

**THE ACCIP REPORT ON THE EDUCATION OF
CALIFORNIA INDIANS**

A Report by
The Advisory Council on California Indian Policy
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ACCIP EDUCATION TASK FORCE

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LIST OF EXHIBITS

- Exhibit 1: Memorandum of July 12, 1968, from Wesley L. Barker, BIA Community Services Officer.
- Exhibit 2: Memorandum of August 14, 1970, from William E. Finale, Area Director, Sacramento Area Office, to Commissioner of Indian Affairs, Re: Services to California Indians.
- Exhibit 3: Memorandum of January 16, 1970, from Harrison Loesch, Assistant Secretary - Public Land Management, to Commissioner of Indian Affairs.
- Exhibit 4: Memorandum of December 9, 1971, from Charles M. Soller, Assistant Solicitor, Division of Indian Affairs, to Commissioner of Indian Affairs.
- Exhibit 5: Memorandum of May 13, 1971, from Roderick H. Riley, Assistant to the Commissioner, to the Commissioner of Indian Affairs.

SUMMARY

Indian people and tribes in California have long recognized and continue to recognize the importance and power of education. Education is inextricably linked to the survival of Indian people and tribal communities at every level. For the individual, education is the source of his or her upliftment and future prosperity, through the acknowledgment of cultural identity and through the acquisition of skills of trade or profession. For the tribe or Indian community collectively, education is the source of continuing cultural vitality, resiliency and group prosperity as members of the community contribute to the growth and change of tribal and community life. But these positive benefits of education cannot be realized by California Indians unless the barriers blocking the effectiveness of Indian education efforts in California are removed.

The problem areas have been identified and documented in this report. They are generally grouped into four broad categories: the lack of California Indian control, the lack of inclusion of California Indian culture and perspective, overly restrictive eligibility criteria, and the lack of equitable funding. The root cause of these problems is the historical and ongoing discrimination by the Bureau of Indian Affairs (BIA) against California Indians and tribes and the failure of the federal government to adequately tailor programs and services to meet the unique needs of California Indians in those programs not involving the BIA.

In effect, California Indians are still contending with assimilationist practices, even though the federal policy of assimilation as a guiding principle for the relationship between the federal government and the Indian tribes was discredited and abandoned long ago. The fact is that the policy of Indian self-determination in education, as in other areas, has never been implemented in California in a tangible way. Consequently, those programs and services designed to achieve the goals of self-determination and to uphold a government-to-government relationship between the federal government and the tribes of California have little or no effect in practical terms. Meanwhile, the vast majority of California Indian children continue to languish within a public school system that institutionally invalidates them. It is precisely because most Indian children and adults in California never achieve their educational potential, that the promise of Indian self-determination in education must finally become a reality in California.

In the areas of higher, adult and vocational education, where Congress has provided at least some programmatic and funding tools for Indians to progress into skilled and professional positions, the policies of the BIA have short-circuited the opportunities for many California Indians. In these programs, the overarching issues of equity funding and individual eligibility for BIA programs are most clearly evident. Thousands of California Indians have been denied access to these education programs by administrative fiat implemented in violation of federal law.¹ Even those California Indians who have not been denied services through the BIA's arbitrary attempt to redefine the California Indian service population are nevertheless denied adequate educational funding and support because the BIA continues to allocate to the California Indians less than their fair share of the Indian education budget. More recently, the BIA has used the budget allocation process to foreclose program eligibility for all California Indians who are not members of federally

recognized tribes. By moving all Indian education programs into its Tribal Priority Allocation (TPA) method of dividing up program funding, the BIA effectively allocates all education funding to California's federally recognized tribes without regard to the Snyder Act's broad mandate to provide education assistance to "Indians throughout the United States."²

The most successful educational projects and initiatives in California have been those that have placed control of education programs with parents and tribes at the local level. This includes the Noli School located on the Soboba Reservation, the Four Winds charter school in Chico, and the formulation of the United Tribes Education Coalition (UTEC) to advocate on behalf of Indian children and parents and to address a myriad of problems in several local public school districts serving the children of multiple tribes. As these few examples illustrate, approaches in California are varied, but they are affected by many of the same issues: tribal control and the concomitant need for tribal infrastructure development, eligibility requirements and funding. The greatest single reason for the lack of success and the unpopularity of BIA programs has been that they have failed to involve Indians in the planning and implementation of programs which affect them.

As presented in the recommendations herein, a joint study must be conducted to devise a plan to develop this new tribally controlled system of education. The study should focus at the local and tribal levels, not merely at the state level. Tribes and unrecognized California Indians have to this point worked with the existing local school systems, and in some cases have had some measure of success. These efforts should not be disrupted, but should be complemented in the proposed study, by applauding local efforts to work together, and providing answers to problems that have prevented continued growth. In areas where there has been greater conflict, this process should be an opportunity to address issues in a positive environment which stimulates creation of new options that were previously unavailable.

Each of the Advisory Council's recommendations is aimed at assisting Congress in formulating thoughtful approaches tailored to meet the needs of California Indians in the area of education. In order to translate these recommendations into successful programs, the suggested approaches must be backed by funding commitments from both Congress and the BIA—Congress must make the necessary appropriations and the BIA must ensure that the funds are made available promptly and in a manner consistent with effective program implementation. Without adequate funding, even the most carefully crafted programs are unlikely to succeed. Historically, California Indians and tribes have suffered from both failings—inadequate program development and inadequate funding. Nevertheless, they have retained the vision that Indian education in the State of California may one day enable individuals and Indian communities and tribes to reach their ultimate potential. It is well past time, as we approach the twenty-first century, to attain that vision.

Recommendations

General Recommendations

1. There needs to be a clear definition of California Indian for purposes of eligibility for all federal programs and services available to Indians based on their status as Indians. That definition should include:
 - a. Any member of a federally recognized California Indian tribe;
 - b. Any descendant of an Indian who was residing in California on June 1, 1852, but only if such descendant
 - i. is a member of an Indian community served by a tribe, the BIA, the IHS or any other federal agency, and
 - ii. is regarded as an Indian in the community in which such descendant lives;
 - c. Any California Indian who holds trust interests in public domain, national forest or Indian reservation allotments in California;
 - d. Any California Indian who is listed on the plans for distribution of assets of California rancherias and reservations under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian; and
 - e. Any California Indian who is listed on the rolls of California Indians prepared in 1933, 1955 and 1972 for the distribution of the United States Court of Claims and Indian Claims Commission awards.

Historically, Congress has dealt with California Indians as a discrete group for purposes of federal benefits and services, as evidenced by the Homeless California Indian Appropriations Acts, the California Indian Claims Cases, and the current eligibility of California Indians for health care services provided by the Indian Health Service. In addition, several federal agencies have recognized the unique history of federal relations with California Indians, and have adjusted their eligibility criteria accordingly. The BIA, however, after decades of similarly recognizing the broad eligibility of California Indians for federal Indian programs, has since the mid-1980s insisted that only members of federally recognized tribes are eligible for the services it provides, even where the particular statute creating the benefit is intended to have a broader application. Thus, Congress should clarify the eligibility of all California Indians, as defined above, for all of the services available to Indians based on their status as Indians.

2. Create a grant program for the development of curricula for use in tribally-controlled or public schools, which fully integrates California tribal histories, languages and cultural perspectives. The entities eligible for the grants would be tribes (both recognized and unrecognized), consortia of tribes, Indian organizations, and collaborative projects between tribes and Indian organizations and school districts. School districts would be ineligible to apply on their own.
3. Enact legislation authorizing the establishment of a joint federal/state/tribal team to study,

devise and implement a plan to coordinate comprehensive delivery of services among the 27 State of California Indian Education Centers and the BIA tribally-controlled school programs. The study would address issues concerning (a) the establishment of tribally-controlled schools, possibly utilizing the facilities and resources of those state Indian Centers already established on or near reservations, and (b) the potential for utilizing some state centers as regional technical assistance centers for Indian-specific programs.

Recommendations made under the joint study should be implemented with final decision-making authority in the hands of tribes in consultation with Indian educators and administrators. This will ensure that tribally-controlled schools and Indian Education Centers are designed to address the educational needs of those tribes and the local Indian community.

Program Specific Recommendations

Bureau of Indian Affairs Programs and Services:

Sherman Indian High School

1. Enact legislation mandating that the management and administration of Sherman Indian High School be turned over to California Indians.
2. Enact legislation setting forth enrollment eligibility criteria specifically for California Indian students attending BIA-controlled day schools and boarding schools consistent with the definition of California Indian recommended above.
3. In the same legislation, enact provisions which explicitly allow for BIA-controlled day schools and boarding schools to receive funding for eligible California Indian students based on the new enrollment criteria. This will require amending 25 U.S.C. 20007(f) to define "eligible Indian student" to include a California-specific provision consistent with the definition of California Indian recommended above.

Tribally Controlled Contract Schools

1. Enact legislation exempting California from the prohibition of new school start-ups contained in the 1995 Department of the Interior Appropriations Act. Enact legislation specifically authorizing establishment of day schools and boarding schools in California under contract with California tribes, consortia of tribes and Indian organizations serving California Indian children.
2. Increase Congressional appropriations and BIA funding for such schools so that per capita spending for California at least equals national per capita expenditures. Per capita spending for California should be calculated taking into account an Indian service population based on the definition of California Indian recommended above.

Johnson O'Malley (JOM)

1. The BIA distribution formula under the Tribal Priority Allocation (TPA) system for JOM monies should be reexamined by Congress and the BIA, in consultation with California tribes. An alternate funding and distribution method for California should be specified by legislation or regulation, in which:
 - a. Base level funding for California JOM programs would be determined according to a student count using the definition of California Indian recommended above.
 - b. Specific program monies would be distributed on the basis of actual counts of students to be served by the programs.
 - c. There would be express language indicating that the FY 1995 cut off does not apply in California.
 - d. There would be a provision specifying that any California JOM monies not contracted for in a particular year would be added to funds available for tribally-controlled contract school start-ups in California.

The BIA should reconsider the distribution formula for TPA-JOM funds because: (a) it locks in a pattern of inequitable funding; (b) it excludes California Indians who are eligible for education programs authorized by the Snyder Act, but are not members of federally-recognized tribes; (c) it disadvantages small tribes; and (d) it disregarded the overwhelming opposition of California Indian tribes and individuals.

Tribally-Controlled Community Colleges

1. Congress and the BIA should allocate planning grants for at least two new tribally-controlled community colleges in California.
2. Increase BIA funding for existing tribally-controlled community colleges in California even as new colleges are established, so that per capita spending for California at least equals national per capita expenditures. Per capita spending for California should be calculated taking into account an Indian service population based on the definition of California Indian recommended above.

Higher Education Scholarships

1. Enact legislation directing the BIA to revise its eligibility criteria for higher education scholarships so that all California Indians who meet the definition of California Indian recommended above are also eligible for higher education scholarships. These eligibility criteria should also be revised to clarify that California Indians need not reside "on or

near” a reservation in order to qualify for such scholarships. In addition, the legislation should be retroactive, and provide that California Indians who were denied higher education scholarships in the past be reimbursed for educational loans, or be eligible for loan forgiveness.

2. Increase BIA funding for scholarships to California Indians so that per capita spending for California at least equals national per capita expenditures. Per capita spending for California should be calculated taking into account an Indian service population based on the definition of California Indian recommended above.

U.S. Department of Education Programs and Services

Formula Grant Program (Title IX, Subpart I)

1. Implement federal regulations that define the “establishment” of an Indian parent committee to mean the “consistent functioning of the committee during the previous year.” The regulations should specify that if such a committee fails to function consistently, the tribal application option is triggered. Evidence of the consistent functioning of the committee would be regular meetings and regular majority Indian parent membership on the committee.
2. Implement federal regulations modeled after the pre-1984 regulations that provide detailed language regarding access to documents, needs assessment, evaluation, hiring, responsibilities of the Local Education Agency and the parent committee, and composition of the parent committee.

Special Programs and Projects to Improve Educational Opportunities for Indian Children (Title IX, Subpart 2) and Special Programs Relating to Adult Education for Indians (Title IX, Subpart 3)

1. Fully appropriate Title IX, Subpart 2 and 3 programs, with any funding formula to include California-specific provisions that ensure per capita spending that at least equals the national per capita expenditure for all programs.
2. The funding formula should also include the option that tribes may devise consortia or intertribal associations to apply for and administer such funds or that they may apply separately and later combine funds and administer the programs jointly.

Impact Aid

1. Enact legislation amending 20 U.S.C. § 7701 *et seq.* and providing direction for revised implementing regulations in the following categories as specified:

a. Local Educational Agency Eligibility

Provide for exemption of public school districts in California from eligibility requirements dealing with minimum numbers of federally connected children (i.e. more than 400 or at least 3% student enrollment.)

b. Application for Payment

Require joint application by tribe(s) and school district(s), requiring joint signature by tribal government representative(s) and the district superintendent. Alternatively, require tribal approval and sign-off on the Annual Impact Aid application submitted by the district to the federal government.

c. Payment

Provide for payment of funds to either the tribe(s) or the district with release of funds dependent upon joint signature by both tribal and district representatives. Provide for notification of funding to both the tribe(s) and the district.

d. Tribal Option to Remove Children and Contract for Services

Provide for a tribal option prior to proceeding through the complaint process to remove all or a portion of its children from the public schools and apply directly for Impact Aid monies to provide educational services for those children. Impact Aid funds would be made available to tribes for all children residing on the reservation who choose to attend the tribal school (regardless of affiliation with the tribe) through the BIA tribally-controlled school program. Provide tribe(s) the option to gradually phase in a tribally-controlled school program by allowing tribe(s) to apply for funds on a periodic basis, as the children are removed from the public school or choose to attend the tribal school.

e. Indian Policies and Procedures

Provide for specific requirements in the district's Indian Policies and Procedures that restore former federal regulation provisions regarding meaningful Indian input.

Define meaning of "equal participation of Indian children" such that it is understood to include qualitative outcomes (achievement of grade level goals, test scores, grade point averages, dropout rates, enrollment in college preparation classes, graduation rates, alternative assessment outcomes, etc.) of Indian children in comparison to non-Indian students.

Define meaning of data and program information that must be provided to parents

and tribes such that it encompasses and is coordinated with the collection and disaggregation of data referenced in Title I of the Improving America's Schools Act.

f. Federal Reporting

Provide for reporting by the school district to the federal government concerning the equal participation of Indian children as well as program financial information.

