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## A Meeting of the Minds: Utilizing Maine's State Education System to Promote the Success of Its Native Students While Maintaining Tribal Sovereignty

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# A MEETING OF THE MINDS: UTILIZING MAINE'S STATE EDUCATION SYSTEM TO PROMOTE THE SUCCESS OF ITS NATIVE STUDENTS WHILE MAINTAINING TRIBAL SOVEREIGNTY

*Jordan Ramharter*

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The United States Federal Government is failing to provide its Native American students with access to equal educational opportunities. Although “tribal sovereignty” provides tribes with the right to self-govern, a “trust relationship” is maintained between the sovereign nations and the federal government. This duality results in tribes being viewed as “domestic dependent nations” by the federal government. Due to this relationship, the federal government has long recognized not only a right, but a duty to utilize its plenary powers to develop necessary legislative and executive authority in order to support the nation’s tribes. Encompassed in this duty is the responsibility, put both on the federal government and state governments, to ensure that Native American children are provided the same educational opportunities as any other racial or ethnic group.

However, the statistical discrepancies between Native American students and their non-Native peers is identifiable early on in their academic careers and becomes even more vividly apparent as they transition from primary school to secondary school. This results in less Native students seeking higher education opportunities, which subsequently leads to Native American children struggling to see commonalities between themselves and their teachers, their politicians, and their doctors; a phenomenon that, when present, has been identified as a key component in students’ academic success. Currently, the support provided by the federal government to the tribes comes in the form of financial funding—however money alone will not suffice to make the needed impact.

Meaningful change will require the federal, state, and tribal governments to put their heads together to develop a plan. The State of Maine and the Wabanaki Confederacy are well-suited to lead the charge: The governments should work together to develop hands-on programing to create life-long learners and promote educational success for their Wabanaki students, while also maintaining tribal sovereignty and preserving cultural traditions.

## I. INTRODUCTION

“Many see education as the key to success for children of all backgrounds. However, deeply entrenched inequities can obstruct future opportunities and successes . . . .”<sup>1</sup> In 2015, the Education Trust reported that although educational progress was identified among the majority of American students throughout the past decade, there was one group of students that stood apart from the rest.<sup>2</sup> “Unlike achievement results for every other major ethnic group in the United States, those for Native students . . . remained nearly flat in recent

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<sup>1</sup> ALYSSA RAFA, *Policy Analysis: State and Federal Policy: Native American Youth* (Education Commission of the States, 2016), [https://www.ecs.org/wp-content/uploads/State\\_and\\_Federal\\_Policy\\_for\\_Native\\_American\\_Youth.pdf](https://www.ecs.org/wp-content/uploads/State_and_Federal_Policy_for_Native_American_Youth.pdf) [<https://perma.cc/DD8H-PT8P>].

<sup>2</sup> Susan Brenna, *Why are Native Students Being Left Behind?*, ONE DAY MAG. (Teach for America) (Dec. 11, 2014), <https://www.teachforamerica.org/stories/why-are-native-students-being-left-behind> (internal quotations omitted) [<https://perma.cc/AUN2-D68D>].

years, and the gaps separating those students from their white peers have actually widened.”<sup>3</sup>

Research suggests that the majority of Native American<sup>4</sup> students are not proficient in reading or math by eighth grade.<sup>5</sup> Additionally, Native students consistently have the lowest high school graduation rates in the country and their average ACT scores, which are substantially lower than their white peers’, have continued to decline over the past decade as well.<sup>6</sup> Lastly, compared to any other racial or ethnic group, high-level high school courses are often less accessible to Native students, putting them at a disadvantage for college admissions.<sup>7</sup>

Although educational opportunities are provided by both public schools and federally-funded tribal schools, many Native American students fall behind their white peers prior to entering high school.<sup>8</sup> In fact, data suggest that between twenty and twenty-eight percent of Native students do not graduate from high school.<sup>9</sup> Overall, even though data is limited, the evidence is clear that a “striking disparit[y] of educational achievement and attainment levels” exists between Native Americans and their white counterparts.<sup>10</sup>

Ultimately, the federal government is failing to provide its Native American students with access to equal educational opportunities. Although the concept of “tribal sovereignty” in the United States is understood to provide indigenous tribes with the right to self-govern within the nation’s borders, there still exists a “trust relationship” between the sovereign nations and the federal government.<sup>11</sup> The relationship between the United States and the Native American tribes is defined by the federal government as “domestic dependent nations,” thus emphasizing that tribal “sovereignty has diminished but never extinguished.”<sup>12</sup>

Considering this relationship, the federal government has long recognized not only a right, but a duty to utilize necessary legislative and executive authority in

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<sup>3</sup> *Id.*

<sup>4</sup> Throughout this comment, “Native Americans,” “American Indians,” “Native,” and “Indians” will be used interchangeably.

<sup>5</sup> See Rebecca Klein, *The Education System is Failing Native American Students. Here’s Proof.*, HUFFINGTON POST (July 28, 2014), [https://www.huffingtonpost.com/2014/07/18/native-american-education\\_n\\_5593253.html](https://www.huffingtonpost.com/2014/07/18/native-american-education_n_5593253.html) [<https://perma.cc/BR3D-UDC5>].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Devan M. Crawford, Jacob E. Cheadle & Les B. Whitbeck, *Tribal vs. Public Schools: Perceived Discrimination and School Adjustment among Indigenous Children from Early to Mid-Adolescence*, 49 J. AM. INDIAN EDUC. 86, 86 (2010); see also Howard S. Adelman, Linda Taylor & Perry Nelson, *Native American Students Going to and Staying in Postsecondary Education: An Intervention Perspective*, 37 AM. INDIAN CULTURE & RES. J. 29, 31 (2013).

<sup>9</sup> Adelman et al., *supra* note 8, at 130.

<sup>10</sup> *Id.*

<sup>11</sup> Robert McCarthy, *The Bureau of Indian Affairs and Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 129 (2004); see also *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

<sup>12</sup> Michalyn Steele, *Breaking Faith with the Tribal Sovereignty Doctrine*, THE FED. LAW., Apr. 2017, at 48, 50.

order to support the Nation's tribes.<sup>13</sup> Encompassed in this duty is the responsibility to ensure that Native American children are provided the same educational opportunities as any other racial or ethnic group. However, the federal government continues to struggle to fulfill this duty due to an uncertainty about how to effectively craft legislation that promotes Native American students' success both in and out of the classroom.<sup>14</sup>

The federal government began to implement plans to promote the education of the Native American tribes starting in 1934. One of the initial plans, still actively in place today, was establishing federally-funded tribal schools that would serve to "meet the cultural and educational needs of Indigenous children."<sup>15</sup>

More recently, in 2001 the No Child Left Behind Act, established by former President George W. Bush and his administration, required states to develop year-long academic goals to ensure that all students succeed and make progress in closing the achievement gap.<sup>16</sup> The Act incorporated educational programs for Native American students, stating:

It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children and for the operation and financial support of the Bureau of Indian Affairs-funded school system to work in full cooperation with tribes toward the goal of ensuring that the programs of the Bureau of Indian Affairs-funded school system are of the highest quality and provide for the basic elementary and secondary educational needs of Indian children, including meeting the unique educational and cultural needs of those children.<sup>17</sup>

Thus, the federal government, along with the state and local governments, owe a duty to ensure that access to equal educational opportunities are provided to Native students; a duty that they are failing to successfully perform. Currently, the federal government is prioritizing preserving what little is left of tribal sovereignty, which is consequently costing Native American students their ability to access equal educational opportunities and inevitably stunting student achievement.

In Part I of this Comment, I frame the basic right to equal educational opportunity established under the Fourteenth Amendment of the United States Constitution. In Part II, I assess the ever-growing nationwide student achievement gap—a gap caused by disparities in opportunities available to children of different racial, ethnic, socioeconomic, and cultural backgrounds. In Part III, I analyze both federal and state legislation that serves to promote and improve the basic educational programs offered by state and local governments. In Part IV and Part V, I explore the relationship between Native American tribes and education, with Part V focusing specifically on Maine's Native American students. Throughout these two Parts, I argue that Native American students are being deprived of their right to access equal educational opportunities in violation of the Fourteenth Amendment. Lastly, Part VI describes potential policy solutions that the State of Maine could utilize and

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<sup>13</sup> See McCarthy, *supra* note 11, at 128-29.

<sup>14</sup> *Id.*

<sup>15</sup> Crawford, *supra* note 8, at 87.

<sup>16</sup> See No Child Left Behind Act of 2001, 20 U.S.C. § 6319 (2002).

<sup>17</sup> 25 U.S.C. § 2001 (2004).

implement in order to improve achievement results for its Native students.

## II. THE RIGHT TO EQUAL EDUCATIONAL OPPORTUNITIES

Although the right to an education is not deemed fundamental under the United States Constitution by the Supreme Court of the United States, the Equal Protection Clause of the Fourteenth Amendment has long been relied upon to establish judicial and statutory recognition of American citizens' right to access equal educational opportunity at the K-12 level.<sup>18</sup> The Fourteenth Amendment provides that no state can "deprive any person within its jurisdiction the equal protection of the laws."<sup>19</sup> In its earliest holdings regarding education, the Supreme Court of the United States used the Equal Protection Clause to establish a basic right to educational opportunities.<sup>20</sup> Yet the right to equal educational opportunities, without regard to race or ethnicity, was not established until the Court's 1954 holding in *Brown v. Board of Education*.<sup>21</sup>

In *Brown*, the Court reviewed four state cases in which African-American students sought the right to attend public schools in their community that traditionally only allowed white students.<sup>22</sup> At the time, the laws permitted schools to segregate children on the basis of race and thus administrators were legally able to deny African-Americans admission. In three out of the four cases, the district courts denied relief to the Petitioners, citing the constitutionally permissible doctrine of "separate but equal" established in *Plessy v. Ferguson*.<sup>23</sup>

The Petitioners alleged that the segregated public schools were not equal, nor could be made equal, and therefore deprived the students the equal protection of the laws under the Fourteenth Amendment.<sup>24</sup> The Petitioners requested that the Court provide the students the opportunity to attend their local schools on a non-segregated basis, therefore requiring the Court to decide whether the "separate but equal" doctrine applied to public education.<sup>25</sup> The Court held that segregation was a denial of equal protection of the laws under the Fourteenth Amendment and overturned *Plessy*'s "separate but equal" doctrine, establishing its inapplicability by stating that it had "no place" in public education.<sup>26</sup> Although the decision in *Brown* was a "seminal civil rights and constitutional moment," and thus a monumental step forward in establishing all citizens' rights to an equal educational opportunity, it was

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<sup>18</sup> See STUART BIEGEL, ROBERT KIM & KEVIN WELNER, *EDUCATION AND THE LAW* 347 (4th ed. 2016).

<sup>19</sup> U.S. CONST. amend. XIV, § 1.

<sup>20</sup> See *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950) (holding that the petitioner had a Constitutional right to an education equal to that offered to students of other races, but refusing to affirm whether the doctrine of "separate but equal" satisfied the requirements of the Fourteenth Amendment); *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) (reasoning that the concept of racially "separate but equal" did not conflict with the Equal Protection Clause of the Fourteenth Amendment); *Cumming v. Bd. of Educ. of Richmond Cty.*, 175 U.S. 528, 543 (1899) (holding that taxpayers were not denied equal protection of the laws when the Board decided to temporarily suspend black children from the high school for economic purposes because the decision was not made to discriminate against black children).

<sup>21</sup> *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

<sup>22</sup> *Id.* at 486.

<sup>23</sup> *Id.* at 488.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 492.

<sup>26</sup> *Id.* at 495.

not a firm victory in that it did not, in its effect, obviate discrimination and bias in American classrooms.<sup>27</sup>

Today, the right established in *Brown* has expanded; it broadly recognizes protection for all students “against the denial of equal access and equal opportunity on the basis of such group delineations as gender, disability, language status, sexual orientation, gender identity, and religion.”<sup>28</sup> For example, in 2003 the Supreme Court of the United States held that “the Equal Protection Clause [did] not prohibit [a] Law School’s narrowly tailored use of race in admission decisions” because the school’s narrowly tailored use of race promoted “a compelling interest in obtaining the educational benefit that flowed from a diverse student body.”<sup>29</sup>

Subsequently, in 2007 the Court clarified that although a narrowly tailored consideration of race in admissions decisions was permissible when used to achieve school diversity, the Fourteenth Amendment prohibited public schools from assigning students to schools solely based on race for the purpose of achieving racial integration.<sup>30</sup> This clarification became necessary when two school districts—one in Seattle and one in Louisville—independently adopted student assignment plans that relied purely on race to determine which schools children would attend.<sup>31</sup> The districts’ contention rested on the idea that the solely racial-based school assignment was done in order to establish racial integration, i.e., to desegregate, and thus was constitutionally permissible.<sup>32</sup> However, the Court identified this reasoning as flawed and held that “no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor for affording educational opportunities among its citizens.”<sup>33</sup>

The Court, through its holdings, has delivered a consistent message about equal access to education. Ultimately, “all students in the public education setting are expected to be treated by law with equal respect and equal dignity, consistent with the mandate of the Fourteenth Amendment.”<sup>34</sup> Yet, despite the Court’s consistency, the nationwide discrepancies in educational opportunities are still prevalent and yet to be resolved, judicially or otherwise.

### III. STUDENT OPPORTUNITY AND ACHIEVEMENT GAPS

Currently, when viewed nationwide, United States public schools are riddled with significant inequities, often with race and socioeconomic status being identified as common denominators. “While some young Americans . . . are getting a truly

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<sup>27</sup> Jeannie Oakes & Martin Lipton, *Schools that Shock the Conscience: Williams v. California and the Struggle for Education on Equal Terms Fifty Years After Brown*, 6 BERKELEY J. OF AFR.-AM. L. & POL’Y REP. 152, 152 (2004).

