ 22.01[3], 22.03[1][b] (Neil Jessup Newton ed. 2012). Quoted in 2014 Native Youth Report, Executive Office of the President (December 2014). Retrieved from

https://www.whitehouse.gov/sites/default/files/docs/20141129nativeyouthreport_final.pdf, last accessed June 28, 2022.

¹⁴ *Id.* p. 53.

¹⁵ National Congress of American Indians, *Becoming Visible Report*, p. 8, citing *Reclaiming Native Truth* (2018) Research Findings: Compilation of All Research. Echo Hawk Consulting & First Nations Development Institute, June 2018, Accessed on September 15, 2019 at: <https://illuminatives.org/reclaiming-native-truth/>

¹⁶ *Id.*

¹⁷ *Id.* (“Education is one of the most powerful opinion shaping systems in America. The RNT research demonstrates that K-12 education is a key driver of invisibility and false narratives about Native peoples.”)

¹⁸ *Id.* at p. 8, citing Shear S.B., Knowles R.T., Soden G.J. & Castro A.J. (2015) *Manifesting Destiny: Representations of Indigenous Peoples in K–12 U.S. History Standards*. *Theory & Research in Social Education*, 2015; 43:1, 68-101. Accessed on September 15, 2019 at: <https://doi.org/10.1080/00933104.2014.999849>

¹⁹ *Id.* p. 9.

²⁰ *Id.*

²¹ U.S. Department of Education Consultation and Coordination with American Indian and Alaska Native Tribal Governments, p. 1, [Tribal Consultation Policy \(ed.gov\)](#), last accessed June 28, 2022.

²² Native American Student Achievement Advisory Council Report, South Dakota, November 25, 2015, last accessed on June 22, 2022, <https://mylrc.sdlegislature.gov/api/Documents/125136.pdf>

²³ President Biden Executive Order on the White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Native Americans and Strengthening Tribal Colleges and Universities, October 11, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/11/executive-order-on-the-white-house-initiative-on-advancing-educational-equity-excellence-and-economic-opportunity-for-native-americans-and-strengthening-tribal-colleges-and-universities/>, last accessed June 28, 2022.

²⁴ *Id.*

²⁵ Departments of the Interior, Education, and Health & Human Services Multi-Agency Initiative to Protect and Preserve Native Languages, <https://www.ed.gov/news/press-releases/departments-interior-education-and-health-human-services-launch-multi-agency-initiative-protect-and-preserve-native-languages>, last accessed on June 28, 2022.

²⁶ South Dakota House Bill 1012, <https://mylrc.sdlegislature.gov/api/Documents/236257.pdf>, last access June 28, 2022.

²⁷ See, Statement by AACU and PEN opposing enactment of divisive concept laws. <https://pen.org/wp-content/uploads/2022/06/Statement-by-AACU-and-PEN-2.pdf>, last accessed July 11, 2022.

²⁸ <https://news.sd.gov/newsitem.aspx?id=28591>

²⁹ <https://mylrc.sdlegislature.gov/api/Documents/Attachment/127064.pdf?Year=2020>, last accessed June 28, 2022.

³⁰ See, Exhibit 1, Winner School District Mid-Year Report to ACLU, Attachment #1.

³¹ Winner High School Report Card, South Dakota Department of Education,

<https://sdschools.sd.gov/Nimble/asp/Main.aspx#>, last accessed July 13, 2022.

³² High School Completion Chart, South Dakota Department of Education, Winner, South Dakota, SD_ARC_PUBLIC_1920>Shared Reports>School Safety, <https://sdschools.sd.gov/Nimble/asp/Main.aspx>, last accessed July 12, 2022.

³³ *Iron Heart et al v. Winner School District 59-2 et al*, Civ. 06-3007, D.S.D Central Division (2006).

³⁴ General recommendation XXIII on the rights of indigenous peoples, Fifty-first session (1997),

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7495&Lang=en, last accessed July 12, 2022.

³⁵ CERD/C/USA/CO/7-9, para. 22, 24, 25; CERD/C/USA/10-12, para. 128.

³⁶ UN Treaty Body Database, HRI/CORE/USA/2011 [Treaty bodies Download \(ohchr.org\)](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=HRI%2fCORE%2fUSA%2f2011&Lang=en), last accessed June 28, 2022.

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=HRI%2fCORE%2fUSA%2f2011&Lang=en

³⁷ The 1776 Report, The President's Advisory 1776 Commission, January 2021,

<https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf>, last accessed June 29, 2022.

³⁸ CERD/C/USA/10-12, 02June2021, para. 59, 63, 128, a copy of which can be found at,

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&%3BTreatyID=6&%3BDocTypeID=11, last accessed July 11, 2022.

³⁹ Report on the Working Group on the Universal Periodic Review, United States of America, 22 February – 19 March 2021, Agenda Item 6, Universal periodic review, page 13, section 26.144,

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/348/52/PDF/G2034852.pdf?OpenElement>, last accessed June 28, 2022.

⁴⁰ Id. p. 22, section 26.313