Regional Assistance Centers

1. Develop federal regulations to carry out authorization for regional technical assistance centers pursuant to 20 U.S.C. § 8621(b) which specify establishment of Indian education program specialists for the two Regional Assistance Centers in California:
 - a. Indian education program specialists will disseminate to tribes, on an ongoing basis, information about all federal and state grant programs available to serve Indian children and adults, including higher education financial aid services for California Indians.
 - b. The centers will provide parents with information and training regarding the function and role of Indian parent committees under various programs, as well as technical assistance for the proper functioning of the committees.

Bilingual Education, Language Enhancement and Language Acquisition Programs

1. Enact legislation amending Title VII of the Improving America's Schools Act, 20 U.S.C. § 7404, to include unrecognized or unacknowledged California tribes, and Indian organizations or consortia of tribes and Indian organizations in the list of Native American entities eligible for the program.

I. Introduction and Overview

This report by the Advisory Council on California Indian Policy fulfills one of the most important tasks included in its mandate from Congress—to “develop recommendations for specific actions that will address . . . the needs of California Indians for . . . improved levels of educational achievement . . .”³ As with the other areas studied by the Council, the development of education programs for California Indians has been influenced by early historical events in California’s rapid settlement by Anglo-European peoples after the discovery of gold in 1848, and by the various federal policies addressing the “Indian problem” in California. While history and the events that shaped it cannot be rewritten, its continuing effects can be examined and understood and efforts to remedy them initiated in the present. The objective of this report is to provide a comprehensive overview of the context and nature of the education problems of California Indians and to propose recommendations for addressing their educational needs and aspirations.

The present situation of the California Indians cannot be fully understood without a knowledge of the historical events that have shaped federal Indian policy and programs in California.⁴ While this history shares some common characteristics with that of Native peoples elsewhere in the United States, it is distinguishable in many troubling aspects.⁵ These include the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848; Congress’ refusal to ratify the 18 treaties negotiated with California tribes during 1851-52⁶; and the lawless nature of California’s settlement after the Treaty of Guadalupe Hidalgo, including state-sanctioned efforts to “exterminate” the indigenous population.

Genocide, failure to ratify the California treaties and the resulting theft of Indian lands under the guise of law, suppression and denigration of Indian languages and cultural traditions, and the breach of solemn trust obligations—all have been part of the history and experience of California Indians. Looking at Indian education in California against this sobering backdrop, it is not surprising that California Indians have fallen far short of their education potential. Historically, educational programs for California Indians, as elsewhere in the country, were intended to carry out the goals of oppressive assimilationist policies. California Indian children were often forced to attend mission schools, or federally-operated day or boarding schools. The appalling treatment of Indian children in federally run schools during this time is a matter of public record.⁷

Assimilationist goals were also behind later federal efforts to place Indian students into public schools. In the 1920s, Indian Commissioner Frances E. Leupp championed the idea that by putting Indian students into public schools, the overwhelming number of non-Indian “peers” would draw Indian children away from their own traditions while at the same time reducing BIA costs for Indian education.⁸ To carry out this policy, Congress allocated up to three hundred thousand dollars annually between 1923 and 1929.

Meanwhile, in an effort to keep Indians in separate schools, public schools in California

objected to the enrollment of Indian students. Indian plaintiffs in 1923 and 1924 were forced to sue local school districts in order to enroll.⁹ Efforts to utilize the public schools to accomplish federal assimilation goals, while getting the federal government out of the business of Indian education, led to the passage of the Johnson O'Malley (JOM) Act in 1934.¹⁰ With so many California Indian children in public schools, JOM quickly became of major importance to California Indians. Under the Act, federal monies were made available through the BIA to local school districts, which contracted with the federal government for the education of California Indians.¹¹ Originally, JOM funds were not limited to Indian-specific needs and schools could make them part of their general operating budget.

The Impact Aid¹² legislation was passed in 1950 to compensate schools for the education of children connected with tax free federal lands. At the same time, JOM was amended to have the monies used only for supplementary programs specifically for Indian education.¹³ In 1953, Public Law 280 was enacted,¹⁴ which transferred federal criminal and civil jurisdiction on reservations to certain designated states, including California.¹⁵ Although the law did not dictate the cessation of services to California Indians, the BIA's central office, as well as its Sacramento Area Office took it as a signal for decreasing services drastically and withdrew scholarships, vocational education, JOM aid, and other programs, cutting the majority of all federal education funds for California Indians.

In 1958, Congress passed the Rancheria Act, which slated for termination the reservation and tribal status of 41 California groups.¹⁶ Indians belonging to those groups immediately lost their eligibility for the few federal programs still available. Although most of the terminated tribes have been reinstated since the 1970s through litigation or special federal legislation, the organization and momentum lost during the period of termination has made it difficult for these groups to press for needed federal support. In 1969, JOM funding was reinstated in California, but the level of assistance was considerably below the pre-1953 level.

With the passage of the Indian Self-Determination and Education Assistance Act in 1975,¹⁷ federal Indian education policy, at least in theory, shifted away from assimilation to self-determination. The Act encouraged Indian control of Indian education by allowing tribes to contract with the BIA to operate BIA services and programs. In California, however, this shift to Indian control was hardly felt because BIA education services, besides JOM, were practically non-existent in 1975. The only BIA run school still in operation at that time was Sherman Indian High School (then called the Sherman Institute), which was administered out of the Phoenix, Arizona Area Office and served mostly Indian children from outside of California.¹⁸

Also, the historical failure of the federal government to support California tribal infrastructure development had left most California tribes unable to even initiate contract programs under the Act. As a consequence, California Indian children continued to receive their education mainly through the state's public schools, despite the schools' dismal record in addressing their needs.

Indian children in California today, on average, are still far from reaching their educational potential. What little data is available from the state about the achievement levels of Indian children shows a dropout rate that is nearly twice that of White children.¹⁹ A study done in 1992 by the California Department of Education reported that Indian students were consistently performing below non-Indian students, as measured by the California Assessment Program (CAP) for reading and mathematics. According to that study, Indian students performed about one-half standard deviation below non-Indians in grades three, eight and 12 in the subject of reading. In math, the difference between Indian and non-Indian students increased at each grade level following third grade. By grade 12, Indian students were reported to be performing about 2/3 of a standard deviation below non-Indians.²⁰ The Report also said that Indian high school students were enrolled at a much lower percentage than non-Indian students in advanced mathematics and science courses.²¹

While these figures provide ample evidence that Indian students are not achieving on par with their non-Indian counterparts in the state's public schools, evidence from independent sources throughout the state indicate that the situation is much worse than these figures show. The Noli Indian School, a tribally-controlled BIA contract school operated by the Soboba Tribe, found that the graduation rate of its students from public schools in 1988 was 17%.²² In a 1991 letter supporting a local tribe's application for education grant money, a high school district superintendent in southern California cites a 90% dropout rate for its Indian students "for the past few years."²³ And a report prepared by an elementary school district in southern California shows that the district's Indian students scored lower on a state standardized California Test for Basic Skills than others classified as Limited English Proficient and whose scores were also below the national average percentile.²⁴

There is considerable anecdotal evidence that also verifies the poor success rate of Indian students in the state's public schools. The Education Task Force of the Advisory Council on California Indian Policy conducted a three-day Dialogues Conference in Sacramento in February 1994 to identify issues and brainstorm possible recommendations for correction. Over 200 people attended, including representatives of Indian tribes and organizations from across the state, and individuals with expertise and daily experience in Indian education in California. Participants in the dialogue sessions identified the obvious signs of crisis in Indian education across the state. There was consensus that core issues included high absenteeism, high dropout rates, low achievement levels, low graduation rates, low self-esteem, loss of motivation, insufficient resources and financial support for programs, and ineligibility for programs due to tribal status.²⁵

In today's educational climate, one of the basic goals of education is to instill a positive self-image and respect for oneself and one's community. Yet, one must ask how this can be accomplished for California Indians when the majority of Indian children are in schools directed by local public school boards and administrators who are generally ignorant of the history, traditions and special educational needs of California's Indian populations. Even where ignorance does not prevail, some school boards and administrators are simply unwilling to acknowledge that Indian youth from both reservation and urban communities have special needs and problems

integrating into an educational system that denies their history or ignores the continuing vitality of their cultures and traditions.

While the State of California must be part of any solution to the education problems of the California Indians, it is the Federal government that bears the heaviest responsibility for the current crisis state of Indian education in California. California Indians on the whole lack effective control over the education of their children largely because of the BIA's historical discrimination against them. This discrimination by the BIA has taken three primary forms: first, its under-funding of Indian education programs and services in California relative to other areas of the country; second, its resistance to dealing with the California tribes on the same basis as it deals with other federally recognized tribes throughout the United States (an example is the lack of Indian-controlled schools and tribal community colleges); and, third, its attempt to administratively redefine California Indians by restricting its Indian programs and services to only members of federally recognized tribes (some refer to this as "administrative termination"). Furthermore, even those federal Indian education programs and services not directly administered by the BIA have had limited effect in California because they are not tailored to address the unique circumstances of California Indians.

An example of BIA discrimination in higher education where federal financial support is absolutely critical to the success of California Indian youth and adults with college and professional education aspirations is illustrative. Commencing in the mid-1980's, the BIA began to redefine the California Indian population for purposes of receiving federal benefits and services, including financial assistance for higher education. Only those California Indians who were enrolled members of federally recognized tribes were deemed eligible, thus creating unfair eligibility criteria.

Prior to 1986, the BIA had provided higher education grants to *all* California Indians as long as they met certain minimum Indian blood quantum (one-fourth) and other specified criteria. This approach to eligibility was consistent with federal law²⁶ and the BIA's history of dealing with California Indians as a discrete, identifiable group of Indians for federal program purposes.²⁷ By departing from this established federal policy, not only did the BIA disrupt the education of aspiring California Indian students, it did so contrary to congressional intent and in violation of applicable federal law and regulations.

Even as it was informing some California Indians that they were no longer eligible for the education programs, the BIA was continuing to allocate its education budget in a manner that provided the California Indians with less than their fair share. Indeed, in 1990 the BIA attempted to reduce funding for the administrative functions of the Sacramento Area Office of Indian Education by 60% from its FY 1989 level, while most other Area Education Offices nationwide either did not face a reduction, or had one significantly lower than 60%.²⁸ Though the California tribes succeeded in preventing these cuts, discriminatory allocation or under-funding of BIA education programs in California has continued. In fact, as discussed later in this report, the funding of Indian education programs has been even more problematic since the recent BIA

reorganization.

Historical discrimination by the BIA and the federal government's tendency to ignore California Indian circumstances in national legislation lies at the root of the problems that continue to plague Indian education in California. These problems can be grouped under four broad categories: (1) lack of sufficient California Indian control and involvement in education programs, services and institutions; (2) lack of inclusion and respect for California Indian culture and history in education programs and services; (3) restrictive eligibility criteria prohibiting broader participation from California Indians in programs and services; and (4) lack of adequate and equal funding of Indian education programs in California. Each of these problem areas is discussed below on a program by program basis and can be cross-referenced with the matrix attached as Appendix C.

II. Pre-School and Early Childhood Education

A. Bureau of Indian Affairs—Early Childhood Education

At one time the Bureau of Indian Affairs (BIA) received early childhood development dollars for children connected with the Sherman Indian High School. Today the Sacramento Area Office receives no such funding for California. This is symptomatic of the BIA's lack of support for California Indian education in general. Funding for education, if any, comes when children are older and is often easily absorbed into a school district's general funds. A recent California Department of Education report on Indian education programs reiterated the need for early incentives in education, given the significant number of early dropouts from the public school systems.²⁹ To make its existing education programs function, the BIA needs to make a greater commitment to California Indian education and develop early childhood grant programs.

B. U.S. Department of Education Program

Part B of Title I of the Improving America's Schools Act,³⁰ sets forth the Even Start Family Literacy Program, designed to "help break the cycle of poverty and illiteracy by improving the educational opportunities of the Nation's low-income families by integrating early childhood education, adult literacy or adult basic education, and parenting education into a unified family literacy program."³¹

While not aimed at Indian education specifically, the program promises to serve many Indian populations because of the large numbers of poor Indians who meet the program's eligibility requirements. Like the Head Start program, Indian tribes and tribal organizations may apply directly for funds out of a 5% set aside amount. However, only those Indian tribes and organizations defined in 25 U.S.C. 450b are eligible to apply for these funds.³² In other words, only federally recognized tribes, or organizations controlled, sanctioned or chartered by federally recognized tribes may apply. Unrecognized tribes must apply for grants out of the general fund, a limitation that unfairly discriminates against a large class of California Indians.

C. California Program—American Indian Early Childhood Education

In 1972, the California Legislature, recognizing that early childhood development needs of Indian children were not being met by any existing programs (although the BIA technically had such a program), created the American Indian Early Childhood Education Program (ECE).³³ School districts located in rural areas with 10% or more Indian student enrollment are eligible to apply for the program, which is intended to raise the academic achievement of Indian students in grades K through four in reading and mathematics. Despite its excellent goals, the program's effect is only minimal due to the funding level and the requirement of cooperation from the school district. In 1994-95, six projects were funded, with an overall budget of \$396,317 serving 650 students.

The ECE program is patterned after JOM and Title IX, in that it requires Indian parent committee approval but does not involve tribes in such approval processes. Its potential has been hindered by the failure of many school districts to acknowledge the role of parent committees and to work with them in a meaningful way in addressing Indian student needs. The primary beneficiaries of the ECE funds in California are those communities serviced by one of the 27 State of California American Indian Education Centers (*see* § III (C), *supra*), because they have developed agreements with the local school districts to provide the services outlined in the jointly submitted grant applications. In the 1996-97 fiscal year, nine grant awards totaling \$427,735 were made to school districts served by the Indian Education Centers.

III. Elementary and Secondary Education

A. Bureau of Indian Affairs Programs and Services

1. Indian Boarding Schools and Day Schools

During the second half of the nineteenth century, the federal government set aside a few small areas of land for occupation by California Indians. By 1881, a small number of federal day schools had been founded, but they were too few and far apart to serve the needs of Indian children.³⁴ In their 1883 report to the Commissioner of Indian Affairs, Helen Hunt Jackson and Abbott Kinney wrote of the need to create real reservations for California Indians, and further recommended the establishment of more schools.³⁵

Between 1891 and 1935, Congress allocated funds to create reservations for landless California Indians. When the federal government established day schools on those reservations, however, it was difficult to assemble a sufficient number of school children. Accordingly, most of these day schools were closed by 1895. To implement the prevailing federal policy of assimilation, the federal government replaced many of the day schools with boarding schools on the Tule River, Round Valley, Middle Town, Hoopa Valley, Perris, and Fort Bidwell Reservations. Another boarding school, the Sherman Institute, was set up in Riverside County in the 1890's, but for many decades it was closed to California Indians, mainly serving tribal

members from Arizona and New Mexico.