<sup>28</sup> BIEGEL ET AL., *supra* note 18, at 347.

<sup>29</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *see also Fisher v. University of Texas at Austin*, 570 U.S. 297, 314-15 (2013) (“[A] university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”) (internal quotations omitted).

<sup>30</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007).

<sup>31</sup> *Id.* at 709-10.

<sup>32</sup> *Id.* at 741.

<sup>33</sup> *Id.* at 747.

<sup>34</sup> BIEGEL ET AL., *supra* note 18, at 347.

world-class education, those who attend schools in high poverty neighborhoods are getting an education that more closely approximates school in developing nations.”<sup>35</sup> In terms of wealth distribution, the United States is one of the most unequal countries in the world, which amplifies the “the inadequate education received by many children in low-income schools.”<sup>36</sup> The socioeconomic disparities impact American schools by creating an unequal access to educational opportunity for low-income students, which in turn threatens the future of the United States itself.<sup>37</sup>

“Educational disparities and intergenerational economic inequality are highly correlated with skin color, ethnicity, linguistic and social class status.”<sup>38</sup> However, when considering factors that contribute to the opportunity gap, Prudence Carter, Dean of the Graduate School of Education at University of California, Berkeley, and Kevin Welner, Professor of Education at University of Colorado, emphasize the importance of analyzing the school environment as well as students’ external life—identifying both as relevant when it comes to analyzing the cause for such a gap.<sup>39</sup> For example, students whose families do not have access to health or dental care, who lack stable housing and parental employment, or who worry about food security and safety, are most often those found falling behind academically.<sup>40</sup>

These external factors make it challenging to use the law as a way to close the achievement gap and improve educational quality and equity because, often, the policies developed attempt to solve problems without “investing in the key community needs and classroom resources necessary to create engaging, supported learning and learners.”<sup>41</sup> For example, education reform is currently focused on raising academic standards, improving standardized assessments, and developing teacher evaluation programs; none of which aim to diminish the negative external factors that widen the ever-growing gap.<sup>42</sup>

#### IV. FEDERAL EDUCATION-BASED LEGISLATION

Although education is largely a state and local responsibility in the United States, the federal government has announced a broad educational mission: “to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.”<sup>43</sup> In large part, the federal government’s role in education is seen as “a kind of ‘emergency response

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<sup>35</sup> U.S. DEPT. OF EDUC., FOR EACH & EVERY CHILD: A STRATEGY FOR EDUC. EQUITY & EXCELLENCE 12 (2013), <http://www2.ed.gov/about/bdscomm/list/eec/index.html> [<https://perma.cc/WE7M-HUBB>].

<sup>36</sup> *Id.*; see also *Wealth Inequality in the United States*, INEQUALITY.ORG, <https://inequality.org/facts/wealth-inequality/> (last visited Mar. 7, 2020) [<https://perma.cc/4L4Q-VJNB>].

<sup>37</sup> U.S. DEPT. OF EDUC., *supra* note 35, at 12.

<sup>38</sup> KEVIN G. WELNER & PRUDENCE L. CARTER, CLOSING THE OPPORTUNITY GAP 1 (Prudence L. Carter & Kevin G. Welner eds., 2013).

<sup>39</sup> *Id.* at 217-18.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 3.

<sup>42</sup> See generally Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified at 20 U.S.C. §§ 6301 *et seq.*) (2015) (reauthorizing the Elementary and Secondary Education Act of 1965 to ensure that every child achieves).

<sup>43</sup> *The Federal Role in Education*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/GX9Q-5MM2>] (last modified May 25, 2017).

system,’ [or rather] a means of filling gaps in state and local support for education when critical national needs arise.”<sup>44</sup> Therefore, although the federal government is not without power in the educational sphere, the state and local governments are primarily responsible for developing curriculum, setting academic goals, and determining requirements for enrollment and graduation.

With that said, starting in 1965, the federal government prioritized the need to ensure educational equity for all children. Former President Lyndon B. Johnson, who began the “War on Poverty,” enacted the Elementary and Secondary Education Act of 1965 (“ESEA”) as a cornerstone of the initiative.<sup>45</sup> “ESEA [was] an extensive statute that fund[ed] primary and secondary education, [and] emphasis[ed] high standards and accountability.”<sup>46</sup> ESEA allocated funds to increase “professional development, instructional materials, resources to support educational programs, and the promotion of parental involvement.”<sup>47</sup> The largest financial component of ESEA was its Title I funds, “which provided financial assistance to local educational agencies for the education of low-income families.”<sup>48</sup> Although core decisions regarding curriculum and standards remained under state control, the Title I provision required schools to use these federal funds for eligible low-income students.<sup>49</sup> These students were usually taught in a “pull-out” style classroom,<sup>50</sup> and were provided additional instructions to help close the economic-based learning gap.<sup>51</sup>

However, by the 1980s student achievement in the United States was concernedly low.<sup>52</sup> This, paired with a poor economy and rising deficits, led the Reagan administration to create new education-focused legislation known as the “Excellence Agenda.”<sup>53</sup> Not seeking to have a direct role in educational policy, the Excellence Agenda delegated the responsibility for improving student achievement and educational reform to state governors and legislators.<sup>54</sup> The Excellence Agenda, supported by a number of business leaders and civil rights organizations alike, led to the creation of the Education Consolidation and Improvement Act of 1981 (“ECIA”) and “was premised on the belief that increased rigor in schools would serve to improve education for *all* students and ultimately boost the nation’s economy.”<sup>55</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> Catherine A. Paul, *Elementary and Secondary Education Act of 1965*, VCU LIBRARIES SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965/> [<https://perma.cc/TQL4-4B3Q>] (last visited Mar. 7, 2020); *see also* Elementary and Secondary Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

<sup>46</sup> Paul, *supra* note 45.

<sup>47</sup> *Id.*

<sup>48</sup> *Evolution of the Elementary and Secondary Education Act: 1965-2015*, HUNT INST., <http://www.hunt-institute.org/wp-content/uploads/2016/09/Development-of-the-Elementary-and-Secondary-Education-Act-August-2016.pdf> [<https://perma.cc/B4WK-Q5M5>] (last visited Nov. 4, 2018).

<sup>49</sup> *Id.*

<sup>50</sup> For the purpose of this Comment, “pull-out instruction” means that students receiving Title I services would be pulled out of the general education classroom to work in a small group setting in another room with a Title I teacher.

<sup>51</sup> *Evolution of the Elementary and Secondary Education Act: 1965-2015*, *supra* note 48.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; *see* Education Consolidation and Improvement Act of 1981 (ECIA), Pub. L. No.

The ECIA, although ostensibly aimed at preserving the original intent of Title I, led to significant decreases in Title I funding.<sup>56</sup> By 1988, due to lack of notable improvement, Former President Ronald Reagan reauthorized ESEA under the name of Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988.<sup>57</sup> The Act amended the requirements for states to receive Title I funds. It required each state to “define the levels of academic achievement expected for Title I-eligible students” as well as to “identify the schools that were not making substantial progress toward raising the achievement of students.”<sup>58</sup>

When George H. W. Bush took office in 1988, the educational policy goals shifted towards creating federal uniform standards in order to improve student achievement by better aligning testing and accountability throughout the country.<sup>59</sup> It all started in 1989 while the President was attending an education summit in Charlottesville, Virginia. President Bush developed a plan, along with state governors, to improve the United States education system through a standards-based initiative. The theory behind the Bush Administration’s standards-based proposal, entitled “America 2000,” was that having unified federal academic goals would lead to improving the education systems throughout the country while also “boost[ing] the nation’s global economic competitiveness.”<sup>60</sup> Although America 2000, “failed to pass Congress, . . . Bush’s education strategy helped create momentum for increased federal involvement in education based on standards, testing and accountability.”<sup>61</sup>

Mirroring President Bush’s educational goals, President Bill Clinton also promoted a standards-based reform policy.<sup>62</sup> First, President Clinton created the “Goals 2000: Educate America Act” which “established a process for the development of voluntary national education standards and provided grants for states to institute their own aligned standards and tests.”<sup>63</sup> Additionally, President Clinton reauthorized ESEA under the Improving America’s Schools Act (“IASA”).<sup>64</sup> Clinton’s amendments to ESEA required that students eligible for Title I services be “taught inclusively” in the classroom and that schools “provide evidence that learning goals and curricular opportunities” were the same for *all* students.<sup>65</sup> Furthermore, school districts that were receiving Title I funds were required to recognize their schools that were not making “adequate yearly progress” and develop

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97-35, § 514, 95 Stat. 357 (1981).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; see also Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 140 (1988) (codified as 20 U.S.C. § 2701).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; see also Improving America’s School Act of 1994, Pub. L. 103-382, 108 Stat. 3518 (1994) (codified as 20 U.S.C. § 6301).

<sup>65</sup> *Id.*

plans to improve them.<sup>66</sup> Although IASA provided states with more “decision-making authority and flexibility for their Title I programs” the Act was not as successful as hoped due to the nationwide implementation discrepancies, which lead to continued inequality of learning opportunities.<sup>67</sup>

Over the past decade the federal government reverted back to the foundation of ESEA, using it as a model with the hope of reaching all learners and providing a quality and consistent education to all American students. On January 8, 2002, the No Child Left Behind Act (“NCLB”) was signed by former President George W. Bush.<sup>68</sup> NCLB significantly increased the federal government’s role in holding schools accountable for student outcomes by “put[ting] in[to] place measures that exposed achievement gaps among traditionally underserved students and their peers and spurred an important national dialogue on education improvement.”<sup>69</sup>

Further promoting the goal of making education equal and accessible to all students nationwide, state leaders, along with teachers, content experts, and other leading thinkers, developed the Common Core State Standards (“CCSS”) as a way to ensure consistent, real-world learning targets for all American students.<sup>70</sup> The goal of the CCSS was, and still is, to ensure that all K-12 students are prepared to succeed in life—whether it be attending college or starting a career after graduating from an accredited high school.<sup>71</sup> Since its launch, the CCSS were adopted by forty-one states, the District of Columbia, four territories, and the Department of Defense Education Activity (DoDEA).<sup>72</sup>

As time passed, it became clear that the policies of NCLB, though well-intentioned, imposed near-impossible standards for educators to realistically meet.<sup>73</sup> On December 10, 2015, former President Barack Obama signed Every Student Succeeds Act (“ESSA”), a new education law reauthorizing ESEA and upholding the nation’s longstanding commitment to equal opportunity for all students, a goal which was also previously encompassed in NCLB.<sup>74</sup>

The primary goal of ESSA continues to promote the goals that were established by NCLB, yet aims to make attainment of those goals more flexible, workable, and thus achievable for educators.<sup>75</sup> For example, ESSA attempts to “[a]dvance equity by upholding critical protections for America’s disadvantaged and high-need students” and “[r]equires that all students in America be taught to high academic

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See No Child Left Behind Act of 2001, 114 Stat. 1425 (2002) (codified as 20 U.S.C. § 6319).

<sup>69</sup> *Every Student Succeeds Act*, U.S. DEP’T OF EDUC., <https://www.ed.gov/essa?src=rn> (last visited Jan. 30, 2020) [<https://perma.cc/E7Z2-MFHH>].

<sup>70</sup> Development Process, *Common Core State Standards Initiative: Preparing America’s Students for College & Careers*, CORE STANDARD, <http://www.corestandards.org/about-the-standards/development-process/> [<https://perma.cc/3GED-XSZ5>] (last visited Jan. 30, 2020).

<sup>71</sup> *Id.*

<sup>72</sup> *Common Core State Standards Initiative: Preparing America’s Students for College & Careers*, CORE STANDARD, <http://www.corestandards.org/standards-in-your-state/> [<https://perma.cc/BWU2-8QFR>] (last visited Jan. 30, 2020).

<sup>73</sup> See *Every Student Succeeds Act*, *supra* note 69.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

standards that will prepare them to succeed in college and careers.”<sup>76</sup> Furthermore, it “[m]aintains an expectation that there will be accountability and action to effect positive change in our lowest-performing schools, where groups of students are not making progress, and where graduation rates are low over extended periods of time.”<sup>77</sup>

Ultimately, the federal government’s educational goals, reflected in their legislative initiatives, although idealistic, have been well-intentioned. The federal government seeks to encourage consistent and purposeful learning goals and promote academic rigor in order to increase student achievement on the national scale. However, to this day, legislative initiatives have yet to result in significant improvement with regard to national academic achievement.<sup>78</sup> In fact, the United States education system and academic achievement continue to decline in comparison to other leading countries.<sup>79</sup> Furthermore, no legislation has resolved the troubling and continued nationwide inequity of learning opportunities and educational disparities for America’s disadvantaged students.

## V. AMERICAN INDIANS AND EDUCATION

### *The Federal Government’s Use of the Plenary Power Doctrine*

Although masked with the identity of “sovereign nations,” American Indian tribes do not truly possess ultimate, unfettered control over their own people or their lands.<sup>80</sup> More accurately, the United States Supreme Court has consistently held that Congress is authorized to exercise “plenary power” over Native American tribes.<sup>81</sup> The Doctrine of Plenary Power has been used in several different capacities. For example, “plenary power” can refer to “exclusive power, as, for example, the exclusive power of Congress to spend federal money.”<sup>82</sup> It also has been applied to

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See Kevin Mahnken, *Education by the Numbers: 9 Statistics That Have Made Us Think Differently About America’s Schools This Academic Year*, THE 74 (July 2, 2018), <https://www.the74million.org/education-by-the-numbers-9-statistics-that-have-made-us-think-differently-about-americas-schools-this-academic-year/> [<https://perma.cc/P2P2-REHR>]. The National Assessment of Educational Progress (NAEP) of 2017 indicated that American students have made zero progress over the last year. *Id.* “[P]rogress since 2007 has been basically flat. And 2017’s scores were no exception . . . . The stagnation led one expert to call the past 10 years a ‘lost decade’ for education reform.” *Id.*

<sup>79</sup> See AJ Willingham, *In 1990, the US Was Ranked 6th in Education and Healthcare. Today, It’s 27th, a Study Says*, CNN (Oct. 1, 2018), <https://www.cnn.com/2018/10/01/health/health-care-education-united-states-27th-world-trnd/index.html> [<https://perma.cc/6JP8-CTRK>]. “[T]he United States clocked in at 27th . . . . However, in 1990, the United States ranked sixth in the world . . . . So why the precipitous fall? The institute characterizes it as a stagnation ‘due in part to a lack of improvement in years of education attained.’” *Id.*

<sup>80</sup> See McCarthy, *supra* note 11, at 129.

