



## UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

September 26, 2016

Dear Colleague:

Thank you for your hard work and commitment in implementing the new requirements of the Every Student Succeeds Act (ESSA), the reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA). The ESSA represents a unique opportunity to increase equity and access for all children. I write today to offer guidance on a provision in the law that is of particular importance to our Nation's tribal communities: the new requirement under section 8538 of the ESEA, as amended by the ESSA,<sup>1</sup> for affected local educational agencies (LEAs) to consult with Indian tribes and tribal organizations on issues affecting Native students.<sup>2</sup>

Consultation will create opportunities for LEAs and tribal leaders to work together on behalf of American Indian and Alaska Native students. The consultation process will allow affected LEAs to gather input from Indian tribes and tribal organizations, fostering the collaboration that is a critical part of improving academic outcomes for Native students.<sup>3</sup>

The enclosed Frequently Asked Questions provide basic information to assist LEAs in ensuring that this process drives positive outcomes for administrators, Indian tribes and tribal representatives, and, most importantly, Native students.

I look forward to continuing to work with you and your staff to address the needs of our Native students.

Sincerely,

/s/

Ann Whalen  
Senior Advisor to the Secretary Delegated  
the Duties of Assistant Secretary for  
Elementary and Secondary Education

Enclosure

*Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.*

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

<sup>2</sup> Under Title I, State educational agencies (SEAs) are also required to conduct timely and meaningful consultation with Indian tribes, among other entities, prior to submitting their State plan to the Secretary (ESEA section 1111(a)(1)(A)).

<sup>3</sup> The U.S. Department of Education conducted tribal consultations on the changes to the ESEA generally, which included the SEA and LEA consultation requirements, with four meetings which took place on April 24, April 28, May 12, and June 27, 2016.

[www.ed.gov](http://www.ed.gov)

400 MARYLAND AVE., SW, WASHINGTON, DC 20202

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

**Frequently Asked Questions**  
**ESEA, Section 8538, CONSULTATION WITH INDIAN TRIBES AND TRIBAL ORGANIZATIONS**

**1. What are the consultation requirements under section 8538 of the ESEA<sup>1</sup>?**

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

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

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

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

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

**4. How can an LEA find information about tribes?**

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**11. Can the Department provide additional information?**

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