From at least 1928, when the Merriam Report was released, the federal government was aware of the problems plaguing federal boarding schools and began shifting its policy to pass on responsibility for the education of Indian children to the states.³⁶ Federal Indian schools in California were gradually closed down and, despite resistance from the White society and the public schools, California Indians were eventually enrolled in public schools.³⁷ Currently, there are no BIA-operated day schools in California.

a. Tribally Controlled BIA Day Schools

Only one tribally-controlled day school exists in the entire state of California. The Noli School on the Soboba Reservation began as an after-school tutoring and "alternative learning" site. Funded by a grant from the Department of Education to help reduce the dropout rate of Soboba students, the Noli School now boasts full services provided for about 60 students in grades six through 12. As recently as 1994, the school was added to the BIA's Contract Schools Program but, as a result of certain language in the 1995 Department of the Interior Appropriations Act, it may remain the only one in California.

In 1989, the high school graduation rate for the Soboba Indian Reservation was only 17%.³⁸ This prompted Soboba tribal members to take action to address the educational needs of its children going unmet in the public schools.³⁹ Many of the children served by the tribe's initial grant program had either been expelled or suspended from the local school district, or were considered "at risk" students.⁴⁰ The Noli School is attempting to turn around the poor level of educational success previously experienced by its students in local public schools:

Noli Indian School is made up entirely of Native American Indian students. Our students have not experienced a high degree of success in public schools. Many of our students come to us with academic deficiencies. Our small school environment has assisted them in experiencing educational success.⁴¹

At this early stage in the school's existence, there are already significant signs of improvement by the students: student self esteem has grown markedly; students feel safe and supported in the environment; discipline referrals have dropped and students have instituted their own methods to curb profanity and promote positive school citizenship; daily attendance is increasing; and aspirations for future education and job possibilities have risen.⁴² Moreover, parent and community participation and involvement at the school is very high and very supportive.⁴³ While student scores on the standardized California Achievement Test (CAT) are still below average, the administration, staff and community are in the process of developing a Consolidated School Reform Plan that will incorporate relevant student assessment methods and set curriculum that can help students achieve top academic potential.⁴⁴

As the foregoing illustrates, the Noli School is beginning to succeed where the public

schools serving children living on or near the Soboba Reservation have failed miserably over the years. At the Noli School, children are immersed in an environment of respect for who they are and where they come from. The curriculum is carefully designed to integrate tribal and general Indian history, arts, Native language (Luiseño and Cahuilla), and present day challenges, while maintaining cultural values and identity.⁴⁵

The Noli School is tailored to meet the needs of the children through people who know them the best—the tribe and the community. Concurrent with learning necessary academic skills, the children are encouraged to grow and develop within the context of their cultural identity. Moreover, the tribe and school personnel share a common vision of the children's future, which is intertwined with the tribal community's future:

Noli is a Luiseno word for envision. The Soboba Tribe envisions a new future through the educational opportunities provided by Noli Indian School.

The philosophy for Noli Indian School which determined its mission statement is to serve Native American Indian middle and high school students so they will become contributing tribal members as well as viable contributors to other nations (tribal and non-tribal). Through educational opportunities available at Noli Indian School, Noli students will receive a quality education in addition to learning tribal traditions and American Indian culture. It is the desire of the Soboba Indian Tribe that Noli students value tribal traditions yet envision a life that integrates the past with the future so that all tribal members will prosper culturally, financially, and socially.⁴⁶

The vitality of this approach is embodied in the BIA's own policy central to the Indian Self-Determination and Education Assistance Act.⁴⁷ However, Congress' failure to appropriate adequate funds for the program and the prohibition on new school start-ups is contrary to such facilitation. The Interior Appropriations Act cut off funding for new schools after the final 1995 budget submission.⁴⁸ The rationale for closing the program was simply that starting up any additional schools would jeopardize services for the existing schools.⁴⁹ With this program change, California tribes that are just beginning to be able to take advantage of the BIA programs will now be shut out from ever pursuing such an option. Yet the experience of the Noli School is exemplary, and should be the beginning of a trend in California Indian country that would vastly increase the educational success of California Indian children.

There are currently 187 tribally-controlled contract schools across the United States. Yet California, with the largest number of Indian tribes, has only one such school. Many California tribes still lack the infrastructure and resources necessary to apply for and implement such programs as the Noli School due to the failure of the federal government to adequately fund and support California tribal development on a par with that of tribes outside of California. For those tribes that are now able to participate in the long-standing BIA Contract Schools Program, the federal government's decision to halt new school start-ups without an express exception for

California tribes is grossly unfair.

Again, it appears that the historical attitude toward California Indians persists—that California Indians do not need educational services because the public schools of California will suffice. The fact that there is a persistent failure of Indian children to thrive in the public schools demonstrates the fallacy of such a notion. The public schools are not meeting the current educational needs of Indian children as the vast majority of public school personnel do not understand their needs in the context of the tribal community.

By contrast, tribally-controlled schools have the potential to be linked with tribal initiatives to address specific community needs. For instance, unlike the state's public schools, tribally-controlled schools are not prohibited from including spiritual or religious instruction, should the tribe choose to do so. Hence, the tribally-controlled school option is vital to the improved educational achievement of California's Indian children and needs to be fully developed.

b. Sherman Indian High School

Sherman Indian High School is now the only BIA-operated boarding school in all of California. Located in the southern part of the state at Riverside, the school currently serves approximately 450 Indian students in grades nine through 12. During the course of a century of dealings with Sherman, California Indians have been largely underserved or inadequately served by the school. In the past decade, several changes have occurred which have begun to correct these problems. As long as these improvements continue, Sherman Indian High School has the potential to be of great value to California Indians as an alternative to public school education.

Although today Sherman has less than 35 California Indian students, it was not always so. When the school was first established as the Perris Indian School, it was intended to be specifically for California Indians. At the time the school's main goal, like that of all other federal Indian schools, was to assimilate Indian children into the dominant White American culture by stripping them of their own cultural values and traditions.

In 1916, two more grades were added to serve school grades one through 10. In 1926, the institute became a high school for Indian youth. Until 1946, the majority of the students at the school were California Indians. However, soon Sherman began to serve mostly Navajo and other children from out-of-state tribes. Even the administration of the school was moved to the Phoenix BIA Area office, illustrating the BIA's intention to diminish its services and programs for California Indians.

In 1968, the BIA published regulations setting forth eligibility criteria for enrollment in BIA-operated schools, which further removed California Indians from Sherman's services.⁵⁰ Enrollment has since been restricted to children "of one-fourth or more degree of Indian blood who reside within the exterior boundaries of Indian reservations" or "on trust or restricted lands under the jurisdiction of the Bureau of Indian Affairs except when there are other appropriate

school facilities available to them” provided by the public school district wherein they reside (emphasis added).⁵¹ Children of one-fourth or more degree of Indian blood who reside near but not on a reservation may enroll “when a denial of such enrollment would have a direct effect upon Bureau programs within the reservation.” The only way Indian children who do not meet these requirements could enroll at Sherman was by paying tuition “when their presence will not exclude [eligible] Indian pupils.”⁵²

These regulations obviously failed to take into account the unique circumstances of California Indians. As discussed at length in other accompanying ACCIP reports,⁵³ the history of land loss suffered by California Indians as a result of federal policy, and the inferiority and small size of most established reservation lands, has made the majority of California’s Indian population non-reservation residents. Lack of adequate funding for tribal governments has also contributed to the scattering of tribal populations off the reservation. Tribes or communities that have yet to be recognized, and those that have recently been recognized or restored, do not usually have trust lands.⁵⁴ Hence, enrollment restrictions for BIA-operated schools which based eligibility on reservation residency precluded many California Indian students from attending the only Indian school in the state.

Approximately 10 years ago, although federal regulations did not change,⁵⁵ the eligibility criteria for Sherman changed.⁵⁶ Currently, only members of federally recognized tribes and their descendants of at least one quarter degree are eligible to attend Sherman Indian High School.⁵⁷ These eligibility criteria are inconsistent not only with the regulations but also with the statutory funding criteria for Sherman.⁵⁸

While this change in eligibility had the effect of eliminating an entire class of California Indians who are not members of federally recognized tribes from certain programs that had previously only required one-fourth degree Indian blood, it opened doors to other California Indians to enroll at Sherman. It did this in two ways: first, by doing away with the reservation residency requirement; and second, by eliminating the minimum blood quantum, at least for those who are members of a recognized tribe. However, it closed the door completely to California Indians who are not members of federally recognized tribes, regardless of their residency on trust or restricted land and their Indian blood quantum of one-fourth degree or more.⁵⁹

Why have California Indian enrollment figures remained low at Sherman in light of these changes? One reason may be that, after years of exclusion, tribal members are simply not aware that their children are eligible to attend Sherman.⁶⁰ Another reason may be the historical experience of California Indians who learned that education at Sherman could be worse than it was at California’s public schools.⁶¹ The quality of education at Sherman has historically been inadequate for all Indian students attending the school but because of its location in the state, California tribes have expressed a special proprietary interest in its operations. This interest has not been welcomed by the BIA, despite federal policy encouraging tribal involvement.

In 1968, at the beginning of the self-determination era, President Johnson signed an

Executive Order mandating all Indian schools to have locally controlled school boards. Shortly thereafter, a group of California Indian parents with children at Sherman elected the California Sherman Indian High School Board and adopted Articles of Association and Bylaws. These documents were sent to the Phoenix Area office but were never accepted by the BIA. Provisions of the Board's Bylaws are illustrative of the desire of California tribes to control the school and to include all California Indians in that effort, even members of non-federally recognized tribes. Also evident from the Bylaws is Sherman's historic failure to incorporate and value California Indian culture and experience.⁶²

Instead of accepting local California control, the BIA established the Phoenix Area Intertribal Board made up entirely of non-California Indian tribes with the exception of one representative from Northern California, although Sherman is located in Southern California. Ten years later, in 1978, spurred on by the promises of the Indian Self-Determination and Education Assistance Act, California tribes again asserted their right to be involved in the operation of Sherman through the establishment of the Sherman Ad Hoc Committee.⁶³ The Committee conducted a detailed investigation and released a report in 1980 revealing a dismal student achievement record at the school.⁶⁴ The Committee's Report recommended the transfer of Sherman's administration from Phoenix to Sacramento and the establishment of two different boards to carry out effective California-based local control of the school, while maintaining intertribal involvement.⁶⁵

After great persistence on the part of southern California tribes and individuals, the transfer of program functions was finally accomplished in 1989. The Phoenix Area Committee was dissolved and a local intertribal board was established, which guarantees two positions on the seven-member board exclusively for California Indians. The school is already beginning to show improvements from having a local board.

In 1995, Sherman received state accreditation for six years, the highest accreditation level granted by the Western Association of Schools and Colleges Accrediting Commission (WASC).⁶⁶ Yet, current statistics for student achievement are still low.⁶⁷ In response, the local board has adopted a Consolidated School Reform Plan and is pushing the school to improve the quality of education at Sherman, including asking for more courses on Indian issues, history and cultures. If the improvement measures initiated by the local board in the past five years continue to be implemented, Sherman may develop into a vital educational option for California Indian students, eventually ending up with a program superior to that of California public schools. This is a vital hope, as Sherman's mission is Indian-oriented. In acknowledging the unique educational needs of Indian students, it complements the federal government's trust responsibility to Indians.⁶⁸

In contrast, California public schools have no such perspective, and no commitment to assist the federal government in carrying out its trust obligations, even when receiving federal funds (see the following discussion under Impact Aid and Title IX). The poor level of achievement of Indian students in public schools demonstrates the urgent need for educational alternatives for California Indians. But the Sherman option is currently unavailable to California

Indians who are not members of federally recognized tribes. Eligibility criteria for Sherman, therefore, should be broadened, taking into account the unique California Indian circumstances. Future funding of Sherman should be based upon these revised eligibility criteria.

Sherman Indian High School should also be funded at a level comparable to BIA administered Indian schools in other parts of the country.⁶⁹ For the 1994-95 school year, Sherman received \$4.4 million and served 445 Indian students, approximately 35 of whom were California Indians. This amount represents approximately 1.8% of the total \$259 million spent nationwide on BIA schools in that year. Of this, the percentage spent on California Indians amounts to a meager .2%. Funding increased to \$5.9 million for 1995, but the number of California Indian students remained below 40. Using these figures provided by the BIA, it is clear that California Indians are not receiving their equitable share of education funds from BIA education programs.

2. Johnson O'Malley Program (JOM)

a. Overview

California was the first state to receive funds under the Johnson O'Malley Act of 1934,⁷⁰ which enabled the federal government to contract with states to provide public education for Indians. For almost 20 years, California received an annual appropriation of approximately \$318,000 in JOM funds. In 1953, the federal government began to phase out California JOM programs. Then in 1958, they were eliminated altogether. Meanwhile, JOM funding for other states kept growing. In 1967, for example, the California Indian population of 39,047 received no JOM monies,⁷¹ while Colorado, with just 4,288 Indian people received over \$100,000.

The BIA and the California State Advisory Commission on Indian Affairs gave four reasons for their decision to recommend a phased elimination of JOM programs in California over a five-year period beginning in 1953: (1) under Public Law 280 and termination statutes California Indians would soon lose all eligibility for services; (2) California was constitutionally obligated to provide equal education for its Indian citizens; (3) California Indians were "better off" than other Indians; and (4) funds under a separate program, known as Impact Aid, would adequately replace JOM funds.⁷²

These four justifications, however, never matched actual developments. As to the first reason, many of the tribes that were terminated during the late 1950s and early 1960s had by the 1970s reversed the process through litigation against the federal government. In addition, by the early 1970s Congress had abandoned termination as its Indian policy in favor of a new array of policy initiatives supporting Indian self-determination and economic self-sufficiency. As elsewhere in the United States, national efforts to strengthen tribal sovereignty had taken root in California where the scope of Public Law 280's seemingly comprehensive grant of civil jurisdiction to the States was being challenged in the courts.⁷³ These efforts to protect tribal sovereignty reached their high point in 1976 when the U.S. Supreme Court soundly rejected the

argument that Public Law 280 had conferred on states broad civil regulatory jurisdiction over Indian reservations.⁷⁴ As a consequence of these events, neither the Termination Policy nor Public Law 280 accomplished the widespread substitution of state responsibility and services for those provided by the federal government in Indian country. And, except in the limited area of tribal criminal jurisdiction, Public Law 280 did not displace broad tribal civil regulatory jurisdiction (and responsibility) on Indian reservations.