<sup>81</sup> Irene K. Harvey, *Constitutional Law: Congressional Plenary Power over Indian Affairs: A Doctrine Rooted in Prejudice*, 10 AM. INDIAN L. REV. 117, 148 (1982) (arguing that discriminatory objections motivated the concept of the plenary power doctrine and that a “concrete and core function of the doctrine has been deception fostering the self-interest of white America”).

<sup>82</sup> Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 196 n.3 (1984).

the federal government's ability to override state law.<sup>83</sup> Lastly, it has been used to mean "unlimited power."<sup>84</sup> "In Indian Law, the term plenary power has been used with each of these connotations."<sup>85</sup> Yet, the "roots of the plenary power doctrine [are] not [found] in the Constitution," but rather are justified due to the "'practical' necessity of protecting Indians and the nonexistence of such power of the states."<sup>86</sup>

For example, in *Lone Wolf v. Hitchcock*, the Court upheld Congress's enactment of a land agreement made with three Indian tribes that reduced the amount of reservation land the tribes controlled and reallocated it to non-Indians.<sup>87</sup> This agreement was made in direct violation of a treaty provision that precluded transfer of tribal land unless consented to by three-fourths of the adult males in the tribe.<sup>88</sup> The Court reasoned:

The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of the power to act, if the assent of the Indians could not be obtained.<sup>89</sup>

The Court relied on plenary power to justify its decision, explaining that "Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though contradictory to the strict letter of a treaty with the Indians."<sup>90</sup> Ultimately, the Court gave Congress unilateral control over land, reasoning under an illusion that because the federal government possessed the responsibility to protect the tribes, the decision made by Congress to enact the agreement was presumably made in the best interests of all parties.

Just over fifty years later, the Court maintained its same position on Congressional authority over the nation's tribes.<sup>91</sup> In *Tee-Hit-Ton v. United States*, the Petitioners, the Tee-Hit-Ton Indians, alleged that the United States owed compensation pursuant to the Fifth Amendment<sup>92</sup> for a taking of their private property that they had occupied in Alaska.<sup>93</sup> The Court held that the United States did not owe any compensation, reasoning that the Petitioners' never possessed title to the land.<sup>94</sup> In other words, the Court could find "nothing to indicate any intention of Congress to grant to the Indians any permanent rights in the lands of Alaska

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Harvey, *supra* note 81, at 119.

<sup>87</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553, 563-64 (1903).

<sup>88</sup> *Id.* at 564.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 565.

<sup>91</sup> See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

<sup>92</sup> U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

<sup>93</sup> *Tee-Hit-Ton*, 348 U.S. at 273.

<sup>94</sup> *Id.* at 278.

occupied by them by permission of Congress.”<sup>95</sup> However, the Court conceded that the Indians were being wronged.<sup>96</sup> The opinion stated:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.<sup>97</sup>

The Court concluded simply by stating there was no solution to this problem.<sup>98</sup> It expressed that the United States was growing and that there was no sensible resolution for how to rehabilitate the Petitioners.<sup>99</sup> The decision ultimately met their end goal, which was to “leave[] with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.”<sup>100</sup> This was a decision that relied upon plenary powers to promote the development of society and essentially dismissed the effect that it would have on the Native peoples.

In summary, for centuries the judiciary has almost always provided deference to federal legislation impacting Native American tribes.<sup>101</sup> Relying on federal plenary power, “[t]he Supreme Court has sustained nearly every piece of federal legislation it has considered directly regulating Indian tribes, whether challenged as beyond federal power or within that power but violating individual rights.”<sup>102</sup> The judiciary’s “undue deference” to the legislature, paired with the “unusual nature” of tribal claims made against the government, provide an understanding as to why there has been stagnation in clearly defining tribal sovereign rights.<sup>103</sup> This has led to blurred lines and a lack of clarity as to the federal government’s role in relation to the nation’s tribes and whether this relationship should be strengthened or diminished.<sup>104</sup>

Therefore, due to the essentially unfettered ability for the legislature to exercise control over tribal regulation, the federal government has assumed a duty of protection, and “[w]here there is a duty of protection, there is power.”<sup>105</sup> By choosing to treat American Indian tribes as dependents, or wards of the state,<sup>106</sup> and declaring the right to exercise protective “plenary power,”<sup>107</sup> the government has placed upon itself the responsibility to ensure the success of Native American

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 289.

<sup>97</sup> *Id.* at 289-90.

<sup>98</sup> *Id.* at 290.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 291.

<sup>101</sup> See Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 195 (1984).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 198.

<sup>104</sup> *Id.*

<sup>105</sup> Harvey, *supra* note 81, at 117 (citing *United States v. Kagama*, 118 U.S. 375, 384 (1886)).

<sup>106</sup> *Id.* at 145.

<sup>107</sup> See *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (“The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else.”).

students.<sup>108</sup>

*Federal Legislation and the Bureau of Indian Education*

Schools for American Indian students are “operated and totally funded by the federal government under treaty agreements that promised federally-supported schooling in perpetuity in exchange for tribes giving up lands (which are not subject to property tax and generate no revenue to support schools).”<sup>109</sup> The need for educational support for Native American students became evident in 1928, when John Collier, a prominent activist for Native American Rights and the Secretary of the Indian Defense Association, along with the Institute of Government Research, released the Meriam Report.<sup>110</sup> The Report highlighted the “poor conditions of tribal economies and the utter destitution in the Indian country.”<sup>111</sup> It also unveiled the educational impact that federal educational policies were having on Native children.<sup>112</sup>

The federal policies in place at the time forced the separation of Native American families by requiring Native children to attend boarding schools.<sup>113</sup> At these schools, the goal was to strip students of their “Indianness.”<sup>114</sup> The philosophy for doing so was premised on making American Indians “more white” by teaching them that their “cultures and languages were inferior” to that of the white man’s.<sup>115</sup> The schools required students to participate in manual labor and learn English in order to begin their assimilation to the white culture.<sup>116</sup>

After identifying the detrimental effect of the deeply-engrained racist methodologies on the Native children attending the boarding schools, Congress passed the Indian Reorganization Act, also known as the “Indian New Deal” in 1934.<sup>117</sup> The Act provided Native American tribes “extended self-determination rights . . . that extended to education and later created new funding streams for schools on and off reservations.”<sup>118</sup> It led to the creation of the Bureau of Indian Education (“BIE”), which was “responsible for the line direction and management of all education functions, including the formation of policies and procedures, the supervision of all program activities and the approval of the expenditure of funds

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<sup>108</sup> See U.S. DEP’T OF INTERIOR, BUREAU OF INDIAN EDUC. STRATEGIC DIRECTION 2018-2023 (2018) (President Donald J. Trump stated, “My administration is committed to Tribal sovereignty and self-determination. A great Nation keeps its word, and this Administration will continue to uphold and defend its responsibilities to American Indians and Alaska Natives. The United States is stronger when Indian Country is healthy and prosperous.”).

<sup>109</sup> Brenna, *supra* note 2.

<sup>110</sup> Jessie Kratz, *The Indian New Deal*, NATIONAL ARCHIVES: PIECES OF HISTORY (Nov. 30, 2015), <https://prologue.blogs.archives.gov/2015/11/30/indian-new-deal/> [<https://perma.cc/DS7T-2REG>].

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Brenna, *supra* note 2; see also DAWNLAND (The Upstander Project 2018) (“A documentary about cultural survival and stolen children; inside the first truth and reconciliation commission for Native Americans.”).

<sup>114</sup> Brenna, *supra* note 2.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

appropriated for education functions.”<sup>119</sup> However, even thirty-five years after the establishment of the BIE, the education provided to Native Students was extremely poor.<sup>120</sup> For instance, in 1969, “a Senate report declared a near-total lack of high-quality education on reservations, calling Indian education ‘a national tragedy.’”<sup>121</sup>

In 1975, Congress passed the Indian Self-Determination and Education Assistance Act.<sup>122</sup> The goal, similar to the Indian Reorganization Act, was to provide “maximum Indian participation in the Government and education of the Indian people.”<sup>123</sup> The Act was seen as a way to rejuvenate tribal governments and provide Native Americans the right to operate their own schools.<sup>124</sup> This meant that the tribal schools would be able to incorporate their own languages, beliefs, and philosophies into their curriculum while being assisted by federal funding.<sup>125</sup> In order to continue supporting tribal schools, the Education Amendments Act of 1978, along with other supporting amendments, was established.<sup>126</sup> The Act “provided funds directly to tribally operated schools, empowered Indian school boards, [and] permitted local hiring of teachers and staff.”<sup>127</sup>

The BIE is still an active entity and works under the slogan of “Doing What’s Best for Students!”<sup>128</sup> As of November 2018, the BIE reported being “responsible for educating approximately 41,051 American Indian and Alaska Native children at 183 elementary and secondary schools on 64 reservations in 23 states.”<sup>129</sup> The BIE believes that the educational services and programs they provide to Native students are “vital to current and future students who are their tribes’ future.”<sup>130</sup> The BIE continues to make changes designed to improve the quality of the education provided to their students.<sup>131</sup> In August 2018, the BIE released their “Strategic Direction for 2018-2023” which includes increasing services to its students by “organizing management activities, setting priorities, and ensuring efficient utilization of staff and resources.”<sup>132</sup>

In order to support their mission, the BIE provides funding in two different forms: (1) the U.S. Department of the Interior Bureau of Indian Education funds for tribal schools and (2) the U.S. Department of the Interior Bureau of Indian Affairs

<sup>119</sup> *Indian Affairs: Bureau of Indian Education*, U.S. DEP’T OF THE INTERIOR, <https://www.bia.gov/bie> (last visited Feb. 24, 2020) [<https://perma.cc/B2FY-2HVC>].

<sup>120</sup> See Brenna, *supra* note 2.

<sup>121</sup> *Id.*

<sup>122</sup> 25 U.S.C. § 5301 (2018).

<sup>123</sup> Indian Self-Determination Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Bureau of Indian Education*, *supra* note 119.

<sup>127</sup> *Id.*

<sup>128</sup> BUREAU OF INDIAN EDUCATION, <https://www.bie.edu> (last visited Apr. 10, 2020).

<sup>129</sup> *About the BIE*, BUREAU OF INDIAN EDUCATION, <https://www.bieresources.com/about.html> [<https://perma.cc/VG89-ZS3Q>] (last visited Apr. 10, 2020).

<sup>130</sup> *Id.*

<sup>131</sup> See *Bureau of Indian Education*, *supra* note 119.

<sup>132</sup> *Id.* Ordinarily, legal institutions and governmental bodies carefully craft documents, ensuring that each word carries important meaning. However, it is important to note that the language used here to describe the BIE’s “strategic direction” words are utterly meaningless, giving no clear understanding for what plans will be implemented, what changes will be made, and thus what impact will be felt.

Johnson-O'Malley funds.<sup>133</sup> The funds provided by the BIE for tribal schools, which are generally operated outside of the local public school system, are used not only to run the schools, but also to implement a Title I school-wide program.<sup>134</sup>

Although the BIE provides a significant amount of the total education funding for Native American students, there are other federal education funding streams that were developed to support Native American learners. For instance, Title VII Indian Education Funds of the U.S. Department of Education Elementary and Secondary Education Act awards funds to “school districts and BIE-funded or operated schools based on the number of Indian students and the state’s per pupil expenditures.”<sup>135</sup> These funds are “used for a variety of activities including early childhood education, special health and nutrition services, career preparation partnerships and family literacy services.”<sup>136</sup> Comparably, “Johnson-O'Malley (JOM) funds are distributed to tribes as part of the U.S. Department of the Interior Bureau of Indian Affairs Tribal Priority Allocation (TPA) block grant.”<sup>137</sup> Initially, the JOM funds provided general education programs but as a result of reduced funding, JOM now solely supports special programs for Native students.<sup>138</sup>

Finally, the Federal Impact Aid program “provides funds to local school districts whose boundaries encompass lands that are owned by the federal government or removed from local tax rolls, including Indian lands.”<sup>139</sup> This program, which was Title VIII of the No Child Left Behind Act of 2001, requires that districts that receive this funding “must consult with parents and tribes of children about the education provided” as well as ensure that the Native students “receive equal educational opportunities.”<sup>140</sup>

*The Gaps in Native Students Opportunity & Achievement: Data from State-Funded Public Schools and BIE's Federally Funded Schools*

A Native student is defined as “a member or descendent of an Indian tribe or band, or an Eskimo, Aleut, or other Alaska Native.”<sup>141</sup> As of November 2016, Native Americans made up about one percent of the national student population.<sup>142</sup> Although Native students are spread throughout the country, a notable majority reside predominantly in twelve states “with the largest concentration of Native American Students in Alaska, Oklahoma, Montana, New Mexico, and South Dakota.”<sup>143</sup>

Currently, the BIE oversees a total of “183 elementary, secondary, residential

<sup>133</sup> LAWRENCE O. PICUS, ET AL., AN INDEPENDENT REVIEW OF MAINE’S ESSENTIAL PROGRAMS AND SERVICES FUNDING ACT: PART 1, 61 (2013).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 62.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> RAFA, *supra* note 1, at 2.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1-2. (“Additionally, Native students face myriad difficulties outside of the classroom, including high levels of poverty and challenges with both physical and mental wellness.”).