Second, while California does indeed possess a constitutional obligation to educate its Indian constituents, the state has never provided *equal* education to meet the needs of Indian students. The California Legislature has effectively conceded that this inequity exists.⁷⁵ Third, the documentation about the state of California Indians was never sound.⁷⁶ Once federal funds were withdrawn from California, the relative condition of its Indians deteriorated markedly.⁷⁷

With respect to the fourth reason, Impact Aid program funds never served as an adequate substitute for JOM funds because they became part of the local school district's general funds and were not earmarked for special Indian programs. Furthermore, Impact Aid is available only where Indians live on tax-exempt federal lands. As such a high proportion of California Indians live off reservations, the school districts where their children are educated are not entitled to the funds.

In 1968, the BIA studied the need for restoring JOM funds to California and funding was reinstated in 1969, though at a level considerably below the pre-1953 level. In 1970, for example, the BIA established 10 programs with a JOM allocation of \$90,000 for California, a far cry from the \$318,000 in 1953. By 1973, the funding level had grown to \$248,000 but was still only 1% of the total JOM budget of \$24.5 million. Had the BIA matched the 1953 level of JOM funding in California, the state would have received \$2.9 million, or 12% of the JOM budget.

Prior to 1970, the BIA had made its JOM contracts in California with the state's Department of Education. From 1970 to 1975, the Sacramento Area Office administered the funds. Since the enactment of the Indian Self-Determination and Educational Assistance Act of 1975,⁷⁸ the BIA, in the spirit of making federal services more responsive to the needs of Indian communities, has entered into many JOM contracts directly with tribal organizations. Tribes use the funds to pay for education-related purposes, such as providing tutors, school supplies and clothes for needy Indian children, as well as organizing cultural field trips.

b. Current Problems in Administration

The recent decision to transfer the JOM program out of the "other recurring programs" budget category and into the Tribal Priority Allocation (TPA) process⁷⁹ has had a devastating impact on California Indians. Prior to finalizing the transfer, the BIA held 11 regional consultation meetings across the country to solicit tribal comments on this and other proposals. California tribal representatives strongly opposed the transfer, both at the consultation meeting and through correspondence. Tribal representatives also advised the BIA that the entire TPA

process was faulty and unfair to California Indians. They requested that a comprehensive study and analysis of the impact of the transfer and of the TPA process on California Indians be conducted. Any meaningful consultation on alternatives to the TPA transfer in California called for such a study.

Specifically, tribal representatives criticized the TPA system for excluding non-federally recognized tribes from participating in the budget process, thereby disenfranchising California Indians who should be receiving services pursuant to the Snyder Act.⁸⁰ They also expressed concern over the effect of the proposed JOM transfer on small California tribes. Most of these tribes lack the infrastructure of larger, out-of-state tribes (again, due in large part to historical and present funding disparities affecting California Indians) and it is not feasible for them to administer new programs with their minuscule share of the fund, regardless of their desire to make education a high priority. Consequently, education dollars are often directed towards existing programs, such as tribal governance, resulting in the virtual elimination of education programs for members of small tribes.

Tribal representatives further noted that due to the large number of tribes in each administering BIA agency, the TPA system in California pits tribes against each other. For example, during the annual BIA budget consultation meetings, over 100 recognized California tribes are blocked together in just three agency-specific meetings. As a result, individual tribal priorities for input into the Area's budget never get submitted—as they do in areas with fewer tribes—because tribal votes tend to cancel each other out. Practically speaking, California Area funding priorities end up satisfying no one, but leave serious tribal divisions in their wake.

In its Federal Register notice dated August 3, 1995, the BIA stated that it had received 2,700 comments on the various education consultation items, and that “most of the comments received on the JOM item were in opposition to the movement of the JOM program funds to the TPA budget category and preferred the program to be administered . . . by formula distribution.”⁸¹ In spite of such opposition from Indian country, and California specifically, the BIA moved forward with the transfer. It then published two methodologies, A and B, for determining a tribe's share of the JOM program funds, and solicited comments.⁸² On October 18, 1995, the BIA published notice that Method B had been chosen based on the 269 comments received, 90% of which favored that method.⁸³

Unfortunately, Method B adds to the already deleterious effect of the transfer to the TPA system by essentially freezing the JOM program to its 1995 status quo. Base funding for each tribal and non-tribal contractor of the program is distributed according to the number of JOM students served by all JOM contractors in FY 1995. So, any tribe, school district or tribal organization that did not have a JOM program in place in 1995 will never be able to apply for JOM monies.

The large numbers of small tribes in California and the historic failure of the federal government to adequately support and fund California tribal development has left many California

tribes without the infrastructure and resources necessary to apply for and implement programs like the JOM. These tribes are now prohibited from ever applying to the program, even if they develop adequate governmental structures in the future; and their children will never be able to avail themselves of these important educational services. As a matter of fact, children not included in a student count for a JOM program administered by a local public school district in 1995 will never receive JOM-funded services.

The children of at least one tribe in southern California have already experienced this shut-out and the corresponding drop in services. The tribe had been engaged in a challenge to a local school district for failing to abide by federal requirements regarding involvement of the JOM Parent Committee. In retaliation, the district refused to pursue the application for JOM program funds in 1995. The tribe then attempted to apply for the funds directly, something it had never done before, and missed the deadline. As a result, the tribe's children were not included in any JOM programs for 1995. Now they are barred from ever receiving JOM funds or services through either the tribe or the district.

Method B further affects California Indians adversely by freezing the student count to 1995 program levels. Unlike Indian populations in many other states, Indian populations in California tend to fluctuate dramatically between rural and urban areas and among the various urban centers of the state, due in part to the large numbers of out-of-state Indians. Previously, when funding amounts were based on a yearly student count, the JOM program had the flexibility to accommodate such fluctuations in student populations served by individual JOM contractors. Now, with funding proportions frozen to a 1995 student count, even eligible JOM contractors may never receive adequate funding to cover increases in the number of students they serve. Conversely, public school districts in urban areas that may not have had the requisite percentage of eligible Indian students in 1995 but do now, are barred forever from pursuing JOM funds.

Unique to California is also the problem of large numbers of tribes that have only recently been recognized or un-terminated, or that will have such status in the near future.⁸⁴ These tribes were barred from applying for JOM funds in the past because of their non-recognized status and they are barred now because of the 1995 program cut-off date. The marked injustice of this policy is obvious.

One final issue regarding JOM, also echoed in other education programs intended to fulfill the federal government's trust responsibilities to California Indians, is this: program eligibility requirements fail to reflect and accommodate the unique historical circumstances of California Indians and thus, unfairly restrict benefits and services to certain groups, even though it has been established that individual California Indians became trust beneficiaries under the 1965 California Indians Appropriation Act.⁸⁵ Prior to the funding distribution change, students eligible for JOM services had to be either members of federally recognized tribes or have one-fourth or more degree Indian blood. This alternative definition of Indian, while it failed to include all California Indians as anticipated by the broad language of the Snyder Act, acknowledged the federal government's responsibility to California Indians who were not members of federally recognized

tribes. Congress itself has recognized the complexity of Indian status issues in California and has begun to move towards a uniform definition of California Indian, as demonstrated by the 1988 Amendments to the Indian Health Care Improvement Act.⁸⁶ The Advisory Council's recommended definition of "Indian," which comports with the intent of and closely tracks, but is not identical to, the language of the Indian Health Care definition, provides a principled and historically consistent approach to individual California Indian eligibility for federal programs and services.

B. U.S. Department of Education Programs

The U.S. Department of Education administers numerous programs that impact California Indian education. Some of these programs specifically address Indian education while others affect Indian students indirectly, as students in the nation's public schools. Many, though not all, of these programs have been recently reauthorized and pulled together under the Improving America's Schools Act of 1994.⁸⁷ However, many of them have not yet received appropriations from Congress. In the following pages, the most significant of these programs in terms of California Indian education are discussed.

1. Indian, Native Hawaiian and Alaska Native Education (Title IX)

In 1967, at the beginning of the Indian Self-Determination era, the federal government initiated an investigation into the problems of Indian education, the results of which were published in 1969. The report emphasized the failure of public schools to educate Indians and cited individual and institutionalized racism as the main reasons for it.⁸⁸

The Special Senate Sub-committee responsible for drafting the report noted that 40 years of attempts by the federal government to assimilate Indian children into the mainstream by increasing public school enrollment had amounted to "coercive assimilation" resulting in:

(A) The classroom and the school becoming a kind of battleground where the Indian child attempts to protect his integrity and identity as an individual by defeating the purposes of the school.

(B) Schools which fail to understand or adapt to, and in fact often denigrate, cultural differences.

(C) Schools which blame their own failures on the Indian student and reinforce his defensiveness.

(D) Schools which fail to recognize the importance and validity of the Indian community. The community and child retaliate by treating the school as an alien institution.

(E) A dismal record of absenteeism, dropouts, negative self-image, low achievement, and, ultimately, academic failure for many children.

(F) A perpetuation of the cycle of poverty which undermines the success of all other Federal programs.⁸⁹

To correct these problems, Congress recognized that greater Indian control over the use of federal education monies was necessary. The Indian Education Act was enacted in 1972.⁹⁰ Regulations were later promulgated detailing the involvement and control of the Indian Parent Committee.⁹¹ Yet, just as the Act was beginning to achieve its goals by Congressional accounts, new, vaguer federal regulations were introduced in 1984, significantly undermining Indian Parent Committee authority and lessening school accountability.⁹² The loss of Indian control continues to be felt today and has negatively impacted the Act's effectiveness. Hence, there is a vital need to reinstate tighter, detailed regulations such as those in place prior to 1984.

The Indian Education Act was amended significantly in 1994 and now constitutes Title IX of the Improving America's Schools Act.⁹³ Title IX actually includes numerous Indian-specific programs, although the "Formula Grant Program to Local Educational Agencies" (LEA) set forth in Part A of Title IX is the program commonly referred to as Title IX. The purpose of the formula grant program is to provide supplemental funds to local educational agencies to reform current school programs serving Indian children so that they meet their special needs, and to ensure that Indian students meet state and national educational standards.

In 1984, Title IX (then called Title IV of the Indian Education Act) was amended to take into consideration the unique circumstances of California, Oklahoma and Alaska. LEAs located on or "in proximity to" a reservation in California do not have to meet the grant requirements with regard to the minimum number of eligible Indian children to be served.⁹⁴ Additionally, the definition of eligible Indian children for purposes of the grant award calculation is significantly broader than the BIA definitions for its education programs.⁹⁵ Despite the more inclusive provisions for California Indians, the program has not achieved its potential for a number of reasons.

Because tribes in California have not been adequately supported or funded to establish tribal-based educational programs, the need for tribes to exercise some control in local school districts cannot be underestimated. But the program has been hindered by a lack of adequate funding and support services for training and assistance to Indian Parent Committee members, and the lack of an effective enforcement mechanism to hold grantee schools accountable for proper implementation of the program. At the public school level, many California school districts have failed to fully embrace the spirit of the program or to abide by federal law with regard to Indian Parent Committee authority and involvement. School administrations have often utilized the Indian Parent Committee as a "rubber stamp" to keep funds flowing into the district without any real input on program development. In many instances, school officials have failed to provide parent committees with data and assessment results for purposes of evaluating the program's

effectiveness, even though evaluation is usually a component of the grant application. Problems have also occurred with regard to the lack of involvement of the Indian Parent Committee in the hiring of personnel funded under the program. Often, an Indian person hired under the grant is unofficially designated the district's Indian "liaison," and obliged to perform duties over and above those funded under the grant, without adequate support to carry out the grant services. Districts with children from more than one tribe have also played off tribes against each other by designating one tribe the representative of all Indian interests served by the district.

These and other issues have prompted five tribes in southern California to join in forming the United Tribes Education Coalition (UTECH), an intertribal association to address the educational problems facing their children in four different public school districts.⁹⁶ As a result of UTECH's involvement through legal representation and community advocacy, several districts have improved their administration of federal education programs. The success of this unified effort has prompted other tribes in southern California to consider forming similar associations.

In certain respects, some of the problems have been alleviated by the recent 1994 amendments to Title IX. The amendments allow tribes to apply for the grant funds directly, or as members of consortia formed expressly for the purpose of applying for the grant.⁹⁷ The only drawback—not unique to California Indians—is that a tribe or consortia can pursue this option only if the LEA has not established a parent committee for the grant.⁹⁸ Moreover, this option does not help urban Indian populations served by the program but having no tribal entity or consortia to assist in advocacy with the district or in applying for the funding itself.

In 1995, California was awarded over \$4 million in Title IX formula grant funds, which supported 117 projects. That budget was over four times the amount of JOM funds allocated to California and reflects the fact that the Office of Education is more inclusive than the BIA in defining its service population. While JOM served only 11,175 Indian students in California in 1995, Title IX formula grant funds served over 33,000. Eligible students include those who are members of tribes, members of tribes terminated since 1940, members of state recognized tribes, and descendants in the first or second degree of any of the above-mentioned individuals.⁹⁹ No distinction was made between members of tribes indigenous to the state and other tribal members.

Other special projects under Title IX which have the potential for making a very positive impact on California Indian education include: grant programs for the development of demonstration projects for the improved achievement of Indian children, professional development of Indian educators, fellowships for Indian students, gifted and talented programs, adult education, and grants to tribes for education, administrative planning, and development. These programs must be funded so that California Indians are allocated their equitable share in relation to other tribes across the country. Moreover, funding equations for such programs should not discriminate against proposals submitted by Indian organizations or educational institutions, in light of the limited number of tribally-controlled schools in California.

2. Impact Aid

On September 30, 1950, President Truman signed legislation entitled "Financial Assistance for Local Educational Agencies in Areas Affected by Federal Activity," popularly known as "Impact Aid."¹⁰⁰ The Impact Aid laws authorize federal subsidies to state operated public schools for the education of children "connected" with federal lands exempt from state taxation. The "federally connected" children are those who either reside on federal lands (military reservations, Indian trust lands or other federal properties) and/or whose parents work on these lands. The legislation and implementing regulations set forth a funding formula that is applied for each qualifying child enrolled in a public school. The local school district then applies for the funding based upon its submission of the count of "federally connected" children during a specified period. In 1958, Congress recognized unique obligations to children residing on Indian reservations and amended Impact Aid to allow school districts to receive both Impact Aid monies for general support and JOM monies for supplemental or "special" services.

The Impact Aid program continues to be one of the most significant federal education programs affecting California Indians. In some ways, it is more significant than JOM and the Title IX Formula Grant Program because it has the potential to achieve Indian input in the overall educational program in public schools, precisely because the monies are not "supplemental," in which case they would go into the district's general fund.

Unfortunately, there exists a great deal of frustration over the inability of most public school districts in California to develop constructive relationships with tribal communities, so that Indian children can attain the intended benefit of the law. Consequently, there is a need for amendment to the Indian-specific provisions of the law to encourage and require greater collaboration between tribes and LEAs, and to ensure accountability of the LEAs to both tribes and the federal government. Currently, the burden of enforcement of LEA obligations rests solely on tribes through the initiation of a complaint process. While the complaint process is a vital and necessary aspect of the legislation, it should come as a last resort, following more proactive and preventative provisions in the law. This requires greater detail in the federal regulations with regard to program definitions, and clearly defined criteria for measuring school district accountability to the Indian community. At present, even to receive a minimum of compliance by the districts, tribes must become, or must hire, experts on data, statistical analysis and the latest educational theories, just to have their recommendations taken seriously rather than be routinely ignored. This level of engagement is impossible for small tribes with limited resources.

Failure of local school districts to properly implement the law for the benefit of their Indian students is not a new problem in relation to the Impact Aid laws. In 1978, based upon a report outlining the inequities borne by Indian children in the nation's public schools, Congress passed significant amendments to the legislation requiring those districts receiving Impact Aid monies for children residing on Indian lands to adopt certain "Indian Policies and Procedures."¹⁰¹ The intent of the policies and procedures is to ensure the equal participation of Indian children in all aspects of the instructional program of the district.

The required parameters of the policies and procedures were set forth in the amendments, and further elaborated in the implementing regulations. They focused on the dissemination of information to tribal officials and parents of Indian children, district assessment of equal participation of Indian children, opportunities for comment and input to the district by tribal officials and parents of Indian children, modification methods for adjusting the educational program of the district to better address the needs of Indian children, and a requirement that the district "meaningfully consider" Indian input. Additionally, Congress provided an enforcement mechanism by establishing an administrative complaint procedure within the U.S. Department of Education.

Recently, as part of the Improving America's Schools Act,¹⁰² Congress reauthorized the Impact Aid legislation and made modifications to several of the Indian-specific provisions. The Department of Education also modified its implementing regulations to conform to changes in the new law and, in the course of doing so, eliminated provisions relating to the "meaningfulness" of Indian input. Prior to these changes, districts were required to evaluate their own use of Indian input, and failure to take into consideration meaningful Indian input in the design of its education programs was one of the grounds upon which a tribe could bring a complaint against the district. With this provision eliminated, tribal attempts to utilize the complaint process to enforce the spirit and intent of the law regarding tribal input and consultation are restricted to the more mechanical violations by the district in the development and implementation of their policies.

At least two tribes in California have utilized the Impact Aid complaint process to attempt to improve the overall education of their children by the local public school district.¹⁰³ Both cases have resulted in protracted litigation in the administrative process, and negotiated settlement agreements that include having tribal financial resources partially pay for independent compliance liaisons to jump-start the districts in properly assessing, evaluating and modifying their programs. Both cases are currently open and are to be monitored by the appointed judge. Other tribes are in negotiations with school districts to improve district policies and procedures under threat of the complaint process.

Special evaluation requirements have been part of the law for over 18 years, but districts are only now implementing systems that will enable them to comply with the law with regard to generating data, statistics, evaluations, and other information used to determine the achievement levels of Indian children and make necessary modifications. The question remains as to whether more detailed policies and procedures and institutionalized systems for implementing them will translate to actual gains for Indian children over the long term. The fact that California tribes have had to resort to the complaint process or the threat of complaint is further indication that troubles persist for Indian children in the state's public schools.

This is particularly lamentable because of evidence that the achievement levels of Indian children improve dramatically when more constructive collaborative approaches between public school personnel and tribal representatives exist. In 1989, such an approach was taken by Humboldt State University, the College of the Redwoods, the Humboldt County Office of

Education, and Hoopa Tribal education representatives to construct course content that would be more relevant to the lives of the students. The program, called PARITY (Promoting Academic Retention for Indian Tribal Youth), was funded for four years by the California Academic Partnership Program of the California State University Chancellor's Office. In its first two years, the standardized test scores of Indian students in the Klamath-Trinity Unified School District jumped 35% in science, while math scores increased by 21%.¹⁰⁴

Spurred on by its success, the PARITY program then expanded its activities to include middle and elementary schools. The initial funding ran out in 1993, but due to its success, it was funded for three more years by an Eisenhower Math and Science grant from the California Post Secondary Education PARITY II, which expanded the program to the Round Valley Unified School District.¹⁰⁵ This second round of funding ran out in 1996 and despite its success, PARITY is not currently funded.¹⁰⁶

It should be noted that there has been no shortage of input from the Indian community regarding the needs of their children—a key component of the Impact Aid regulations. Participants in an ACCIP Education Task Force Dialogue Conference quickly identified needs that have been stated repeatedly by tribal and Indian parent representatives to public schools for decades: a culturally relevant curriculum; the use of teaching methods that are appropriate for Indian learning styles; the inclusion of Native American languages; improved parent/school communication; meaningful Indian control of and increased funding for Indian-specific programs; greater numbers of Indian teachers; and sensitization of non-Indian teachers and administrators.¹⁰⁷ Still, funding for successful initiatives like the PARITY program remain extremely limited.

Currently, the Impact Aid law provides tribes with the option to contract with the BIA to establish a tribally-controlled school, or to receive services directly from the BIA, only if the district refuses to implement remedial measures ordered by the Assistant Secretary for Elementary and Secondary Education.¹⁰⁸ The ability of tribes or inter-tribal associations in California to exercise this option at an earlier stage of the process would greatly boost tribal self-determination efforts in the area of education. Again, the ban on new tribally-controlled school start-ups should be lifted in California to make this option a reality.

Impact Aid is a vital piece of legislation for many California tribes precisely because so many California Indian children who reside on reservations attend public schools. However, in comparison with other states, the remoteness, inaccessibility and limited area of Indian lands in California result in fewer people living and working on Indian lands than off-reservation lands. This translates into lower funding for California Indians, even though most continue to live in discrete communities within their ancestral areas. Another related problem is that Impact Aid funding is only allowed when a local school district has at least 400 students or at least 3% of the total district population living on Indian lands.¹⁰⁹ Thus, if the children living on Indian lands in California are scattered among various school districts, those California school districts are not eligible for Impact Aid.

One final limitation on the effectiveness of Impact Aid is that funding is based on federal land residency and the absence of applicable state property taxes to fund public education. As discussed above, California Indians are disproportionately landless or land-poor. Those tribes in California without a land base or without member children residing on their lands are, therefore, deprived of the special input, comment opportunity and complaint procedures that are a part of Impact Aid—opportunities that would otherwise allow them to be uniquely involved in the overall educational program serving their children.

3. Title I—Helping Disadvantaged Children Meet High Standards

Originally enacted in 1965, Title I has effectively served Indian children because it aims to address the educational needs of disadvantaged students from all racial and ethnic backgrounds. This program provides grants to states and local education agencies to improve basic programs, educate migratory children, and establish prevention and intervention programs for children who are neglected, delinquent or at risk of dropping out.¹¹⁰

Title I funds are also available to BIA and tribally-controlled schools. One percent of all appropriations are reserved in part for use by the Secretary of the Interior to meet the special educational needs of Indian children on reservations and out-of-state Indian children served by local educational agencies under contracts with the Department of the Interior.¹¹¹ In effect, the only way to achieve significant Indian input in the administration of Title I resources is through this BIA-controlled option. But because of the dearth of these options in California, Indians can only benefit indirectly from Title I programs under the public school programs, which do not necessarily take into consideration the specific needs of Indian children.

4. Dwight D. Eisenhower Professional Development Program

This program provides grants to state educational agencies for “the improvement of teaching and learning through sustained and intensive high-quality professional development activities in the core academic subjects at the state and local levels.”¹¹² One half of one percent of the fiscal amount is allotted to the Secretary of the Interior for professional development programs and activities for teachers, staff and administrators in schools operated or funded by the BIA.¹¹³ With only two such institutions in California, California Indians do not receive their fair share of program benefits. To correct this inequity, the prohibition on new tribally-controlled schools in California must be lifted.

Currently, one of the few alternatives available to California Indians is the nationally acclaimed Indian Teacher and Educational Personnel Program (ITEPP) at Humboldt State University. Established in 1969, ITEPP trains American Indian students for educational careers. Today, there are over 45 students enrolled in ITEPP, but the program faces significant funding limitations because priority in the funding process is given to tribal colleges.

Since ITEPP is located on a California State University Campus and not on a reservation,

it loses vital points in the USDE grant proposal evaluation process. In 1995, a consortium of tribes, including the Yurok, Karuk and Hoopa Valley Tribes, submitted a proposal for funding for the ITEPP program, which was not met. In fact, comments by the evaluators indicated a lack of understanding of California's Indian education situation. There was significant criticism of the fact that ITEPP was located on a California State University campus, and not at a tribal college or on a reservation. Some even questioned whether there were any "real Indians" in the ITEPP program since it was so successful.¹¹⁴ ITEPP is making a difference for Indian children and youth by training California Indian teachers who will be teaching in both tribal programs and public schools. Such an important program should be supported by consistent federal education funding.

5. Comprehensive Regional Technical Assistance Centers

This program authorizes five-year grants, contracts or cooperative agreements between the U.S. Department of Education and public or private non-profit entities or consortia to establish "a networked system of 15 comprehensive regional assistance centers."¹¹⁵ The assistance centers are intended to provide training and technical assistance to public school districts, tribes and other community organizations in order to administer and implement the federal programs authorized under the Improving America's Schools Act. The centers are also directed to ensure that staff has expertise in integrating and coordinating the programs with other federal, state and local programs. Furthermore, the law specifies that "each comprehensive regional assistance center that serves a region with a significant population of Indian or Alaska Native students shall (1) be awarded to a consortium which includes a tribally-controlled community college or other Indian organization; and (2) assist in the development and implementation of instructional strategies, methods, and materials which address the specific cultural and other needs of Indian or Alaska Native students."¹¹⁶

While these Indian-specific provisions are appropriate for Indian populations concentrated in one geographical area, California Indians, being widely scattered throughout the state, may not be considered a "significant population," even though California has the second largest total Indian population of any state. There are two technical assistance centers in California, but without regulations to specifically ensure that California tribes and Indian populations receive the intended benefits of this program, it is possible that the badly needed services of the technical assistance centers will be unavailable to most California Indians.

6. Bilingual Education, Language Enhancement and Language Acquisition Programs

Title VII of the Improving America's Schools Act funds programs "to develop systematic improvement and reform of educational programs serving limited English proficient students through the development and implementation of exemplary bilingual education programs and special alternative instruction programs."¹¹⁷ It also contains specific provisions dealing with Native American languages and acknowledges that Native Americans and their languages "have a unique status under Federal law that requires special policies."¹¹⁸ Those Native American entities

eligible for the program are federally recognized Indian tribes, "tribally sanctioned educational authorities," or BIA-funded or operated elementary and secondary schools.¹¹⁹

Here again, the eligibility criteria used for the program fail to take into account California Indians who are not members of federally recognized tribes. Moreover, with only one BIA school and one tribally-controlled school in California, it appears that California Indians will be unable to receive their fair share of the funds for these important programs. It is well documented that language is inextricably linked to culture. The number of native speakers of California's numerous native languages is quickly dwindling and it is unlikely that public schools will make an effort to utilize native language materials and programs, given their poor record in acknowledging and respecting the importance of Indian culture.¹²⁰ These issues underscore the importance of exempting California tribes from the prohibition on new tribally-controlled schools.

C. State of California Programs—American Indian Education Centers

Following the failed Termination era policies by which the BIA withdrew services from California Indians, Indian people throughout the state pushed for measures to address the emergency condition of Indian education through the formation of the California Indian Education Association in 1967. In 1974, the state passed legislation which authorized the creation of 27 California Indian Education Centers to raise the graduation rates and academic achievement of Indian students.¹²¹ The centers are community-based and Indian-controlled, though not necessarily tribally-controlled.

Ten of the current centers are located on reservations or rancherias and most are operated by private, non-profit, Indian-controlled agencies. The definition of Indian for eligibility purposes is the same as that set forth in the federal Title IX legislation.¹²² The centers often administer JOM, Title IX, early childhood education, and adult education programs, and tend to offer after-school tutoring or "alternative" schooling, such as home study programs. The two million dollar program which funds the centers serves approximately 5000 Indian students throughout the state. However, this amounts to only about 12 percent of the estimated 43,459 Indian students in the state who need services.

That the centers are still in existence and considered necessary underscores the point that the education needs of the large majority of Indian students are going unmet in public schools. It also underscores the importance of Indian control and involvement in the education of Indian children. But even the programs and services provided by these centers are considered inadequate in stemming the tide of low achievement levels and high dropout rates among Indian children. In a search for solutions, two of the state Indian Education Centers initiated efforts to establish full-service public charter schools on-site to meet the pressing need for comprehensive services specifically tailored to Indian students.¹²³ At the Indian Education Center in the City of Chico, Butte County, Northern California, these efforts have resulted in the establishment of the Four Winds Charter School.

Administrators at the Four Winds Charter School have expressed concern that the supplemental or "pull-out" programs usually provided by the centers simply cannot address the total context of a student's educational needs. In their view, the only way to make a real difference is to offer services to the entire family, as part of the children's educational program. Four Winds students in grades six through nine are generally two grades behind their grade level at enrollment. Additionally, many of the students are dropouts from the public schools in the district. Administrators know of Indian children dropping out even before high school age, a fact that would not appear in the California state statistics for grades nine through 12.¹²⁴

Absenteeism of Indian children is another major problem. For example, there was one third-grader with a 35% attendance rate in the Chico Unified School District—not an isolated case, unfortunately. Although 60 Indian students are presently enrolled in public kindergarten, only two are expected to graduate from the 12th grade at Chico Unified School District.¹²⁵ Even if the current senior class had only 15 Indian students at the start, a two out of 15 graduation rate amounts to a dismal 13%.

The Four Winds Charter School currently serves 105 children in grades K through nine, 99% of whom are Indians from various tribes, including non-California tribes. Though in existence for only a year, the school shows great promise with a 90% student attendance rate, a figure that has remained unattainable by regular public schools.¹²⁶ This figure is particularly significant in light of the high early dropout rate for Indians in the public school system. By exposing the children early to a positive educational experience, there is hope that they will develop the skills necessary to complete high school and even consider going into higher education.

The trend in California to develop comprehensive programs within the American Indian Education Centers highlights the need for tribally-controlled schools. The strategy thus far has been to obtain available grant funding as a tribal consortium or Indian organization, and then to develop broader programs as additional funds are accessed or made available. Of course, larger tribes administer their own tribal grants, but for the most part the Centers represent a joint strategy to address education problems in regions where small, geographically dispersed tribes cannot individually access the education funding available to Indian children and youth.