and peripheral dormitories” across 23 states; 130 schools are tribally controlled under the Indian Self Determination Act and 53 are operated by the BIE itself.<sup>144</sup> “While BIE schools serve a small share of Native American students, they focus on members of tribes that tend to be geographically isolated and face various challenges, including poverty.”<sup>145</sup> The BIE defines its mission as to:

[P]rovide quality education opportunities from early childhood through life in accordance with a tribe’s needs for cultural and economic well-being, in keeping with the wide diversity of Indian tribes and Alaska Native villages as distinct cultural and governmental entities. Further, the BIE is to manifest consideration of the whole person by taking into account the spiritual, mental, physical, and cultural aspects of the individual within his or her family and tribal or village context.<sup>146</sup>

However, data on educational outcomes still demonstrate significant disparities between Native students and their non-Native peers.<sup>147</sup> As of 2011, “just 22 percent of Native fourth graders scored at proficient or advanced levels in mathematics on the National Assessment of Educational Progress (NAEP), compared to the national average of 40 percent.”<sup>148</sup> Furthermore, between 2005-2011, every other major ethnic group made identifiable gains in reading performance on the NAEP, every group aside from Native students, who “saw no such gain.”<sup>149</sup>

Concernedly, as Native students move their way through high school, many drop out prior to graduation, making Native graduation rates shockingly low.<sup>150</sup> In the public school setting, Native student high school graduation rate is sixty-seven percent while at BIE schools the graduation rate is even worse at fifty-three percent;<sup>151</sup> this makes it the highest dropout rate out of all major ethnic groups<sup>152</sup> and is notably lower than the national average graduation rate of eighty percent.<sup>153</sup>

Additionally, “[m]any BIE-funded tribal schools are outdated, and construction funding remains insufficient to address current maintenance backlogs”<sup>154</sup> which negatively affects BIE schools, and consequently its Native learners. For example, approximately one-quarter of BIE schools were reported to be more than forty years old in 2011.<sup>155</sup> “Old and unsafe facilities reduce educational opportunities for BIE students, who are already struggling.”<sup>156</sup> Ultimately, BIE schools lack adequate funding to make the much-needed improvements to school facilities and will require additional resources.<sup>157</sup>

<sup>144</sup> BUREAU OF INDIAN EDUCATION, *supra* note 128.

<sup>145</sup> *Maintenance of Federally Funded Tribal Schools*, CTR. ON BUDGET AND POL’Y PRIORITIES, [https://www.cbpp.org/sites/default/files/atoms/files/5-19-17bud\\_tribalschools.pdf](https://www.cbpp.org/sites/default/files/atoms/files/5-19-17bud_tribalschools.pdf) [<https://perma.cc/BF8R-KFHR>] (last visited May 11, 2020).

<sup>146</sup> *Bureau of Indian Education*, *supra* note 119.

<sup>147</sup> RAFA, *supra* note 1, at 2.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 3.

<sup>151</sup> *Id.*

<sup>152</sup> NAT’L CTR. FOR EDUC. STATS., *THE CONDITION OF EDUCATION* 138 (2018).

<sup>153</sup> RAFA, *supra* note 1, at 3.

<sup>154</sup> *Maintenance of Federally Funded Tribal Schools*, *supra* note 145.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

Another factor affecting student achievement and likely posing a challenge to Native American learners is the strikingly high poverty rates amongst Native families. As of 2015, seventy-three percent of all fourth grade American Indian and Alaska Native (“AI/AN”) and sixty-six percent of all eighth grade AI/AN students qualified for the National School Lunch Program (“NSLP”).<sup>158</sup> The NSLP is considered a strong indicator of the percentage of economically disadvantaged students attending public school in the United States.<sup>159</sup> In order to qualify for NSLP, household income must be at or below the poverty level.<sup>160</sup> Based upon this, at least sixty-six percent of AI/AN students’ families are living at or below the poverty level.<sup>161</sup> Furthermore, related to these statistics, only twenty percent of AI/AN fourth grade students and seventeen percent of AI/AN eighth grade students reported having access to the recommended amount of age-appropriate books in their households.<sup>162</sup>

Unsurprisingly, all of these factors naturally impact Native American students’ pursuit of higher education.<sup>163</sup> As of the 2016-2017 school year, Native American students enrolled at a higher education institutions was a mere nineteen percent.<sup>164</sup> Furthermore, research shows that out of those who do enroll at a higher education institute, only seventeen percent of these students attain an associate’s degree and only ten percent of Native Americans who enroll in a bachelor’s degree program finish and attain the degree.<sup>165</sup> Over the past decade these percentages have been declining.<sup>166</sup> In 2000, thirty percent of Native Americans aged twenty-five to twenty-nine attained at least an associate’s or bachelor’s degree.<sup>167</sup> As of 2017, that number decreased to twenty-seven percent, in comparison to fifty-four percent of their white counterparts.<sup>168</sup> Similarly, only sixteen percent of Native Americans attained at least a bachelor’s degree in 2017, compared to forty-two percent of white students.<sup>169</sup>

## V. MAINE’S AMERICAN INDIAN STUDENTS

### *The Wabanaki Confederacy: Federal Recognition and Rights*

Native Americans have lived in Maine for thousands of years.<sup>170</sup> Known collectively as the Wabanaki, the Confederacy is legally recognized as being made

<sup>158</sup> NAT’L CTR. FOR EDUC. STATS., NATIONAL INDIAN EDUCATION STUDY 6 (2015).

<sup>159</sup> See EDMUND CERVONE, EDUCATE MAINE, EDUCATION INDICATORS FOR MAINE 1, 6 (2018),

[http://www.educatemaine.org/docs/EducateMaine\\_2018\\_IndicatorReportWEB01.pdf](http://www.educatemaine.org/docs/EducateMaine_2018_IndicatorReportWEB01.pdf)

[<https://perma.cc/366L-YJBC>].

<sup>160</sup> *Id.*

<sup>161</sup> NATIONAL INDIAN EDUCATION STUDY, *supra* note 158.

<sup>162</sup> *See id.*

<sup>163</sup> See Factsheets: Native American Students, POSTSECONDARY NATIONAL POLICY INSTITUTE (Aug.

2018), <http://pnpi.org/native-american-students/> [<https://perma.cc/Y9NE-JML5>].

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See *About the Wabanaki*, ABBE MUSEUM, <https://www.abbemuseum.org/about-the-wabanaki-nations/> [<https://perma.cc/8XCA-2H2Z>] (last visited May 18, 2020).

up of four tribes: Maliseet, Micmac, Penobscot and Passamaquoddy.<sup>171</sup> However, although yet to be officially recognized, the Abenaki tribe also identifies as a member of the Wabanaki Confederacy, making it comprised of a total of five principal nations.<sup>172</sup>

The word Wabanaki means “Dawn land People” or “People of the Dawn”;<sup>173</sup> a name that references the tribes’ eastern location, making them the first to greet the dawn each morning.<sup>174</sup> Linguistically, “wabun” means “light” or “white” and “aki” means “earth.”<sup>175</sup> The tribes are known for skillfully crafting baskets using splint ash wood, birch bark, and split cedar,<sup>176</sup> and are also known for their birchbark canoes, which “represents thousands of years of traditional knowledge handed down from generation to generation.”<sup>177</sup> Although the tribes share many of the same cultural traditions, each tribe acts independently, maintaining individual communities as well as their own “tribal government, community schools, cultural center[s], and . . . manage . . . respective lands and natural resources.”<sup>178</sup>

First, the Maliseet, formally known as the Houlton Band of Maliseet Indians, received federal recognition in October of 1980.<sup>179</sup> Their tribal lands are located along the Meduxnekeag River near the town of Houlton.<sup>180</sup> Many Maliseet refer to themselves as “Wolastoqiyik,” meaning “people of the Saint John River.”<sup>181</sup> “Before contact with the Europeans, the Maliseets occupied much of what is now considered the eastern border line of the U.S. in Canada and northern New England.”<sup>182</sup> Because their community spread across the two countries, the Maliseets attained free border crossing rights between the United States and Canada.<sup>183</sup>

The Maliseets express that being federally recognized by the United States government created a “unique government to government trust relationship with the United States.”<sup>184</sup> Furthermore, this recognition entitles the Maliseets “to many services provided to Indians by the United States of America, including health care through Indian Health Services, housing through the United States Department of Housing and Urban Development, and the ability to govern [their] own Tribal

<sup>171</sup> *Id.*

<sup>172</sup> *The Tribes*, FOUR DIRECTIONS, <http://www.fourdirectionsmaine.org/who-are-the-wabanaki/> [<https://perma.cc/9WTR-WDVR>] (last visited May 18, 2020); Bill Havigland, *Who Was Here First?*, ABBE MUSEUM, <https://www.abbemuseum.org/blog/2017/3/10/up-from-the-depths-a-stone-axe-and-sea-level-change?rq=abenaki> (last visited May 18, 2020) [<https://perma.cc/8XCA-2H2Z>]; *see also Abenaki Tribe*, <http://www.native-languages.org/abenaki.htm> [<https://perma.cc/9B69-DS5R>] (last visited May 18, 2020).

<sup>173</sup> *Introduction*, AROOSTOOK BAND OF MICMACS, <http://www.micmac-nsn.gov> [<https://perma.cc/49PU-WHVS>].

<sup>174</sup> *See* DAWNLAND, *supra* note 113.

<sup>175</sup> AROOSTOOK BAND OF MICMACS, *supra* note 173.

<sup>176</sup> *Id.*

<sup>177</sup> ABBE MUSEUM, *supra* note 170.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; *see also About Us*, HOULTON BAND OF MALISEET INDIANS, <http://www.maliseets.com/index.htm> [<https://perma.cc/U29D-W6EQ>] (last visited Mar. 5, 2020).

<sup>180</sup> ABBE MUSEUM, *supra* note 170.

<sup>181</sup> *Id.*

<sup>182</sup> HOULTON BAND OF MALISEET INDIANS, *supra* note 179.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

Affairs.”<sup>185</sup> As of today, the Houlton Band of Maliseet Indians is made up of approximately 1700 members and is led by a Tribal Chief.<sup>186</sup>

Second, the Micmacs, formally known as the Aroostook Band of Micmacs, received federal recognition in November of 1991<sup>187</sup> after “complex legal maneuvering and political lobbying” to the U.S. government.<sup>188</sup> The derivation of the name Micmac, originally mi’kmaq, is unknown.<sup>189</sup> However, it is believed to center in the concept of “the family,” “our kin-friends,” or “people of the red earth.”<sup>190</sup> As of February 2018, the Maine Micmacs were comprised of nearly 1500 members.<sup>191</sup> Historically, the Tribe “occupied the lands south and east of the Gulf of Saint Lawrence, the Maritime Provinces, and other regions along the Atlantic Seaboard of Northeastern America.”<sup>192</sup>

Next, the Penobscot, formally known as Penobscot Nation, have a reservation that stretches sixty miles across islands located on the Penobscot River; a majority of their members reside on Indian Island.<sup>193</sup> The name “Penobscot”, originally “Panawahskek,” means “the place of the white rocks,” or “where the rocks widen.”<sup>194</sup> To the Penobscot people the river represents “identity, spirituality, and livelihood.”<sup>195</sup> The Penobscot, along with the Passamaquoddy, were among the first Native Americans to have contact with Europeans.<sup>196</sup> In 1980, the Penobscot tribe was given official recognition.<sup>197</sup> As of 2019, the Penobscot have a membership count of 2365 people, a quarter of whom live on the reservation.<sup>198</sup>

The Passamaquoddy tribe is the largest tribe in Maine with a current total tribal enrollment of 3600 people,<sup>199</sup> and has two reservations in Washington County, one at Motahkokmikuk and one at Sipayik.<sup>200</sup> The name “Passamaquoddy derives from the word pestomuhkatyik, which literally means ‘people of the pollock-spearing

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> AROOSTOOK BAND OF MICMACS, *supra* note 173.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> AROOSTOOK BAND OF MICMACS, *supra* note 173.

<sup>192</sup> *Id.*

<sup>193</sup> *Penobscot Indian Fact Sheet*, ORRIN’S WEBSITE, [http://www.bigorin.org/penobscot\\_kids.htm](http://www.bigorin.org/penobscot_kids.htm) [<https://perma.cc/V9ZT-GTY6>] (last visited May 18, 2020).

<sup>194</sup> ABBE MUSEUM, *supra* note 170.

<sup>195</sup> *Penobscot*, [https://tadubois.com/US\\_indigenous/US\\_indigenous\\_subpage\\_penobscot.html](https://tadubois.com/US_indigenous/US_indigenous_subpage_penobscot.html) [<https://perma.cc/HYZ5-3NKG>] (last visited Mar. 5, 2020).

<sup>196</sup> *Culture & History*, PASSAMAQUODDY TRIBE AT INDIAN TOWNSHIP, [https://www.passamaquoddy.com/?page\\_id=24](https://www.passamaquoddy.com/?page_id=24) [<https://perma.cc/VV29-2HGS>] (last visited Mar. 5, 2020).

<sup>197</sup> *Maine Indian Claims Settlement*, MAINE STATE LEGISLATURE (July 2018), <https://legislature.maine.gov/legis/lawlib/lld/indianclaims/index.html> [<https://perma.cc/7VHH-T4RM>] [hereinafter *Maine Indian Claims Settlement*]; see also *Maine Indian Claims Settlement Act*, 30 M.R.S. §§ 6021-6024 (2018).

<sup>198</sup> FOUR DIRECTIONS, *supra* note 172.

<sup>199</sup> *Passamaquoddy History – A Brief Look Back*, PASSAMAQUODDY PEOPLE, <https://passamaquoddypeople.com/passamaquoddy-history> [<https://perma.cc/3C6D-RZVY>] (last visited Mar. 6, 2020).