One serious problem, however, is the level of funding. Although the centers serve all Indians who wish to participate, some of their major funding sources limit the funding base to members of federally recognized tribes or reservation Indians. The adoption of a uniform definition of California Indian, as set forth in the Advisory Council's recommendations, would hopefully correlate the funding level with the actual Indian population served by the Indian Education Centers.

IV. College and Higher Education

A. BIA Programs and Services

1. Tribally-Controlled Community Colleges

D-Q University (DQU), the only tribally-controlled community college in California, was established in Davis in 1971. Of the 22 tribally-controlled community colleges in the United States, DQU is among the top five in terms of the number of students graduated per year, but the vast majority of them are out-of-state Indians.¹²⁷

DQU is unique among tribally-controlled colleges because it is not located on a reservation or on Indian lands, but on federal surplus lands that were occupied by California Indians and others in order to have them turned over to Indian control. Since its historic, yet troublesome beginnings, DQU has had to overcome many political and funding obstacles, but has continued to provide a place where Indians can gain their first experience in higher education, without the financial and institutional pressures of a four-year college.

As the only tribal college in California, DQU holds particular significance for most California Indians. Because of limited funding in the past, it has had to function with volunteers from the local area, as well as faculty from nearby UC Davis. Without the support of these dedicated individuals, DQU would have had to shut its doors long ago.

Today, DQU is going through growing pains. With a new and successful President, and a knowledgeable Board of Trustees comprised mainly of California Indians, DQU is seeking private and tribal funding to establish educational programs that will be useful to California Indians. The programs include business administration, tribal management, Indian entrepreneurship, medical careers, computer literacy, and gaming administration.

Although the future looks bright for academic programs, DQU faces a major shortfall in funding for site improvements. The dorms are in desperate need of improvements and basic necessities, such as efficient heating and air conditioning systems. There is no recreational facility, so physical education and recreation programs are currently unavailable to students. Existing amenities, such as a tennis court and outdoor basketball court need complete renovation to be useful. Without these necessary site improvements, DQU will have a difficult time recruiting new students in the coming years.

Most federal funding for tribally-controlled colleges is calculated on the basis of the number of student credit hours. In 1995, DQU served over 300 students and received \$595,434 in funds from the BIA, out of a total of \$24,359,385 allocated nationwide. While the BIA spends \$20.57 per capita nationally, spending in California is \$13.07 per capita, using current BIA service population figures. Because the BIA undercounts California Indians by 100%,¹²⁸ per capita spending in California is just \$6.54. This disparity is exacerbated by the fact that education costs

in California are likely to be higher than in other parts of the country.

If DQU is to continue providing its unique services to California Indian students, it must be funded at a level comparable to other tribally-controlled colleges. It should also receive special funding for site renovation and recreational facilities, to bring it up to the level of other such campuses across the country.

It is BIA policy to "support and encourage the establishment, operation, and improvement of tribally-controlled community colleges to ensure continued and expanded educational opportunities for Indian students."¹²⁹ A 1984 BIA task force recommended the allocation of three separate planning grants for tribally-controlled community colleges in California.¹³⁰ The BIA, however, has not provided any planning funds or technical assistance to any California tribe interested in founding its own reservation-based community college. Given California's large Indian population, more facilities are needed to serve college-age students.

2. Higher Education Scholarships

In the area of higher education, eligibility for funding has been the most contentious issue. Up until 1986, the BIA provided higher education grant funding to California Indians of at least one-fourth degree Indian blood.¹³¹ In response to the Ninth Circuit Court of Appeals' decision in Zarr v. Barlow,¹³² which held that the BIA could not apply the blood quantum standard to deny higher education grant benefits to *a member of a federally recognized tribe*, the BIA made the extraordinary policy decision to restrict program eligibility to *only* members of federally recognized tribes. This decision effectively excluded all non-federally recognized Indians of one-fourth degree or greater Indian blood from the higher education grant program, contrary to the plain language of the regulation and the Snyder Act.¹³³ Moreover, the BIA accomplished this major shift in policy by way of internal policy memoranda, without complying with the clear mandate of the Administrative Procedure Act, and without amending the existing regulation. This action prompted a second lawsuit, Malone v. Bureau of Indian Affairs,¹³⁴ in which the Ninth Circuit held that the new restriction was invalid.

While the plaintiffs prevailed in both of these cases, the BIA has continued to deny higher education benefits to California Indians who are not members of federally recognized tribes, regardless of their Indian blood quantum. The underlying issue of who is an Indian for purposes of eligibility for federal programs and services lies at the heart of the problems confronting California Indians on many fronts, but especially in the area of education.

With the advent of the Indian Self-Determination Policy in the 1970s, federal programs for Indians began to focus on the overriding policy goal of strengthening tribal governments. In announcing this new Indian policy, however, Congress did not intend to exclude from the Snyder Act programs those Indians previously served by them, but not affiliated with a federally recognized tribe. Indeed, these Indians had participated for years in various education, housing, health, and welfare programs. Education of the individual Indian, regardless of formal tribal

affiliation, remains fully consistent with the Snyder Act's broad mandate to the BIA to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States ..." (Emphasis added)¹³⁵

Despite this broad mandate, the BIA has proposed the following restrictive definition of Indian for purposes of eligibility for its Adult Education and Higher Education Grant programs:

"a person who is a member, or is at least a one-fourth degree Indian blood descendant of a member, of a federally recognized Indian tribe, eligible to receive services from the Department of the Interior."¹³⁶

Although the definition is phrased in the alternative, the alternative criterion is mostly illusory. It would be unusual for a one-fourth degree Indian blood descendant of a member of a federally recognized tribe to not be enrolled, or eligible for enrollment in that same tribe. Thus, the practical and primary effect of the proposed regulation is to restrict eligibility only to members of federally recognized tribes, despite the broad language of the Snyder Act.

Though there has been no change in the authorizing statute, the BIA is proposing regulations that will exclude a group of Indians previously served under the eligibility criteria for these programs. As the following chronology of the BIA's consideration of Snyder Act program eligibility demonstrates, the proposed exclusion of these Indians is totally arbitrary and conflicts with prior agency practice and the statute itself.

a. Program Eligibility

The BIA first published a regulation governing the Higher Education Grant program in 1957. The regulation, which has not changed in the intervening 40 years, provided that "[f]unds appropriated by Congress for the education of Indians may be used for making educational loans and grants to aid students of one-fourth or more degree of Indian blood attending accredited institutions of higher education..." (Emphasis added.)¹³⁷ This definition was not tied to membership in a federally recognized tribe, but allowed the BIA, consistent with the Snyder Act, to serve Indians anywhere, as long as they met the regulation's minimum blood quantum requirement. Moreover, a 1968 departmental memorandum reveals that the BIA considered California Indians—at least those who possessed the requisite Indian blood quantum and could demonstrate economic need—eligible for Snyder Act education programs.¹³⁸

In August 1970, the Sacramento Area Director wrote to the Commissioner of Indian Affairs questioning the application to California Indians of a memorandum issued by the Assistant Secretary of Public Land Management.¹³⁹ The memorandum asserted that the BIA's "long-standing general policy" was to provide its services only to reservation Indians.¹⁴⁰ The Area Director pointed out that "historically, the California Indians have received much less consideration than Indians in other states," adding that "no appreciable land base was ever authorized for Indian bands or tribes of the state due to the Senate's failure to ratify the 18

treaties negotiated by the Federal Government in 1851-52 with many of California's tribes."¹⁴¹ He further emphasized that, notwithstanding the government's failure to set aside the 8,518,000 acres promised in the California treaties, most California Indians were identifiable as a result of the preparation of rolls pursuant to various Acts of Congress.¹⁴² The Area Director went on to recommend that, "for purposes of defining the Snyder Act service population in California, the term 'on or near' should be construed to be applicable to and include all Indians (outside of those residing in the San Francisco Bay Region and the Los Angeles Area) presently resident in the State of California who are descendants of Indians residing in the State on June 1, 1852."¹⁴³

Slightly more than a year later, on December 9, 1971, the Assistant Solicitor, Division of Indian Affairs, issued a memorandum opinion "on the question of whether the Snyder Act restricts the expenditure of appropriated funds for the benefit of Indians of federally recognized tribes living on reservations established by the United States" in response to an informal request from the Commissioner of Indian Affairs.¹⁴⁴ Regarding the language of the Act, the Assistant Solicitor observed:

On its face, the underscored language ["Indians throughout the United States"] is abundantly clear and requires no interpretation. Literally, it authorizes the expenditure of funds for purposes within the named program categories for the benefit of any and all Indians, of whatever degree, whether or not members of federally recognized tribes, and without regard to residence so long as they are within the United States. * * *

With language so unequivocal, it is subject to the general rule of law that plain and unambiguous statutory language will be followed and there is no need to resort to extraneous material as an aid to construction. [Citations omitted.]¹⁴⁵

In concluding, the Assistant Solicitor observed that "the Snyder Act will, in our opinion, support an application as broad as its language...."¹⁴⁶

Despite the Assistant Solicitor's opinion, the debate over eligibility for BIA services continued within the Department of the Interior. In a May 1971 memorandum to the Commissioner of Indian Affairs, the Assistant to the Commissioner discussed employment assistance to "off-reservation" Indians, with particular attention to "the problem presented with respect to California Indians."¹⁴⁷ The memorandum quoted extensively from the Sacramento Area Director's earlier memorandum of August 14, 1970, regarding the difficulty of applying an "on or near" reservation service population criterion to the largely landless California Indians. Referring to a map prepared by the Area Director, the memorandum emphasized that: (1) the extent of Indian trust land and public domain allotments is very limited; (2) the recognized Indian community areas are generally in proximity to or overlap the original 1852 treaty reservation areas; and (3) there are significant numbers of California Indians dispersed throughout the State,

“comparable to the Oklahoma situation.”¹⁴⁸ The memorandum concluded that “[t]he case presented by the Area Director [to provide services to all California Indians, including those residing in off-reservation areas] is one that I find persuasive, if not compelling.”¹⁴⁹ Eligibility questions persisted, especially with regard to the California Indians, prompting preparation of a Department of Interior report on eligibility for BIA services.¹⁵⁰ In focusing on the situation of the California Indians, the report’s authors observed that “[i]n 1866 the Commissioner of Indian Affairs said that the Native California Indians, both on and off of the federal trust property were ‘wards’ of the government. (1866 Commissioner’s Report).”¹⁵¹ The report questioned on legal grounds, the policy that BIA services were to be provided only to reservation Indians, adding that:

... there is no legal or statutory reason for this limitation. In addition, specific eligibility criteria for BIA services to Indian clients rests largely on blood quantum and place of residence. Not only is this not related to law but it is part of a system that has proved itself to be inconsistent. (Emphasis added.)¹⁵²

* * * * *

Clearly, the outmoded eligibility criteria of the BIA should be rejected in favor of a set of new policies which reflect the social, economic and demographic variables of contemporary Indian life. We must emphasize that there is no legal basis for generally limiting services to Indian tribes or groups. (Emphasis added.)¹⁵³

Regarding the California Indian service population, the report noted that:

California Native Indians number 36,489 as documented by the 1970 census. They are all presently eligible for BIA services, yet the Bureau has only been funded to serve the 6,151 Indians living on trust lands. (Emphasis added.)¹⁵⁴

More generally, the report referred to the 1971 Solicitor’s opinion mentioned above, and concluded:

In light of the opinion of the Solicitor’s office concerning the latitude of activities which the Snyder Act authorizes, and further, the verification that the BIA was serving off-reservation Indians prior to 1921 [the date of enactment of the Snyder Act], it is evident that the Bureau can use funds which have been appropriated by Congress to reach Indian people, whomever they are, and wherever they need assistance.¹⁵⁵

The BIA resolved the eligibility issue for purposes of its Higher Education Grant program by serving those California Indians of at least one-quarter Indian blood quantum, affording a priority to Indians living on or near reservations. In effect, the BIA appears to have simply adhered to the eligibility criteria of 25 C.F.R. § 40.1,¹⁵⁶ notwithstanding the conclusions of the Interior Report questioning the legality of BIA criteria based on blood quantum and reservation residency when applied to California Indians. This practice apparently prevailed until the case of Zarr v. Barlow.¹⁵⁷

In Zarr, the Ninth Circuit Court of Appeals held that the Secretary of the Interior could not use the blood quantum restriction to deny higher education funding to a member of a federally recognized tribe who was slightly less than 1/4 degree Indian blood.¹⁵⁸ In response to the Zarr opinion, the BIA issued two different internal memoranda, one on November 26, 1986,¹⁵⁹ and the second on February 21, 1989,¹⁶⁰ addressing the eligibility criteria for BIA Higher Education programs. The combined effect of the two memoranda was to exclude from eligibility any Indian who was not a member or descended from a member of a federally recognized tribe.

Greg and Gene Malone, brothers of 5/16ths degree Wintu Indian blood, filed suit in 1992 challenging the BIA's restrictive interpretation of the Zarr decision. Although the Malones were more than 1/4 degree Indian blood, they were members of a tribe that is not federally recognized. In their case against the BIA for denying them higher education funding, the Ninth Circuit rejected the BIA's interpretation of Zarr, adding that:

...although we made clear in Zarr that the blood standard could no longer be the sole criterion, we did not rule out all applications of a blood standard. (Emphasis in original).¹⁶¹

The Court also pointed out that Congress itself had used a very broad eligibility standard in implementing another Snyder Act program in California:

...we note that, subsequent to Zarr, Congress adopted an inclusive standard for a Snyder Act program, one which appears to extend eligibility to individuals like the Malones. In the 1988 Amendments to the Indian Health Care Improvement Act of 1980 ("IHCA"),¹⁶² Congress extended eligibility not only to members of federally recognized tribes, but also to certain categories of California Indians.¹⁶³

Three significant legal principles relevant to eligibility criteria for Snyder Act education programs emerge from these authorities: (1) the BIA cannot use Indian blood quantum as the sole eligibility criterion; (2) except for California Indians, the BIA may be able to use blood quantum in conjunction with other criteria, but must demonstrate a rational justification for employing one specific blood quantum over another in developing eligibility criteria; and (3) the BIA must adopt eligibility criteria consistent with Congress' determination that the California Indians, as defined in

25 U.S.C. § 1679, are eligible for Snyder Act benefits.

A fundamental principle of administrative law is that regulations adopted by an agency must be consistent with their authorizing statute. In Malone, the Ninth Circuit emphasized that “in formulating a new standard [for the Higher Education Grant program], the BIA must adopt criteria consistent with the broad language of the Snyder Act” and encouraged the BIA “to look to eligibility criteria used in other Snyder Act programs, such as those set forth in the 1988 Amendments to the [Indian Health Care Improvement Act].”¹⁶⁴ It has been three years since the decision in Malone and the BIA has yet to comply with the Ninth Circuit’s directive.

b. Funding Inequities

Many California Indian college students were rendered ineligible for higher education grants by the BIA’s changes in eligibility criteria. Other California Indians are excluded from grants by virtue of the BIA’s preference for qualified students who live on or near reservation areas. Not surprisingly, California has received a disproportionately small amount of higher education grant monies.

In 1995, for example, California received only \$569,125 of the more than \$29 million allocated nationwide for BIA scholarships.¹⁶⁵ Per capita spending nationwide on this program was \$25.15, compared with California per capita spending of \$12.29 (or \$6.24 if you include unrecognized California Indians who ought to be eligible for education funding).¹⁶⁶ Thus, the California per capita allocation was only one-fourth of the allocation nationwide.

c. Practical Problems of Administration of Higher Education Grants

At the college level, there is a financial aid system in operation apart from the BIA system. Financial aid counselors at most colleges and universities do not generally understand the process or purpose of BIA higher education funding, or how it should replace other funds. California Indian college students often complain that their financial aid counselors are antagonistic when having to deal with the BIA. Personal opinions and biases about Indian scholarships at the financial aid office can make the process very difficult, especially for freshmen who do not understand the financial aid system.

Some University of California and California State College campuses have an “American Indian program,” such as the Indian Teacher and Educational Personnel Program at Humboldt State. Students in the program have access to a special advisor who can facilitate access to financial aid. U.C. Davis used to have a Yakima Indian financial aid counselor with extensive experience in processing BIA applications. She was aware of the problems facing Indian students when they arrived on campus with no money to pay for rent, food, books, and other essentials, believing that their BIA grants would arrive in the first week, along with other financial aid packets. BIA funding, however, typically did not arrive for weeks, or even months into the quarter. Many Indian students dropped out during this critical transition time, even with an

advisor who was willing to help them. Unfortunately, this advisor is no longer at U.C. Davis.

The lack of information about funding options at the financial aid offices, and the failure of the BIA to set out a reasonable funding schedule have been significant barriers to a college degree for most California Indians.

3. Graduate and Professional School Funding Programs

The BIA does not have a graduate level funding program. The three main funding programs for graduate students are 1) The Indian Fellowship Program, Department of Education, (Title IX)¹⁶⁷; 2) American Indian Graduate Program, University of New Mexico; and 3) IHS Health Professions Scholarships.¹⁶⁸ All three programs only fund members of federally recognized tribes based on need, and require a minimum 2.0 grade point average.

The most significant problems facing these funding programs are the ongoing federal budget cuts. Last year's budget dispute resulted in drastic cuts to the Indian Fellowship Program (IFP) and the American Indian Graduate Program (AIGP), both of which are supported primarily by federal funds. The AIGP budget for the next year was cut in half, from 2.4 million to 1.2 million. The IFP was hit even harder and will not be able to fund new fellowships next year. At present, there is only one California Indian in the IFP program.

The IHS Professional Fellowship Program (PFP) is currently redefining its eligibility criteria to match that of the BIA Higher Education Grant Program. Although the changes in eligibility are currently being challenged in California, the IHS continues to fund members of federally recognized tribes only. In any case, consistent funding cuts are making IHS Fellowships more and more difficult to obtain.

V. Vocational and Adult Education

A. Bureau of Indian Affairs Programs

1. Adult Education

The Bureau of Indian Affairs (BIA) has administered an Adult Education Program (AEP) for some time. Since 1983, the funding pattern for the program has fluctuated between \$137,600 and \$350,000 per year, but has remained significantly lower than previous allocations of \$557,500 in 1981 and \$512,800 in 1982.¹⁶⁹ AEP funds are used primarily for high school equivalency programs, the costs of administering the equivalency tests, and related expenses. If additional funds are available, they may be used for job training activities.

In 1987, the BIA proposed revisions to the regulations on the AEP. No further action was taken on the proposed revisions until the regulations were re-proposed in 1994. The proposed rules would limit eligibility to enrolled members of federally recognized tribes and their

descendants of one-quarter or more Indian blood.¹⁷⁰ As discussed above, this limitation is inconsistent with the broad scope of the authorizing legislation, the Snyder Act, and violates the BIA's trust responsibility toward California Indians. To date, the proposed revised regulations for the AEP have not been adopted.

Until recently, when it was included in the Tribal Priority Allocation Process (TPA), the AEP was administered primarily through the Sacramento Area Office of Indian Education and through tribes and Indian education centers. As discussed previously, programs that have been moved to the TPA have a tendency to "disappear" as small, needy tribes re-allocate their pro-rata share of individual programs to more immediate tribal needs.¹⁷¹ When the BIA proposed the transfer of AEP funds out of the "other recurring programs" budget category to the TPA process, a number of California tribes and Indian education organizations voiced significant opposition because the process excludes previously eligible California Indians who are not members of federally recognized tribes, and results in the distribution of relatively small tribal shares of a program that is already under-funded when measured against other BIA Area AEPs. The lack of adequate funding in any case precludes even those tribes who wish to use their tribal shares to establish an AEP from operating an economically viable program. By moving these funds into the TPA process, the BIA has thus set up a situation where the AEP funds are more likely to be used by small, financially-strapped tribal governments to address immediate operational needs rather than to run what would be, in any event, an AEP program in name only.¹⁷²

2. Vocational Education

The BIA offers financial assistance to adult Indians "to acquire the job skills necessary for full-time satisfactory employment."¹⁷³ The program provides for full-time training in vocational or trade schools, apprenticeships and on-the-job training.¹⁷⁴ In most cases, full-time training is available for up to 24 months, except for Registered Nurses, who train for 36 months.¹⁷⁵

The program is available to enrolled members of federally recognized tribes and their descendants of one-fourth or more degree.¹⁷⁶ In theory, other Indians of at least one-half degree or more of Indian blood are also eligible, as long as their Indian blood is not derived from a terminated tribe.¹⁷⁷ The requirement that applicants reside on or near Indian reservations,¹⁷⁸ however, severely limits the eligibility of half-blood Indians who are not members of federally recognized tribes, even though they may be residing on allotted trust lands. The exclusion of California Indians who are not members of federally recognized tribes and the administration of funding through the TPA creates major barriers to the success of the vocational education program.

B. U.S. Department of Education Programs

1. Title IX Adult Education Program

Pursuant to 20 U.S.C. § 7851, the Secretary of Education is authorized to award grants to

State and local educational agencies and to Indian tribes to establish services and programs to improve literacy and provide educational opportunities for Indian adults. Priority is given to Indian educational agencies, organizations and institutions.

As with other programs under Title IX, the Adult Education Program (AEP) in California is administered by both tribes and Indian education centers. The Title IX AEP program provides funding for California Indians who live away from their reservations or are not members of federally recognized tribes, and for out-of-state Indians living in California, to attain their high school equivalency. Title IX AEP is also used for literacy programs and for some limited job training.

2. School-to-Work Opportunities—Vocational Education

The School-to-Work program enables States and local entities to create programs that integrate school with work-based learning and academic with occupational learning, and establish effective linkages between secondary and post secondary education.¹⁷⁹ Indian tribes and organizations are authorized to participate in local partnerships¹⁸⁰ and grants are available to establish programs for Indian youth through BIA-funded schools.¹⁸¹ One-half of one percent of the annual School-to-Work program appropriation is reserved for this purpose.¹⁸² Unfortunately, no such program has been funded for California Indians, in part because of the lack of BIA-funded schools in California.

VI. The Effect of the Tribal Priority Allocation on California Indian Education

As part of the process commenced in 1990 to reorganize the BIA, a Joint Tribal/BIA/DOI Advisory Task Force was formed on December 20, 1990, by the Secretary of the Interior. The process of reform included the design and implementation of a new Tribal Budget System that would introduce greater flexibility in budget formulation and result in tribal control of up to 95% of the program resources of the BIA, consistent with the Indian Self-Determination Policy.¹⁸³ To accomplish this, the Task Force proposed the gradual transfer of the “other recurring programs” elements of the BIA’s budget to tribal base funding, as part of the Tribal Priority Allocation (TPA) process.

The “other recurring programs” category includes educational programs, such as the Higher Education Grant Program, Adult Education, Adult Vocational Education, and Johnson O’Malley, all of which cover a broader Indian eligibility base than purely tribal programs. Indeed, these programs, which are authorized under the Snyder Act, have historically included Indians who are not members of federally recognized tribes, consistent with the Snyder Act’s broad mandate to provide assistance, including education assistance, to “Indians throughout the United States.”¹⁸⁴ By shifting funding from the “other recurring programs” category to TPA, the BIA effectively excluded non-federally recognized Indians from programs for which they were previously eligible, by the simple expedient of reserving all of the funds for tribal purposes.¹⁸⁵ Remarkably, this has been accomplished without any change in either the authorizing statutes or

implementing regulations for these programs. The effect of this budget "reform" did not end there.

Even before the BIA initiated efforts to reform its budget process, California Indians in general were getting far less than their fair share of Indian program dollars.¹⁸⁶ After budget reform and implementation of the TPA process, programs that were previously grossly underfunded in California relative to other areas of Indian country were simply divided up into smaller shares and distributed to individual tribes. The end result of this transfer of funding from "other recurring [education] programs," such as the Higher Education Grant Program, to the TPA process has been to effectively eliminate these programs for many small California tribes and their members, including *all* of California's "unacknowledged" tribes.¹⁸⁷ The net effect of the shift in funding to the TPA process appears to be a decrease in total program dollars. In FY1996, funding for TPA was reduced 9.8% from its FY1995 enacted level.¹⁸⁸

As previously discussed, the BIA used to administer its higher education grants to include both members of federally recognized tribes and California Indians of one-fourth degree or more Indian blood. Grants were made based on the financial need of the student, with a requirement that the student maintain a 2.0 grade point average. In the 1980s, the Hoopa Valley Reservation and the Tule River Reservation began administering their own education funding, under the supervision of the BIA Education Director. Today, most southern California tribes administer their own tribal education funds, with the exception of Barona, Cabazon, La Jolla, Los Coyotes, Pauma, Manzanita, Santa Ysabel, and San Pasqual, whose funding is administered by a consortium called Ahmium, Inc.¹⁸⁹ All the central and northern California tribes, besides Hoopa and Tule River, now individually administer their education funds through the TPA process.

The total education funding available for California Indians has decreased over the past decade, at a time when California Indians are finally seeing an increase in the number of young people making it to college.¹⁹⁰ In 1990, the average award for a semester at college was \$2500-3,000, but today, students are lucky to get \$500 per semester.¹⁹¹ A Yurok college student graduating from UC Davis in 1997 received only \$250 per semester from his tribe.¹⁹²

Obviously, the TPA process, combined with an established pattern of inequitable allocation of Indian education funds to California, has contributed to the sharp decrease in the size of the individual education grants to California Indian college students. For those tribes that decide to take their tribal share of the agency education budget, other more pressing areas of tribal need often trump education in the annual priority allocation process, leaving members who aspire to a college education without any BIA or tribal financial support. In any case, the individual tribal program share is usually too small to support the administration of a separate tribal higher or adult education program. If the funds are used for education purposes, the most feasible alternative is usually for the tribe to simply pass the funds through to deserving members in the form of a mini grant for educational support. Yet, even if a tribe decides to distribute its share of, for example, the higher education grant program in this manner, the amount is generally insignificant if the tribe has more than a handful of member students. For larger tribes, such as the

Yurok, which has a relatively large number of member students, the division of the tribal share results in inconsequential awards of \$250 per semester.

Students fared better under the previous BIA system because there was a larger pool of money to be distributed to all Indian students based on financial need. In addition, the overhead for administering the program was absorbed by the BIA. If a tribe had no students, the rest of the applicants in the pool received larger awards. This system also provided grant awards to members of non-federally recognized tribes.

Under the Ahmium consortium model, the tribes give their education funds as allocated under TPA to Ahmium, which processes the grant applications for members of its constituent tribes. Like the old BIA system, Ahmium distributes a tribe's unused share of funds among the rest of the students in the pool—resulting in larger individual grants—rather than diverting the money towards other uses. Ahmium is currently also administering BIA higher education grants, vocational education and training grants, and tobacco, drug and alcohol programs.

The Education Director at the BIA's Sacramento Area Office has stated that under TPA, funding for all education programs has gone down (including JOM, early childhood and vocational education). The situation has been so bad that the Sacramento Area Office has sought outside funding to supplement the federal appropriation. As a funding formula, it is obvious that TPA does not work in California where there are so many tribes of such varying sizes.

Conclusion: The Need for Equal Treatment and California Tailored Solutions

Strong education programs which reflect Indian traditions and values, designed by or in close consultation with Indian educators and parents, enhance the capacity of Indian tribes to self-govern and to achieve and sustain prosperity and self-sufficiency within their tribal communities. Education programs which place Indian students in educational settings that reflect only non-Indian values, or tend to invalidate Indian values and culture, set up these students for failure and harm the tribal community as a whole. Education should provide a means through which Indian tribes and communities can affirm their cultural identity and achieve individual and group prosperity as tribal members develop and contribute to the growth of tribal and community life.

The most successful educational projects and initiatives in California have been those that have placed control of education programs with parents and tribes at the local level. On the other hand, the greatest single reason for the lack of success and the unpopularity of BIA programs has been their failure to involve Indians in the planning and implementation of programs which affect them. In addition, the BIA has deprived many California Indians of higher, adult and vocational education opportunities by arbitrarily redefining the California Indian service population to exclude all Indians who are not members or descended from members of federally recognized tribes. And more recently, the BIA has thwarted the Snyder Act's broad mandate to provide educational assistance to "Indians throughout the United States" by moving all Indian education programs into the TPA, thus effectively excluding Indians who are not members of federally

recognized tribes.

The Advisory Council's recommendations target these and other problems identified in the foregoing report by formulating approaches tailored to meet the needs of California Indians in the area of education. However, in order to translate these recommendations into successful programs, the suggested approaches must be backed by funding commitments from both Congress and the BIA—Congress must make the necessary appropriations and the BIA must ensure that the funds are made available promptly and in a manner consistent with effective program implementation. In addition, Congress must address the serious and continuing problems associated with the questioned eligibility of non-federally recognized California Indians for BIA higher, adult and vocational education programs. Adequate funding—coupled with congressional resolution of Indian eligibility issues and cooperative federal-tribal efforts to increase tribal and Indian community control and involvement in Indian education—are the tools needed to achieve the Californian Indian vision of empowering their children, as well as their communities and tribes, to reach their ultimate potential.