<sup>200</sup> ABBE MUSEUM, *supra* note 172.

place.”<sup>201</sup> This name serves to recognize the value the tribe places on fishing, both as a source of food and as a major contributor to the tribe’s economy.<sup>202</sup> Although the two reservations each have local tribal governments, meaning they each have their own chiefs and council members, they often come together to make decisions as the Joint Tribal Council.<sup>203</sup> The Joint Tribal Council, recognized as the official governing body of the Passamaquoddy tribe by the United States government, “administers certain programs and activities such as Forestry, Historic Preservation, and Language Preservation.”<sup>204</sup> The Tribe was officially recognized in 1980, along with the Maliseet and Micmacs.<sup>205</sup> The Tribe owns more than 200,000 acres of land in the state, which it monitors and maintains, including the largest reservation in the state at Indian Township.<sup>206</sup>

Although originally natives of New England, the Abenaki tribe is officially recognized as a native tribe of Canada because the Tribe retreated there to avoid attacks, leading the British to label them as Canadian Indians.<sup>207</sup> The tribe’s blurred history, paired with a significant death toll of Wabanaki Indians, has posed challenges in the tribe’s quest for federal recognition by the United States.<sup>208</sup> Nevertheless, over 10,000 descendants of the Abenaki people now reside in New England.<sup>209</sup> The tribe is divided into three bands: “the Sokoki and Mazipskwik Abenakis of Vermont, and the Cowasucks of Massachusetts.”<sup>210</sup>

When Europeans invaded, seized, and settled the land of the Wabanaki people, the Wabanaki were “relegated to remote and isolated places” where they still remain today.<sup>211</sup> Currently, approximately 7800 members of the Wabanaki tribes in Maine reside in the most economically challenged counties in the country and maintain their reservations in the most northern and eastern areas of the state: Aroostook and

<sup>201</sup> *We Are the Passamaquoddy People*, PASSAMAQUODDY MAPLE, <https://www.passamaquoddy.com/pages/our-story> [<https://perma.cc/C32U-788H>] (last visited Apr. 10, 2020).

<sup>202</sup> *Id.*; see also *FOUR DIRECTIONS*, *supra* note 172.

<sup>203</sup> *Joint Tribal Council*, PASSAMAQUODDY AT SIPAYIK, [http://www.wabanaki.com/wabanaki\\_new/joint\\_council.html](http://www.wabanaki.com/wabanaki_new/joint_council.html) [<https://perma.cc/3DBG-3AUG>] (last visited Mar. 6, 2020).

<sup>204</sup> *Id.*

<sup>205</sup> *Maine Indian Claims Settlement*, *supra* note 197.

<sup>206</sup> *Culture & History*, PASSAMAQUODDY TRIBE AT INDIAN TOWNSHIP, [https://www.passamaquoddy.com/?page\\_id=24](https://www.passamaquoddy.com/?page_id=24) [<https://perma.cc/K3XD-Q7SX>] (last visited Mar. 6, 2020).

<sup>207</sup> *Abenaki Tribe*, *supra* note 172.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *FOUR DIRECTIONS*, *supra* note 172. The Maliseet Reservation is located in the town of Houlton, which is approximately three hours north of Augusta and over three hours and forty minutes north of Portland; the Passamaquoddy Reservation at Indian Township is three hours northeast of Augusta and approximately four hours northeast of Portland; the Passamaquoddy Reservation at Pleasant Point is located approximately three hours and twenty minutes northeast of Augusta and four hours northeast of Portland; the Micmac reservation in Presque Isle is three hours and forty-five minutes north of Augusta and four hours and thirty minutes north of Portland; the Penobscot reservation at Indian Island is located approximately one hour and thirty minutes from Augusta and two hours from Portland. See GOOGLE MAPS, <https://www.google.com/maps> [<https://perma.cc/9B9Q-X3V4>] (last visited Feb. 19, 2019).

Washington Counties.<sup>212</sup> Although the tribes have occupied the State of Maine for well over six hundred generations, their rights provided by both the state and federal governments are still developing.<sup>213</sup>

*The Establishment of the Maine Indian Claims Settlement Act of 1980*

“In the early 1970s, the Passamaquoddy tribe (“The Tribe”) declared their intent to claim approximately twelve million acres of Maine,” pursuant to a treaty made between the state and the Tribe.<sup>214</sup> In order to do so, “[t]he Tribe petitioned the Department of the Interior to act as their agent to enforce their claim against the State of Maine.”<sup>215</sup> The petition included a letter to the BIE, which detailed the following grievances the Tribe intended to file against Maine and its predecessor, Massachusetts.<sup>216</sup> The grievances read:

(1) that Maine had divested the Tribe of most of its aboriginal territory in a treaty negotiated in 1794; (2) that Maine had wrongfully diverted 6,000 of the 23,000 acres reserved to the Tribe in that treaty; (3) and that Maine had mismanaged tribal trust funds, interfered with tribal self-government, denied tribal hunting, fishing and trapping rights, and taken away the right of members to vote, from 1924 to 1967.<sup>217</sup>

The Secretary of the Interior denied the Tribe’s request and refused to initiate a lawsuit.<sup>218</sup> The denial was based upon the Secretary’s assertion that “no treaty exist[ed] between the United States and the Tribe and, except for isolated and inexplicable instances in the past, this Department, in its trust capacity, ha[d] no dealings with the Tribe.”<sup>219</sup> Essentially, the Interior Department’s contention was that no trust relationship existed and therefore the Tribe’s “proper legal remedy should be sought elsewhere.”<sup>220</sup>

Subsequently, the Tribe filed suit in the District Court of Maine against the Secretary of the Interior, the Attorney General of the United States, and the State of Maine to establish the existence of a legal “trust relationship” between the United States and the Tribe.<sup>221</sup> The term “trust relationship,” also known as a “guardian-ward relationship,”<sup>222</sup> was coined to identify the resulting relationship between the federal government and the Wabanaki tribes that were officially recognized.<sup>223</sup>

In addition to determining the existence of the trust relationship, the Court was

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<sup>212</sup> *Id.*

<sup>213</sup> The Abenaki do not have a reservation due to lack of federal recognition. *See* NULHEGAN ABENAKI TRIBE, <https://abenakitribe.org> (last visited Feb. 19, 2018).

<sup>214</sup> *Maine Indian Claims Settlement*, *supra* note 197; *see also* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 372 (1st Cir. 1975).

<sup>215</sup> *Maine Indian Claims Settlement*, *supra* note 197.

<sup>216</sup> *Id.*

<sup>217</sup> *Joint Tribal Council*, 528 F.2d at 372 (numerals added).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 372-73.

<sup>220</sup> *Id.* at 373.

<sup>221</sup> *Id.* at 372.

<sup>222</sup> *Id.* at 375.

<sup>223</sup> *Id.*

faced with deciding whether the Indian Nonintercourse Act<sup>224</sup> applied to the Passamaquoddy Tribe and, should no trust relationship be found to exist, whether the United States could properly deny the Tribe's request for litigation solely based upon that finding.<sup>225</sup> The District Court ruled in favor of the Tribe on all issues, granting a declaratory judgement.<sup>226</sup> This resulted in both the federal defendants and the State of Maine appealing.<sup>227</sup>

The United States Court of Appeals for the First Circuit affirmed the decision of the lower court, holding that the Nonintercourse Act imposed a duty upon the federal government based upon the "history, wording and structure of the Act."<sup>228</sup> The ultimate purpose of the Act was to "acknowledge and guarantee the Indian tribes' right of occupancy" and the court reasoned that "clearly there c[ould] be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances."<sup>229</sup>

After this decision, the United States Department of Justice worked to reach a settlement agreement between the Tribe and the State of Maine. Although this failed, and no agreement was reached, the State of Maine sent a proposed draft settlement agreement to Congress.<sup>230</sup> This proposal was eventually amended and became the basis for the Maine Indian Claims Settlement Act of 1980.<sup>231</sup> This legislation provided official recognition to the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians.<sup>232</sup>

The Act was signed by President Jimmy Carter on October 11, 1980, and provided an out-of-court settlement of \$81.5 million as reparation funds for land taken from the three tribes.<sup>233</sup> However, whether this was truly an "agreement" reached by the State and the Tribes is unclear based upon the fact that the original claim was for \$25 billion as well as 12.5 million acres of land.<sup>234</sup> Even so, at the time of signing President Carter stated, "I am pleased that a reasonable compromise has been reached which reflects the unique circumstances involved and avoids an extensive and damaging period of litigation."<sup>235</sup>

Although the money from the settlement enabled the Native tribes to purchase land and property,<sup>236</sup> there are still evident problems with the Settlement Act over

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<sup>224</sup> 25 U.S.C. § 177 (2018) ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").

<sup>225</sup> *Joint Tribal Council*, 528 F.2d at 373.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 379.

<sup>229</sup> *Id.*

<sup>230</sup> *Maine Indian Claims Settlement*, *supra* note 197.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> 1980: *Maine Indians Settle Land Claims Against U.S.*, NATIVE VOICES,

<https://www.nlm.nih.gov/nativevoices/timeline/550.html> [<https://perma.cc/L5K8-NMSL>] (last visited May 18, 2020).

<sup>234</sup> *Indian Land Claims*, MAINE: AN ENCYCLOPEDIA, <http://maineencyclopedia.com/indian-lands-claim/> [<https://perma.cc/KR2N-F95J>] (last visited May 18, 2020).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

forty years later.<sup>237</sup> The Wabanaki tribes have expressed frustration that Maine has “failed to respect their rights and jurisdiction, leaving the historic agreement fractured and broken.”<sup>238</sup>

### *Socioeconomic Demographics and State Funding*

In order to determine the number of American citizens living in poverty, the United States Census “uses a set of money income thresholds that vary by family size and composition.”<sup>239</sup> Essentially, “[i]f a family’s total income is less than the family’s threshold, then that family and every individual in it is considered in poverty.”<sup>240</sup> There are slightly over one million individuals residing in Maine.<sup>241</sup> Considering the total number of Maine residents, slightly under 150,000 are living in poverty, or in other terms, about eleven percent.<sup>242</sup> Yet, when this data is considered through the scope of race and ethnicity, it is evident that Maine Native Americans are the most impoverished group in the state with just over thirty-seven percent living at or below the poverty line.<sup>243</sup>

Therefore, in order to serve the Wabanaki people, maintain the trust relationship, and provide sufficient financial support, the Maine Legislature codified the Maine Indian Claims Act in Title 30 of the Maine Revised Statutes, which is still in effect today.<sup>244</sup> The provisions of the Act focus on the relationship between the State of Maine and three of the federally recognized tribes: Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Nation.<sup>245</sup> The Act entitles each tribe to “receive benefits from the State under any state program that provides financial assistance to all municipalities as a matter of right” and requires that the amount of “entitlement must be determined using statutory criteria and formulas generally applicable to municipalities in the State.”<sup>246</sup>

One aspect of the Act that makes Maine’s educational funding unique is that the State grants each tribe state funds for education in addition to the federal funds provided for the same purpose.<sup>247</sup> However, the amount of educational funds provided by the State is limited to fifteen percent of the amount of federal funds for school operations.<sup>248</sup> This has historically resulted in per pupil funding for Native

<sup>237</sup> Kevin Miller, *Maine Tribes Use Report on 1980 Claims Settlement to Make Case on Sovereignty*, PORTLAND PRESS HERALD (Mar. 3, 2017), <https://www.pressherald.com/2017/03/02/tribal-state-relations-are-fractured-and-broken-over-sovereignty-issues/> [<https://perma.cc/UYX6-B2HY>].

<sup>238</sup> *Id.*

<sup>239</sup> *How the Census Bureau Measures Poverty*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html> [<https://perma.cc/RL8H-5Y6F>] (last visited Feb. 10, 2019).

<sup>240</sup> *Id.*

<sup>241</sup> Ctr. for Am. Progress, *Maine 2018*, TALK POVERTY, <https://talkpoverty.org/state-year-report/maine-2018-report/> [<https://perma.cc/ZKL3-RR37>] (last visited Mar. 4, 2020).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> See 30 M.R.S.A § 6202 (2018).

<sup>245</sup> See *id.*

<sup>246</sup> *Id.* § 6211(1).

<sup>247</sup> See *id.* § 6211(2).

<sup>248</sup> *Id.*

Maine students to be greater than the average state expenditure per student.<sup>249</sup> Even so, educational achievement discrepancies persist.

*Maine's BIE Schools: Maine Indian Education*

A “tribal school” is legally defined as, “[a] school or community college which is controlled by an Indian tribe, band, or nation. It is eligible for special funding by the U.S. government, administered by the BIE.”<sup>250</sup> The State of Maine has three K-8 tribal schools that receive funding from the BIE: (1) Beatrice Rafferty Elementary at Pleasant Point, (2) Indian Island School, and (3) Indian Township School.<sup>251</sup> Together, the three schools comprise Maine’s tribal school district, which is known as “Maine Indian Education,” (“MIE”) and function under one superintendent, currently Linda McLeod.<sup>252</sup> Each school has its own principal and school board.<sup>253</sup> “In addition to BIE funding for the K-8 programs, each of these schools receives Federal Impact Aid, Title VII Indian Education funds, Special Education and Title I funds from the BIE . . . 21<sup>st</sup> Century Community Learning Center grants,” as well as State of Maine Essential Programs and Services Funding (“EPS”).<sup>254</sup>

Beatrice Rafferty Elementary School is located in Perry, Maine on the Passamaquoddy’s Pleasant Point reservation.<sup>255</sup> The school’s mission is to “prepare all students to become lifelong learners in a safe environment with high expectations so that they will become responsible, productive citizens in an ever-changing society.”<sup>256</sup> On average, Beatrice Rafferty School enrolls and educates about one hundred Native American students each year.<sup>257</sup> Looking back to the 2015-2016 school year, the most recent annual school report card shared by the BIE, seventy-three students in grades three through eight participated in Maine’s annual state testing referred to as the Maine Comprehensive Assessment System (MeCAS)<sup>258</sup> using the online assessment program known as eMPowerMe.<sup>259</sup> Notably, all of the students who participated in the assessment identified as economically

<sup>249</sup> RAFA, *supra* note 1, at 6 (“In the 2013 school year, the state’s three tribal schools received between \$27,706-\$34,744 in total state funding per pupil. This compares to the state average expenditure per student in fiscal year 2013 of more than \$12,000.”); *see also id.*

<sup>250</sup> U.S. LEGAL, <https://definitions.uslegal.com> [<https://perma.cc/NZ5U-CBAR>] (last visited Feb. 16, 2019).

<sup>251</sup> Picus et al., *supra* note 133, at 63.

<sup>252</sup> *Id.*; *see also Staff*, BEATRICE RAFFERTY ELEMENTARY SCH., <http://www.beatricerafferty.com/staff.php> (last visited Mar 5, 2020) [<https://perma.cc/XQ45-38MC>].

<sup>253</sup> Picus et al., *supra* note 133, at 63.

<sup>254</sup> *Id.*

<sup>255</sup> *Home*, BEATRICE RAFFERTY ELEMENTARY SCH., <http://www.beatricerafferty.com/index.php> [<https://perma.cc/F5QL-HWDA>] (last visited Mar. 5, 2020).

<sup>256</sup> *Id.*

<sup>257</sup> *See, e.g., PICUS ET AL., supra* note 133, at 63.

<sup>258</sup> *Maine Comprehensive Assessment System (MECAS)*, ME DEP’T OF EDUC., [https://www.maine.gov/doe/Testing\\_Accountability/MECAS](https://www.maine.gov/doe/Testing_Accountability/MECAS) [<https://perma.cc/N7E5-5FL7>] (last visited Mar. 5, 2020).

<sup>259</sup> *eMPowerMe*, ME DEP’T OF EDUC., [https://www.maine.gov/doe/Testing\\_Accountability/MECAS/materials/empowerme](https://www.maine.gov/doe/Testing_Accountability/MECAS/materials/empowerme) [<https://perma.cc/W89N-YAS5>] (last visited Mar. 5, 2020).

disadvantaged.<sup>260</sup>

The results demonstrated that twenty-six percent were proficient in English/Language Arts, meaning that seventy-four percent performed below or well below grade level expectations.<sup>261</sup> The Mathematics results mirrored that of the proficiency results in English/Language Arts,<sup>262</sup> meaning that overall, almost three fourths of the students attending Beatrice Rafferty were not meeting grade level standards and thus were trailing behind their Maine peers.<sup>263</sup>

Similar to Beatrice Rafferty, the annual assessment results from Indian Island School also demonstrate that a majority of students are not meeting grade level expectations.<sup>264</sup> Of the forty-four third through eighth graders who participated in the annual assessment in 2015-2016, only thirty-four percent were proficient in English/Language Arts and thirty-three percent were proficient in Mathematics, meaning almost seventy percent of the school was underperforming.<sup>265</sup> Additionally, every student that participated in annual testing were also identified as being “economically disadvantaged.”<sup>266</sup> Although the assessment scores were low, the school and surrounding community are together committed to providing their children a “quality education through home, school, and community partnership.”<sup>267</sup> The school’s mission statement is simple and speaks for itself. It reads, “Indian Island School is committed to quality education through home, school, and community partnerships that will empower everyone with skills to be a life-long learner.”<sup>268</sup>

Lastly, Indian Township School, located on the other Passamaquoddy Reservation, aims to create a school culture that “provide[s] and foster[s] a culturally integrated education,” “create[s] a desire for learning in each student,” and “produce[s] healthy, responsible, productive citizens.”<sup>269</sup> With that said, the 2015-2016 assessment results align with their tribal school counterparts. A total of seventy-eight students participated in the assessment, all of whom were identified as

<sup>260</sup> ANNUAL SCHOOL REPORT CARD: BEATRICE RAFFERTY SCHOOL, U.S. BUREAU OF INDIAN EDUCATION, 1 (2016), <https://bie.edu/cs/groups/xbie/documents/text/idc2-074404.pdf> [<https://perma.cc/69MT-U6FQ>].

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 2.

<sup>263</sup> See *Test Results: Assessment Results-Public*, ME DEP’T OF EDUC.,

[https://www.maine.gov/doe/Testing\\_Accountability/MECAS/results/assessmentdashboard](https://www.maine.gov/doe/Testing_Accountability/MECAS/results/assessmentdashboard) [<https://perma.cc/W63U-8DDM>] (last visited Feb. 11, 2019) (identifying about fifty percent of Maine students in grades three through five as at or above grade level expectation as of 2017-2018); see also

*Maine Overview*, THE NATION’S REPORT CARD,

[https://www.nationsreportcard.gov/profiles/stateprofile/overview/ME?cti=PgTab\\_OT&chort=1&sub=MAT&sj=ME&fs=Grade&st=MN&year=2017R3&sg=Gender%3A+Male+vs.+Female&sgv=Difference&ts=Single+Year&tss=2015R3-2017R3&sfj=NP](https://www.nationsreportcard.gov/profiles/stateprofile/overview/ME?cti=PgTab_OT&chort=1&sub=MAT&sj=ME&fs=Grade&st=MN&year=2017R3&sg=Gender%3A+Male+vs.+Female&sgv=Difference&ts=Single+Year&tss=2015R3-2017R3&sfj=NP) [<https://perma.cc/A28S-BZAU>] (last visited Feb. 11, 2019).

<sup>264</sup> ANNUAL SCHOOL REPORT CARD: INDIAN ISLAND SCHOOL, U.S. BUREAU OF INDIAN EDUC., 1, 1 (2016), <https://bie.edu/cs/groups/xbie/documents/text/idc2-074443.pdf> [<https://perma.cc/2EWP-A4R9>].

<sup>265</sup> *Id.* at 1-2.

<sup>266</sup> *Id.*

<sup>267</sup> INDIAN ISLAND SCHOOL, <https://iis.bie.edu> [<https://perma.cc/2JEY-J7P3>] (last visited Feb. 11, 2019).

<sup>268</sup> *Id.*

<sup>269</sup> INDIAN TOWNSHIP SCHOOL, <http://www.indiantownshipschool.org> [<https://perma.cc/LZ9E-U3T5>] (last visited Feb. 11, 2019).

economically disadvantaged.<sup>270</sup> Seventeen percent of these students performed at or above grade level in English/Language Arts and nineteen percent in Mathematics, meaning that nearly eighty percent of the student population was performing below grade level expectation.<sup>271</sup>

Test scores aside, tribal schools have been identified as providing their students with “more protective factors,” that help to prevent negative responses such as stress, anger, and withdrawal that are linked to experiencing discrimination in an educational setting.<sup>272</sup> Additionally, Maine’s tribal schools are able to provide instruction that supports and promotes Wabanaki culture and its historical background.<sup>273</sup> Superintendent Linda McLeod, former principal of Indian Island School, describes, “being a Native American school means having the unique task of including lessons about the tribe’s heritage, cultural values, and language in the curriculum.”<sup>274</sup> The schools actively “talk about the native studies, the history of where the Wabanaki people began . . . [and] do the traditional dancing and singing in school every month.”<sup>275</sup> Overall, students and teachers alike value the close-knit environment at the school as well as the community involvement it generates.<sup>276</sup>

Research also shows that “many students who perform well in reservation elementary schools later perform poorly in mainstream secondary schools.”<sup>277</sup> Thus, it is important to note that Maine’s tribal schools only serve children grades K-8, and once students graduate they attend Maine public high schools.<sup>278</sup> As these students leave eighth grade and move on to high school, their education is no longer funded by the BIE, but rather fully-funded by EPS through a voucher program managed by MIE.<sup>279</sup>

In this respect, Superintendent McLeod admits that her biggest challenge is getting students from eighth grade to high school.<sup>280</sup> Often times, these tribal schools have eighth grade classes of fewer than ten students.<sup>281</sup> These groups of eighth graders move to high schools such as “Orono or Old Town or to John Bapst Memorial High School, which is a private school in Bangor. Old Town has almost

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<sup>270</sup> ANNUAL SCHOOL REPORT CARD: INDIAN TOWNSHIP SCHOOL, U.S. BUREAU OF INDIAN EDUC. 1 (2016), <https://bie.edu/cs/groups/xbie/documents/text/idc2-074444.pdf> [<https://perma.cc/LZ9E-U3T5>].

<sup>271</sup> *Id.* at 2.

<sup>272</sup> Crawford et al., *supra* note 8, at 2-3.

<sup>273</sup> *See id.* at 2 (“Tribal schools tend to emphasize traditional language in classes and throughout the school such as in names for classrooms and subjects. Many schools also incorporate traditional ceremonies into daily or weekly curriculum and engage elders in story-telling while teaching language classes, history, and traditional activities. The staff and administration working in predominately Indigenous institutions are apt to be more sensitive and attuned to Indigenous cultural issues, programming materials, and relevant activities argue that this contributes to more significant and repeated opportunities for students to explore their Indigenous identity.”). *Id.*

<sup>274</sup> *Indian Island School Principal Reflects on Native School’s Goals, Challenges*, EDUC. WORLD, [https://www.educationworld.com/a\\_issues/schools/schools007.shtml](https://www.educationworld.com/a_issues/schools/schools007.shtml) [<https://perma.cc/4R5L-DSJE>] (last visited Feb. 18, 2019).

<sup>275</sup> *Id.*

<sup>276</sup> *See id.*

<sup>277</sup> Crawford et al., *supra* note 8, at 3.

<sup>278</sup> PICUS, ET AL., *supra* note 133, at 63.

<sup>279</sup> *Id.*

<sup>280</sup> *Indian Island Principal Reflects*, *supra* note 274.

<sup>281</sup> *See id.*

800 students, and Orono probably has 300 to 400 [students].”<sup>282</sup> McLeod despaired, “when they go to Old Town High School, they are lost.”<sup>283</sup>

*Comparing Statistical Success: Tribal Schools v. State-Funded Public Schools*

In 2007, the National Caucus of Native American State Legislators commissioned a study on the academic performance of American Indian, Alaska Native, and Native Hawaiian students.<sup>284</sup> Painting a snapshot of the report, the first sentence reads: “The state of education in our nation’s K-12 schools for Native American students is distressing.”<sup>285</sup> The report identifies that Native American students, generally, are “237 percent more likely to drop out of school and 207 percent more likely to be expelled than white students.”<sup>286</sup> The report goes on to state that “[f]or every 100 American Indian/Alaska Native kindergarteners, only seven will earn a bachelor’s degree, compared to 34 of every 100 white kindergarteners.”<sup>287</sup>

Recent data continues to prove that Native American students’ graduation rates consistently remain behind other racial or ethnic groups, coming in at the lowest of any racial or ethnic group with less than seventy-two percent graduating from high school.<sup>288</sup> In comparison, the situation for “Native students attending Bureau of Indian Education . . . schools is much worse with an average rate of 53 percent.”<sup>289</sup> With that said, as of November 2016, only eight percent of Native students elected to attend federally-funded tribal schools nationwide, meaning that the remaining ninety-two percent attended their local public school.<sup>290</sup>

Looking to Maine specifically, the State reported that in 2017 approximately seventy-one percent of its American Indian students graduated from high school, a number that aligns with the national statistic of graduation rates for Native Americans.<sup>291</sup> This percentage is low in comparison to the average graduation rate

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> NAT’L CAUCUS OF NATIVE AM. ST LEGISLATORS, STRIVING TO ACHIEVE: HELPING NATIVE AMERICAN STUDENTS SUCCEED 3 (2008), <http://www.ncsl.org/Portals/1/documents/statetribe/strivingtoachieve.pdf> [<https://perma.cc/F48H-TBA3>].

<sup>285</sup> *Id.* at 5.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> See *Public High School Graduation Rates*, NAT’L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/coe/indicator\\_coi.asp](https://nces.ed.gov/programs/coe/indicator_coi.asp) [<https://perma.cc/G7RR-B7WP>] (last updated May 2019) (presenting graduation rates of Asian/Pacific Islander students at 91%, White students at 89%, Hispanic students at 80%, and Black students at 78%); see also *Bureau of Indian Education Reorganization: Synopsis of the Reprograming*, BUREAU OF INDIAN EDUC., <https://bie.edu/BFRI/index.htm> [<https://perma.cc/NT5M-ZX9E>] (last visited Mar. 15, 2020) (comparing high school graduation statistic of Native Americans to the national average of 81%).

<sup>289</sup> *Bureau of Indian Education Reorganization*, *supra* note 288.

<sup>290</sup> *Id.*; see also RAFA, *supra* note 1, at 1.

<sup>291</sup> *Graduation Rates & Drop Out Rates*, ME. DEPT. OF EDUC., <https://www.maine.gov/doe/sites/maine.gov.do/files/inline-files/gradrate1617.xlsx> [<https://perma.cc/3MM9-EK43>] (last visited Mar. 15, 2020). Interestingly, the graduation rate for Maine’s Native American students is significantly lower compared to years prior. Data indicates an approximate graduation rate of 82% in 2015 and 85% in 2016. *Id.*

of the schools as a whole.<sup>292</sup> It should go without saying that the Native American population is not underachieving simply because of their ethnicity or culture. Undoubtedly, the identifiable achievement-gap between Native Americans and their white counterparts is due to extrinsic factors such as location, poverty, and access to educational opportunities—barriers built upon foundations of deep-seeded racism and continued reliance on old, unfair treaties that are still treated as good law. In sum, the statistics alone demonstrate the great need for education reform for the benefit of Maine’s Native Americans.

### *Higher Education*

American Indians and Alaska Natives comprise only one percent of the United States’ undergraduate population and less than one percent of the graduate population.<sup>293</sup> Because of the low percentage of Native students in higher education, “these students are often left out of postsecondary research and data reporting due to small sample size.”<sup>294</sup> However, as aforementioned, the data that is available “indicates that only 10% of Native Americans attain bachelor’s degrees and only 17% attain associate’s degrees . . . .”<sup>295</sup>

Likely contributing to these statistics is the fact that a majority of Native American students have notable disadvantages working against them at the very beginning of the college admissions process. One of the challenges stems from the high poverty levels many Native Americans experience, which results in many being “more likely to need and receive federal financial assistance than White students.”<sup>296</sup> For example, in “2011-12, 85% of Native American students received some type of federal grant aid, compared with 69% of white students. [Additionally,] 62% of Native American students take out some kind of federal student loan, compared to 56% of white students.”<sup>297</sup> Even more discouraging is the fact that “Native American students are less likely to be prepared for college as they are more likely to attend high schools that offer little or no access to Advanced Placement or college prep courses.”<sup>298</sup> Lastly, they are “less likely to have family that have attended college.”<sup>299</sup>

For those Native students that do end up attending a college, research shows that “Native American students are more likely to attend public versus private institutions of higher education” and their completion rates are “below those of their white counterparts.”<sup>300</sup> For instance, “23% of first-time, full-time Native American

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<sup>292</sup> Data from 2013 shows the total student-body graduation rate of Calais School Department as 95.4%; Eastport School Department as 80%; Regional School Unit 34 as 86.7%; Regional School Unit 26 as 90.2%; John Bapst Memorial High School at 98%; and Lee Academy as 80.5%. *Maine High School Graduation Rates*, PORTLAND PRESS HERALD,

[https://www.pressherald.com/interactive/does\\_your\\_towns\\_high\\_school\\_have\\_a\\_good\\_graduation\\_rate\\_compare\\_maine\\_high\\_schools/](https://www.pressherald.com/interactive/does_your_towns_high_school_have_a_good_graduation_rate_compare_maine_high_schools/) [https://perma.cc/G2AD-VGJ6] (last visited Mar. 15, 2020).

<sup>293</sup> Factsheets: Native American Students, *supra* note 163.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

students attending four-year institutions beginning in 2008 graduated within four years, compared to nearly 44% for white students [,]” and “41% of Native American bachelor’s degree-seeking students graduated within six years, compared to nearly 63% of white students.”<sup>301</sup> Considering this data altogether, it is evident that the creation of “a system that is more responsive to the specific needs of these students” must become a priority for both federal and state governments and agencies alike.<sup>302</sup>

In order to address these discrepancies in college success, some programs have been created to support Native American students beginning their college careers. For example, College Horizons, a small non-profit organization based in New Mexico, developed their organization to help Native American teenagers realize that although the hurdles they face, both in and out of school, may be daunting, they are not insurmountable.<sup>303</sup> The organization was “founded on the premise that bright and talented Native American high school students do not receive quality college-counseling and academic advising.”<sup>304</sup>

Due to the low quality college counseling and academic advising provided to Native American students, the hands-on organization supports students across the nation by providing college and graduate admissions workshops.<sup>305</sup> These individualized programs help “students select colleges suitable for them to apply to, get admitted to, and receive adequate financial aid.”<sup>306</sup> Students are guided through researching their top ten schools, drafting their college essays, developing resumes, completing the Common Application, and the FAFSA.<sup>307</sup> Students are also provided interviewing skills and test-taking strategies.<sup>308</sup> As a result of their efforts, College Horizons has seen ninety-nine percent of the 2800 students they served be admitted to college.<sup>309</sup> Additionally, ninety-five percent of these students “matriculate onto a four-year institution” and eighty-five percent “graduated college in four-to-five years.”<sup>310</sup>

Similarly, in Denver, Colorado, the American Indian College Fund has nearly thirty years of success working to help “Native people meet their full potential by helping them access a higher education.”<sup>311</sup> Identifying that “financial support is not enough,” the Fund provides them with “tools, programs, and support they need to

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *How Native American Students Can Succeed in College: ‘Be as Tough as the Land that Made You’*, NPR (Sept. 26, 2016), <https://www.npr.org/sections/ed/2016/09/26/493112553/how-native-students-can-succeed-in-college-be-as-tough-as-the-land-that-made-you> [<https://perma.cc/J5VC-WZ85>]; *see also About Our Organization*, COLLEGE HORIZONS, <http://www.collegehorizons.org/about> [<https://perma.cc/9KFK-C6ZM>] (last visited Mar. 6, 2020) (“The Native American high school graduation rate is 51%. Of those, approximately 5% proceed directly to four-year colleges and only 10% of those students graduate in four years. Of American Indians living on reservations, only half are as likely as white students to persist and obtain a bachelor’s degree.”).

<sup>304</sup> COLLEGE HORIZONS, *supra* note 303.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Meet Our Team*, AM. INDIAN C. FUND, <https://collegefund.org/about-us/team/> [<https://perma.cc/5KYQ-EYZU>] (last visited Apr. 10, 2020).

succeed and graduate.”<sup>312</sup> The program offers four specific “pathways”<sup>313</sup> including: (1) High School Admissions Pathway, which supports high school students to “realize the importance and benefits of attending college” and aims to make the process more accessible and easier to navigate;<sup>314</sup> (2) College Bridge Pathway, which works with sophomores, juniors, and senior Native students to prepare them for college academically and socially;<sup>315</sup> (3) Tribal College Transfer Pathway, which helps students transfer into four-year college programs;<sup>316</sup> and (4) First-Year College Experience Pathway, which works to promote success by building academic habits through individualized coaching and support.<sup>317</sup>

On a smaller scale, Maine Native American students are provided similar support and opportunities. For instance, the University of Maine provides Wabanaki students with a “Tuition Waiver Program [that] pays all tuition and mandatory University fees for eligible students,” including regular credit-bearing courses at the graduate or undergraduate level and mandatory campus fees.<sup>318</sup> Students may also qualify for a room and board grant for on-campus living depending upon financial need.<sup>319</sup> In order to qualify for the waiver programs, student must complete an application, provide original tribal membership documentation, and a birth certificate if the applicant is not enrolled as a tribal member.<sup>320</sup>

Turning to the private sphere, the smaller liberal arts colleges in Maine worked to take a more hands-on approach. In 2015, Bowdoin College in Brunswick, Maine hosted the annual College Horizons summer workshop and welcomed Native American students from all across the United States.<sup>321</sup> However, there was no specific data provided on how many of the students in attendance were Wabanaki Indians.<sup>322</sup> In addition to this, an innovative educational partnership was formed between the Wabanaki, Bates College, Bowdoin College, and Colby College in order to “increase the number of Indian students attending colleges while expanding knowledge and understanding about Maine’s indigenous people in the college communities.”<sup>323</sup> The initiative was led by Paul Bisulca, the Penobscot chairman of the Maine Indian Tribal State Commission, who “was looking for more educational

<sup>312</sup> *Id.*

<sup>313</sup> *Native Pathways to College*, AM. INDIAN C. FUND, <https://collegefund.org/student-resources/native-pathways-to-college/> [<https://perma.cc/KVA5-LF9F>] (last visited Apr. 10, 2020).

<sup>314</sup> *High School Students*, AM. INDIAN C. FUND, <https://collegefund.org/students/preparing-for-college/high-school-students/> [<https://perma.cc/U2KF-YWLJ>] (last visited Apr. 10, 2020).

<sup>315</sup> *Preparing for College*, AM. INDIAN C. FUND, <https://collegefund.org/students/preparing-for-college/> [<https://perma.cc/9STA-SJNQ>] (last visited Apr. 10, 2020).

<sup>316</sup> See *Native Pathways to College*, *supra* note 313.

<sup>317</sup> *Id.*

<sup>318</sup> *Waiver Program*, U. ME., <https://umaine.edu/nativeamericanprograms/wabanaki-center/waiver-program/> [<https://perma.cc/4MW2-G4N5>] (last visited Mar. 6, 2020).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> Doug Cook, *Bowdoin Hosts Annual College Workshop for Native Americans June 19-26*, BOWDOIN (May 15, 2015), <http://community.bowdoin.edu/news/2015/05/bowdoin-hosts-annual-college-workshop-for-native-americans-june-19-26/> [<https://perma.cc/W6PG-4ESA>].

<sup>322</sup> See *id.*

<sup>323</sup> Gale Courey Toensing, *Wabanaki Bates-Bowdoin-Colby Collaborative*, INDIAN COUNTRY TODAY (Oct. 19, 2009), [https://newsmaven.io/indiancountrytoday/archive/wabanaki-bates-bowdoin-colby-collaborative-oQFU2\\_PIWEa04VXXaCZzRw/](https://newsmaven.io/indiancountrytoday/archive/wabanaki-bates-bowdoin-colby-collaborative-oQFU2_PIWEa04VXXaCZzRw/) [<https://perma.cc/HRK7-ZGT7>].

opportunities for Wabanaki students.”<sup>324</sup> As a result of his determination, the collaboration officially began “in May 2007 when the college presidents held a historic meeting with Wabanaki leaders.”<sup>325</sup>

The collaboration led to the development of a three-pronged approach they would use in order to recruit more Wabanaki students.<sup>326</sup> The first prong was the development of the Early College Awareness Program, which involved students from Bates, Bowdoin, and Colby participating in an intensive training session with tribal leaders before visiting Indian students in fourth grade through eighth grade in their classrooms and communities.<sup>327</sup> The purpose of this prong was to introduce these young learners to the idea that “college is a good thing.”<sup>328</sup> The second prong “brings Wabanaki high school students and their counselors for overnight visits and a day of campus tours, workshops on the application process, academic offerings, campus activities and college life.”<sup>329</sup> Lastly, the third prong “aims at improving the campus climate at the colleges to support Native cultural and academic activities and increase awareness and understanding of Wabanaki history and contemporary issues in the college communities.”<sup>330</sup>

Even with their efforts, these elite private colleges still do not see many Wabanaki students on their campuses. The fact that these schools can only provide students with need-based financial assistance, rather than an out-right waiver program, likely contributes to this.<sup>331</sup> As of the 2017-2018 school year, Bates College had a student population of 1622. Out of the total number of students, only two students, or 0.1% of the student body population, identified as “American Indian or Alaska Native, non-Hispanic.”<sup>332</sup> Bowdoin College, its campus made up of a student body of 1816, identified a total of five students as “American Indian Or Alaska Native, non-Hispanic” for the 2017-2018 school year.<sup>333</sup> Lastly, Colby College reported that out of the 1917 students, that “0%” of the student body identified as American Indian or Alaska Native, non-Hispanic students.<sup>334</sup>

Thus, although efforts have been made in Maine to have a more hands-on approach to promoting higher education and supporting academic pursuits, the most utilized program has been the Native American Waiver Programs offered by the

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<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> OFFICE OF INSTITUTIONAL RESEARCH, ANALYSIS, & PLANNING, BATES FACTS 2017-2018 INSTITUTIONAL PROFILE, BATES 15 (2018),

[https://www.bates.edu/research/files/2010/04/bates.facts\\_1718.pdf](https://www.bates.edu/research/files/2010/04/bates.facts_1718.pdf) [<https://perma.cc/JQ8L-YXVC>].

<sup>333</sup> INSTITUTIONAL RESEARCH, ANALYSIS, & PLANNING, *Common Data Set 2017-2018*, BOWDOIN, <https://www.bowdoin.edu/ir/common-data/index.html> [<https://perma.cc/H4R3-6VL7>] (last visited Feb. 23, 2019).

<sup>334</sup> *Colby College*, NATIONAL CENTER FOR EDUCATION STATISTICS

<https://nces.ed.gov/collegenavigator/?q=colby&s=all&id=161086#enrolmt> [<https://perma.cc/MMY6-FXD8>] (last visited, Feb. 23, 2019).

University of Maine school system.<sup>335</sup> The purpose of this programs is to encourage Native American students to participate in public higher education in Maine.”<sup>336</sup> Although the cost for education is waived for Wabanaki students interested in pursuing an undergraduate or graduate degree, the University of Maine at Orono reported that of their 11,240 students, only 0.9% of the student population identified as American Indian or Alaska Native.<sup>337</sup> Perhaps these statistics reflect the aforementioned concept that “financial support is not enough,”<sup>338</sup> and thus, more must be done in order to create, support, and sustain a pathway to higher education for Maine’s Wabanaki Indians.

## VI. POTENTIAL POLICY SOLUTIONS

Considering the identifiable value of a culturally based education, the “key to maintaining the presence of culture in public school”<sup>339</sup> moving forward will be essential. Programs such as, “Native language immersion; teaching Native customs, history and legal obligations to all students; and professional development supporting cultural sensitivity for teachers and administrators”<sup>340</sup> are necessary to preserve Native American culture in school curriculum. With that said, the BIE recognizes that the current programming offered to students is failing; the schools are failing, the infrastructures are crumbling, and the shortage of teachers and principals make the situation that much more urgent.<sup>341</sup>

Yet, the BIE’s future “blueprints” seems lackluster in light of the urgent need for drastic improvement. The Bureau’s reorganization and reprogramming focuses on effecting real change by modernizing to become a “school improvement organization rather than a direct operator of schools.”<sup>342</sup> So, although the BIE recognizes the deficiencies in their education programming, the goal of “clarifying roles and responsibilities”<sup>343</sup> seems to fall short when considering the serious academic jeopardy of Native American youths.

These proposed federal changes will not suffice to make the improvement needed for Maine’s Wabanaki students. Therefore, it will be the responsibility of state legislators and tribal leaders to work together to create an education that both promotes student achievement and creates lifelong learners. Creating lifelong learners is the first step in normalizing the success of Native Americans and engraining in youths the idea that they can be successful. For instance, research indicates that “[m]inority students often perform better on standardized tests, have improved attendance, and are suspended less frequently (which may suggest either different degrees of behavior or different treatment, or both) when they have at least

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<sup>335</sup> *Tuition Waivers*, MAINE’S PUBLIC UNIVERSITIES, <http://www.maine.edu/admissions-aid/scholarships/tuition-waivers/> [<https://perma.cc/3BN3-9YJW>] (last visited Jan. 31, 2020).

<sup>336</sup> *Id.*

<sup>337</sup> *University of Maine*, FORBES, <https://www.forbes.com/colleges/university-of-maine/> [<https://perma.cc/GC6U-9W2D>] (last visited Jan. 31, 2020).

<sup>338</sup> *Native Pathways to College*, *supra* note 313.

<sup>339</sup> See NAT’L CAUCUS OF NATIVE AM. STATE LEGISLATURES, *supra* note 284, at 3.

<sup>340</sup> *Id.*

<sup>341</sup> *Bureau of Indian Education Reorganization*, *supra* note 288.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

one same-race teacher.”<sup>344</sup> In other words, it would be highly impactful for Native children to see more Native Americans in professional roles. Therefore, in order to improve Wabanaki education, increase graduation rates, and increase the number of Wabanaki students striving for higher education opportunities, the following solutions are suggested.

*Make BIE Schools Accessible to all Wabanaki Children, Regardless of Tribe or Age.*

Generally speaking, the Maine Wabanaki value the BIE schools that comprise the Maine Indian Education School District. The cultural component to these schools is critical for preserving the rich and unique culture of Maine Indians. Additionally, considering that the Maine tribes were essentially stripped of both their land and culture, these schools provide the tribes with the long-deserved right and authority to decide how to educate their children. Therefore, the priority should be not only preserving the BIE schools but improving them both in quality and quantity.

First and foremost, the quality of education provided to Native American learners is insufficient and must be remedied. The State should provide incentives to educators, especially Native American educators, to motivate them to teach within the Maine Indian Education district. For instance, the State should offer higher salaries for educators in this area or could provide desirable teacher contracts with unique pension benefits.<sup>345</sup> Alternatively, the State should provide more regular and accessible professional development opportunities for current educators in the district to ensure that students receive high-quality instruction.

As far as quantity goes, the three BIE K-8 schools are specific to certain reservations and therefore currently only serve the Passamaquoddy and Penobscot children.<sup>346</sup> Therefore, in order for the State of Maine to ensure that all Native American students are receiving equal educational opportunities and promote academic success, the State must demand the establishment of BIE tribal schools for each tribal community. Furthermore, these schools only provide education through eighth grade which results in a challenging transition from receiving a culturally-based education within the community to attending a large public high school. This undoubtedly contributes to students’ lack of success in high school and could also account for the lower graduation rate.

Because of the low graduation rates, the State should consider how to better serve its Native American high school students. For instance, there are BIE boarding schools that provide dormitories for their students. This format could provide a

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<sup>344</sup> David Figlio, *The Importance of a Diverse Teaching Force*, BROOKINGS (Nov. 16, 2017), <https://www.brookings.edu/research/the-importance-of-a-diverse-teaching-force/> [<https://perma.cc/HPJ3-9FDX>].

<sup>345</sup> Up until 2006, the State of Alaska provided desirable pension packages to motivate educators to move to the State. Individuals who taught for twenty years in the state could retire and receive full retirement benefits. See *Teacher’s Retirement System*, ALASKA DEP’T OF ADMIN, <http://doa.alaska.gov/drb/pdf/trs/trs-application-instructions.pdf> [<https://perma.cc/S45B-7XYU>] (last visited Feb. 27, 2020).

<sup>346</sup> Interview with Brian Reynolds, Tribal Administrator, Houlton Band of Maliseet Indians, in Portland, Me. (Feb. 20, 2019) (explaining further that the “State of Maine only considers Passamaquoddy and Penobscot land “tribal” for the purpose of Maine Indian Education per the settlement Act”).

solution for providing all Maine Native students with a high school education considering that the reservations are geographically far apart from one another and thus a daily commute to one unified tribal high school would be impractical.

*Eliminate BIE Schools and Put Federal and State Funds Towards Mandating, Funding, and Improving LD 291: Wabanaki Education in all of Maine's Public Schools.*

In 2001, the State of Maine identified a need to incorporate the study of Wabanaki culture in all Maine classrooms.<sup>347</sup> At the First Regular Session of the 120th Legislature, Legislative Document (LD) 291 was proposed to be enacted as public law.<sup>348</sup> The purpose of LD 291<sup>349</sup> was to mandate the instruction of Wabanaki studies in all Maine schools: elementary and secondary, public and private.<sup>350</sup> The legislature heard proponent testimony from educators and students alike.<sup>351</sup> The common theme found in each individual's testimony was the belief that providing academic instruction on Maine's Wabanaki culture would provide students with a better appreciation for the tribes, reducing bias and racism and thus strengthening the future relationship between Native and Non-Native Mainers.<sup>352</sup>

For example, Mary Griffith, a middle school science teacher in Lisbon Falls who also served as the program director for the Wabanaki Program of the American Friends Service Committee between 1978-1989, expressed her belief that "including information about Wabanaki people in school curriculum in primary and secondary schools . . . can [ ] result in building respect among people from different communities and backgrounds."<sup>353</sup> Similarly, a Maine student, Abby Wright, advocated that the bill should be passed because educating young adults "about the culture and history of Native people . . . would limit discrimination, bias, and misconceptions."<sup>354</sup> Even a first grade teacher expressed her desire for the bill to be passed, explaining not only would it support educators to teach an accurate, in depth history on the State of Maine by providing resources and preparing units of study, but would also "help all Maine children develop an appreciation and understanding of the culture and people who were the first inhabitants of our state."<sup>355</sup>

LD 291 was passed on June 7, 2001 and signed into law by Governor Angus King one week later.<sup>356</sup> At the time of enactment, the Bill was seen as "the most

<sup>347</sup> See L.D. 291 (120th Legis. 2001).

<sup>348</sup> *Id.*

<sup>349</sup> Although now formally enacted in statute as "Instruction in American History, Maine Studies, and Maine Native American history" in 20 M.R.S.A. §4706, the law is still commonly referred to as LD 291.

<sup>350</sup> *Id.*

<sup>351</sup> See *Testimony on LD 291: An Act to Require Teaching of Maine Native American History and Culture in Maine Schools*, UNE, <https://www.une.edu/sites/default/files/11-LD291-teachntvamer2001TESTIMONY.pdf> [<https://perma.cc/92VX-TW6C>] (last visited Feb. 22, 2019).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> Donna Loring, *LD 291 "An Act to Require Teaching Maine Native American History and Culture in Maine's Schools"*, DAWNLAND VOICES,

innovative and comprehensive piece of legislation in reference to the teaching of Native American History in the Country.”<sup>357</sup> At that time, “[n]o other State ha[d] created a policy that require[d] teaching Native American History in such detail and also provide[d] the means to do it.”<sup>358</sup> The Bill was codified in Title 20 of the Maine Revised Statutes and requires Maine Native American studies to be taught in Maine schools.<sup>359</sup> These lessons must address: (1) “Maine tribal government and political systems and their relationship with local, state, national, and international governments; (2) Maine Native American cultural systems and the experience of Maine tribal people throughout history; (3) Maine Native American territories; and (4) Maine Native American economic systems.”<sup>360</sup>

The Maine Department of Education (“MDOE”) highlights the benefits of integrating Maine Native American studies in the classroom as allowing “teachers to provide instruction around important concepts that transcend any one subject area or time period” and “students to examine historical and contemporary issues in a more balanced context.”<sup>361</sup> Additionally, the goals of the implementation centered around “develop[ing] future citizens of Maine who will possess a deeper awareness of the complex and continually-evolving Maine Native cultures” as well as cultivating a learning experience that provides students with an understanding of Native Americans by “using authentic, meaningful examples from the state of Maine.”<sup>362</sup>

In order to assist teachers in implementing Maine Native American studies into their classroom, a group made up of (1) Wabanaki tribal members, (2) Native and non-Native educators, (3) the Maine Indian Tribal-State Commission, (4) the Maine Department of Education, and (5) the University of Maine System collaborated to create culturally appropriate resources and materials.<sup>363</sup> The result of that collaboration can be found on the MDOE’s website, which includes resources as well as suggested learning targets to help educators track student progress according to grade level.<sup>364</sup> However, the MDOE website clarifies that these resources “are not comprehensive nor definitive.”<sup>365</sup>

Although steps have been made to make instruction of Maine Native cultures more accessible to educators, many feel that the law has fallen short of its intent. Brian Reynolds, the Tribal Administrator of the Houlton Band of Maliseet Indians, explains that “Maine schools are supposed to teach Wabanaki Ed as part of LD 291,

<https://dawnlandvoices.org/collections/files/original/68a2f4dc71d3eb71fc3d7e9c9b0c00b0.pdf>

[<https://perma.cc/NY3J-UNTE>] (last visited Feb. 22, 2019).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> 20 M.R.S.A. § 4706(2)(A)-(D) (2018).

<sup>360</sup> *Id.*

<sup>361</sup> *Benefits of Maine Native Studies*, ME. DEP’T OF EDUC.,

<https://www.maine.gov/doe/learning/content/socialstudies/resources/mainenativestudies/benefits>

[<https://perma.cc/5GTR-5CVM>] (last visited Feb. 22, 2019).

<sup>362</sup> *Id.*

<sup>363</sup> *Maine Native Studies in Schools*, ME. DEP’T OF EDUC.,

<https://www.maine.gov/doe/learning/content/socialstudies/resources/mainenativestudies/inschool>

[<https://perma.cc/48N2-P7GJ>] (last visited Feb. 22, 2019).

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

but few do. It's an unfunded mandate so it has no teeth and no financial support."<sup>366</sup> Although well-intentioned, the State's legislation has been failed to make the great impact that many hoped to see.<sup>367</sup>

Therefore, if improving the quality and increasing the quantity of BIE schools proves to be unworkable for the State, then the federal and state funds currently used to run the BIE schools should be reallocated to the local public schools. This would serve the Native American students by improving instruction of Wabanaki Education and better establishing a culturally-based learning experience for all Maine children. If funds were reallocated to provide teacher-training, to ensure that their instruction was accurate, as well as to supply needed resources (for example guest speakers, books, videos, and more) students would graduate with a rich understanding of the history of Maine and its original people. Placing the power of funding behind LD 291 would pressure administrators to ensure that their teachers followed through and provided their students with these historical and cultural lessons. Providing all students with this instruction would also create a sense of understanding between Native and non-Native learners, thus diminishing, or perhaps even eliminating, stereotypes and subsequent discrimination.

*Create a Culturally Based Education Program Outside of the School for the Wabanaki Children and Greater Wabanaki Community.*

It is continually emphasized that teaching Native youth about each tribes' culture is of critical importance. In order to preserve that rich culture, the history, language, and traditional craftsmanship must be passed on to youths. With that said, it is also imperative that Native American students receive a quality education in order to ensure their success. At this time, although the BIE schools are providing their learners with a unique culturally based learning experience, they are not providing an adequate academic education to their students. Therefore, it would be best to separate the two and reallocate funds in a way that would allow for the creation of a cultural-based education program for Wabanaki children that is run outside of the school system.

Creating an external, after-school Wabanaki education program for youths living on the reservation would serve the community in a variety of ways. First, students would have fully-funded after school programming that would allow them to learn about their culture. Additionally, a program such as this would create jobs for community members interested and capable of teaching history, language, basket making, canoe making, beadwork, and so on. This would also create a mentor-like relationship between students and their instructors, providing children with role models within their community. Lastly, this program could also act as a bridge between individuals who grow up on the reservation and tribal members who do not reside on the reservation. After having learned a new skill or craft, the students could become the teachers and host a monthly or bimonthly workshop open to all tribal members, providing more Native people with access to their cultural history.

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<sup>366</sup> Reynolds, *supra* note 346.

<sup>367</sup> See Lorraine A. Masterman, *LD 291: Teaching Practices and Pedagogy of Fourth, Seventh and Eighth Grade Teachers 1596* (2011) (Unpublished Master's thesis, University of Maine) <https://digitalcommons.library.umaine.edu/etd/1596/> [<https://perma.cc/Z6CR-RUUJ>].

*Implement a State-Funded College Counseling and Academic Advising Program  
for Wabanaki High School Students.*

If the current educational model remains in place, the State still must develop hands-on programming that supports and motivates college-bound Native American high school students in obtaining higher education. An active, hands-on approach such as those modeled by programs similar to New Mexico's nationwide organization, College Horizons, or Colorado's American Indian College Fund could provide a framework for Maine. However, rather than being implemented by a private organization, a state-funded program would create a sustainable and meaningful impact. An initiative such as this would require collaboration between the State and Tribes in order to ensure its success.

#### VII. CONCLUSION

Whether considering Native American's academic success generally or focusing in on the success of Maine's Wabanaki Indian population specifically, it is clear that the United States' current education system is failing to provide American Indians with equal access to education and learning opportunities. This nationwide academic crisis for American Indians will soon be identified as one that states can no longer ignore.

The statistical discrepancies between Native American students and their non-Native peers is identifiable early on in their academic careers and becomes even more vividly apparent as they transition from primary school to secondary school. As a result, this leads to significantly fewer Native American students considering the idea of attending college in comparison to their non-Native peers. Because of the small percentage of Native Americans that attain undergraduate and graduate degrees, Native American children struggle to find similarities between their teachers, their politicians, their doctors and themselves; a phenomenon that has been identified as a key component in students' academic success.

It is evident that schools in Maine are failing Native American students. Although generally viewed positively by the Wabanaki community due to the emphasis placed on cultural learning, BIE schools are leaving students unprepared and unable to compete academically. Therefore, the federal and state governments, which assumed a responsibility to ensure the educational success of Native American students by way of the trust relationship, must make significant changes to improve the academic achievement of Maine's Wabanaki community.