ENDNOTES

1. See, e.g., Malone v. Bureau of Indian Affairs, 38 F.3d 433, 439-430 (9th Cir. 1994).
2. 25 U.S.C. § 13
3. Section 5 of the Advisory Council on California Indian Policy Act of 1992, Pub. L. No. 102-416, 106 Stat. 2131.
4. There have been a number of previous reports on Indian Education in California. See Appendix A, Summary of Major Reports on Indian Education.
5. See Cary McWilliams, California: The Great Exception, (Peregrine Smith, Inc., 1976), at 50-51.
6. The refusal to ratify the treaties resulted in the displacement and impoverishment of Native peoples on a scale unparalleled in United States' history in terms of acreage of aboriginal lands taken and the number of tribes affected. Not only were the California tribes deprived of their aboriginal lands, encompassing more than 70,000,000 acres, they were also denied the benefit of treaties negotiated in good faith that would have set aside approximately 8.5 million acres of land for California Indians. See Bruce Flushman and Joe Barbieri, Aboriginal Title: The Special Case of California, 17 Pac. L.J. 391, 403-404 (1986).
7. The Problem of Indian Administration, the Institute for Government Research (Brookings Institution, 1928). The government-sponsored report was very critical of the boarding school system and its ill effects on Indian children as a result of their removal from family and community. This large volume was the report of a survey made at the request of Secretary of the Interior Hubert Work and was popularly known as the Merriam Report, from Lewis Merriam, who directed the survey staff. It became a guide for government action in regard to Indians for the next twenty years.

Margaret Szasz also provides a summary of the Indian boarding school experience:

Course work in these schools was usually unrelated to the environment and culture from which the student came from; on the other hand, vocational training was not sufficiently advanced to enable the student to find an urban job. Physical conditions in boarding schools were notoriously inadequate. Overcrowding, insufficient food and improper treatment of sick children led to frequent epidemics. Since congressional appropriations were meager, boarding school pupils, including a significant percentage of preadolescent children, were forced to provide almost all essentials by working long hours in the shops, the gardens and the kitchens. In addition, they were subjected to harsh discipline according to the arbitrary will of the school superintendent. Margaret Szasz, Education and the American Indian: The Road to Self-Determination since 1928, 2d. ed. (University of New Mexico

Press, 1977), at 2.

8. See Edward Castillo, "The Impact of Euro-American Exploration and Settlement," in Handbook of the Indians of North America, Vol. 8, Robert F. Heizer, ed., (University of California Press, 1976), 120.

9. In 1923, after completing the fifth and highest grade level of the federal school she attended, Virgilia Knight was prohibited from entering the sixth grade at the local public school in Mendocino County, California. Her family sued to force her enrollment.

In 1924, a 15-year-old Indian girl named Alice Piper, was refused enrollment in the Big Pine School District because she was a "person of Indian blood" and because there was a federal school established within the boundaries of the district. Her case eventually resulted in the striking down of California Political Code § 1662, which allowed racially separated schools in California:

The governing body of the school district shall have power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Chinese, Japanese, or Mongolian parentage. When such separate schools are established, Indian children or children of Chinese, Japanese, or Mongolian parentage must not be admitted into any other school.

It is further provided, that in school districts in California where the United States government has established an Indian school, or in an area not to exceed three miles from the said Indian school, the Indian children of the district, or districts, eligible for attendance upon such Indian school, may not be admitted to the district school.

Cal. Pol. Code 1662 (1921).

10. 25 U.S.C. §§ 452-457.

11. 25 U.S.C. § 452.

12. Pub. L. No. 81-874 and Pub. L. No. 81-815 (1950).

13. Misuse of these funds by public schools, as well as the continuing failure of Indian children to succeed in public schools was documented by a Special Senate Sub-committee in 1969, leading to the passage of the Indian Education Act in 1972.

14. Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588, *codified as amended* at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-1325 (1988), and 28 U.S.C. § 1360.

15. 28 U.S.C. § 1360(a) (1988).

16. California Rancheria Act of 1954, Pub. L. No. 85-671, 72 Stat. 619. See also the ACCIP Report on Termination.
17. Pub. L. No. 93-638, 88 Stat. 2203, 25 U.S.C. § 450 (1975).
18. Hopes to attain the promises of the Indian Self-Determination and Education Assistance Act spurred an effort in 1978 by California tribes to have the Sherman Institute's administration transferred to Sacramento, so that California tribes could eventually contract with the BIA to run the school for both California and non-California Indian children. See § III(A)(1)(b) of this Report, discussing Sherman Indian High School.
19. California Department of Education statistics for 1994/95 indicate a 2.7 percent drop out rate for White students, while American Indian students have a reported dropout rate of 4.7%. The dropout rate is calculated for grades nine through 12 and equals the number of dropouts per ethnic group, divided by the total number of enrolled students of that ethnicity in those grades. Fact Book 1996/97, Handbook of Education Information, California Department of Education, at 65.
20. California Department of Education, "Enhanced Student Outcomes and Valuable Community Resource: Evaluation Results about California's Indian Education Centers," (Sacramento, 1992), 35.
21. In 1990, 4% of Indian high school students were enrolled in intermediate algebra while 7% of non-Indian students were so enrolled. This same breakdown was also true for enrollment in advanced mathematics. In chemistry, Indian enrollment was only 5.6%, while non-Indian enrollment was 7.8%. Similarly with physics, 2.2% Indians as opposed to 3.3% non-Indians. Id. at 38-39.
22. The Noli Indian School 1996/97 Western Association of Schools and Colleges Report. See also, § III(A)(1)(a), *infra*.
23. Letter dated March 25, 1991 from Escondido Union High School District Superintendent Jane B. Gawronski to "Whom It May Concern" in support of the Rincon Indian Tribe's application for an adult literacy program and tutoring program for youth on the reservation. The letter emphasizes that the 90% dropout rate of Indian students is "just from high school," which infers that Indian students are dropping out even before reaching high school.
24. The Pauma School District American Indian Data (Report dated March 1, 1994) was prepared by the district's Special Projects Coordinator and analyzes 1992/1993 CTBS National Percentile Scores of the Indian student population in comparison with other students at the district. The Report was presented to Indian parent and tribal representatives pursuant to tribal efforts to seek district compliance with Impact Aid requirements to provide such data.
25. Advisory Council On California Indian Policy Education Task Force Dialogues Conference Report. A copy of this Report is attached as Appendix B.

26. The Snyder Act of November 2, 1921, 42 Stat. 208, 25 U.S.C. § 13, provides that:

The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for . . .

General support and civilization, including education.

27. See § IV(A)(2), *infra*.

28. The proposed reduction would have cut back personnel at the Sacramento Area Office of Indian Education (SOIE) from three full-time professionals and one clerical person administering four BIA education programs (Johnson O'Malley, Higher Education, Adult Education, and Vocational Education) for thousands of Indian students, to one full-time professional. Four California tribes and an Indian education program (the Hoopa Tribe, the Hopland Band of Pomo Indians, the Tule River Tribe, the Karuk Tribe, and Ahmum Education, Inc.) filed suit against the BIA to enjoin the discriminatory funding reduction. See Hopland Band of Pomo Indians, et al. v. Bureau of Indian Affairs, et al., CIVS-90-381 EJG/EM (E.D. Cal.), filed March 28, 1990. After suit was filed, the BIA withdrew its initial funding cuts, equalized the cuts among all the BIA Area Indian Education Offices and initiated consultation with the California tribes on the formula for allocating its FY 1991 "Element 10" funds.

29. See California Department of Education, *supra* note 20, at 9-15.

30. 20 U.S.C. § 6301 et seq.

31. 20 U.S.C. § 6361.

32. 20 U.S.C. § 6362(d). Clinics administered by the California Rural Indian Health Board administer some Head Start programs.

33. Cal. Educ. Code § 52060 et seq.

34. A list of BIA-operated schools found in the Federal Archives is attached as Appendix D.

35. "We recommend the establishment of more schools. As the reservations are gradually cleared, defined, and assured for the Indians' occupancy, hundreds of Indians who are now roving from place to place, without fixed homes, will undoubtedly settle down in the villages and more schools will be needed . . . The isolated situation of many of the smaller settlements is now an unsurpassable difficulty in the way of providing education for all the children . . . In every village that we visited we were urged to ask the Government to give them a school . . . In this connection we would suggest that if a boarding and industrial school, similar to those at Hampton and Carlisle, could be established in Southern California, it would be of inestimable value." Helen Hunt Jackson and Abbot Kinney, A Report on the Condition and Needs of the Mission Indians of

California, submitted to the Commissioner of Indian Affairs, reprinted in A Century of Dishonor, H. Jackson, ed., (University of Oklahoma Press, 1995), at 468.

36. See note 7, *supra*, and accompanying text.

37. See note 9, *supra*, and accompanying text.

38. Western Association of Schools and Colleges, 1996-97 Report of the Noli Indian Schools, at 2. The Noli Indian School is in the process of pursuing WASC accreditation.

39. Id. at 2.

40. Id. at 3 and 21.

41. Id. at 10.

42. Students responding to a school survey indicated “an overwhelming feeling of pride and feeling of safety” at the school. They also indicated that they feel “respect for their school, teachers, and administration.” Id. at 14 and 30.

43. Id. at 116-123.

44. Id. at 13 and 30.

45. Id. at 21, 39, 46, 126-142, and generally.

46. Id. at 21.

47. “It is the policy of the Department of the Interior that: (a) Indian control of Indian affairs in all matters relating to education shall be facilitated.” 25 C.F.R. § 33.2 (regarding transfer of Indian Education functions).

48. Pub. L. No. 104-208, 110 Stat. 3009 (1995).

49. 1995 Department of the Interior Budget Appropriations Hearing transcript, at 792-794. Even as discussions against setting up new schools proceeded, BIA officials repeatedly stressed the importance of self-determination and tribal control over Indian education in other areas of the report.

50. 25 C.F.R. § 31.1

51. Id.

52. 25 C.F.R. § 31.3(a).

53. See § II of the ACCIP Termination Report and § II(A) of the ACCIP Recognition Report.

54. In all, 18 federally recognized tribes in California do not have any trust lands. See Table 1 to the ACCIP Economic Development Report.

55. In fact, 25 U.S.C. § 2003(b) specifically provides that the regulations set forth in 25 C.F.R. Part 31 continue to apply until such time as they are revised through rule-making procedures.

56. The authors have not been able to discern a rationale for the change in eligibility criteria. As discussed in § IV of this report, the criteria for higher education benefits were changed as a result of two internal policy memoranda issued within the BIA in 1986 and 1989. See Malone, 38 F.3d at 435. The memoranda limited higher education benefits to members of federally recognized tribes and their descendants of at least one quarter degree. Id. The 1986 memorandum stated, however, that the blood quantum criteria still applied in determining eligibility for elementary and secondary education programs. Id. The Ninth Circuit invalidated the criteria adopted in the internal memoranda with regard to higher education grants, finding that the BIA memoranda were issued without following the Administrative Procedure Act's rule-making procedures. Id. at 438-439.

57. See the 1996/1997 Application for Enrollment at Sherman.

58. According to 25 U.S.C. § 2007(f) "...eligible Indian student" for the purposes of determining funding means a student who:

(1) is a member of, or is at least a 1/4 degree Indian blood descendant of a member, of an Indian tribe which is eligible for the special programs and services provided by the United States through the Bureau to Indians because of their status as Indians, and

(2) resides on or near an Indian reservation or meets the criteria for attendance at a Bureau off-reservation boarding school.

59. Many California Indians reside on public domain allotments that are held by the United States in trust, yet are not members of federally recognized tribes. See § I(C) of the ACCIP Trust and Natural Resources Report.

60. Recently, Sherman staff have made an effort to present information about the school to local area tribes in an attempt to raise the enrollment of California Indians. Interview with Sherman Indian High School Board member Patricia Dixon, February 5, 1997.

61. A 1980 report prepared by the Sherman Ad Hoc Committee, an investigative committee established unilaterally by California tribes in the late 1970s, revealed dismal achievement statistics at Sherman. Sherman Ad Hoc Committee, "A Look to the Future, A Feasibility Report on the Proposed Transfer of Jurisdiction of Sherman Indian High School," August 1980.

62. The purposes and objectives of the Board shall be:

1. To contract with the Bureau of Indian Affairs and the United States Department of the

Interior; and

2. To operate Sherman Indian High School; and
3. Thereby to create at Sherman Indian High School a school solely for California Indian students, a school owned, controlled and operated by California Indians, and a school administered in a manner responsive to the California Indian community and designed to attain its cultural and educational goals.
4. The phrase "California Indians" herein means a recognized member of a Native California Tribe or Band.

63. There is some evidence in the record that the Ad Hoc Committee was formed by California tribes at a BIA Area budget meeting and with the blessing of a National Congress of American Indians resolution initiated by California tribes. However, there was a certain amount of controversy over the existence of the Committee because of fears among Phoenix Area Intertribal School Board members that California tribes, should they gain control, would eliminate the ability of outside tribes to attend Sherman.

64. While it is acknowledged in the Report that most freshmen entering Sherman were already as much as five years behind their age-grade level in reading, math, writing, and language skills, the Report notes that the 1978 California Achievement Test statistics indicated that graduating Sherman students were further behind in basic skills than the freshmen. The Report questions the grading policy at Sherman which appeared to be attendance-based rather than performance-based, and had already been pinpointed as a problem area by the Western Association of Schools and Colleges in its accreditation review. Further, the Report noted that students were graduating from Sherman without having achieved Sherman's own entrance level standards. For example, the Report notes, "We wonder why students are graduating with an average of 7.5 years in math computation when the standard Sherman set for itself was 11.0." A Look To The Future, Sherman Ad Hoc Committee, 1980 at 22-3, 39.

65. Id. at 47-53.

66. The WASC Process is an independent accreditation procedure that may be initiated voluntarily by high schools in the state of California. Once invited, a trained WASC team reviews the entire program of the school and determines whether the school is to be "accredited" such that credits earned at the high school will be acknowledged and accepted by higher education institutions throughout states in the western region. Accreditation may be for one, three, or a maximum of six years. The WASC Team may make recommendations for improvement of the school's program and review it subsequently. WASC accreditation is considered vital to any high school program in the state.

67. The Consolidated School Reform Plan notes that the school has a 28% dropout rate and that an estimated 50% of Sherman's students will fall into the "not proficient" category of the California Achievement Test. However, the Plan also notes that there was a 30% increase in the number of students who met the honor roll requirements in 1995-96, as compared to the previous year. "Consolidated School Reform Plan, Sherman Indian High School," submitted by the

Sherman Indian School Board to the Bureau of Indian Affairs, 1995, at 5-6.

68. The following statement of purpose is set forth in the federal regulations dealing with policies to be followed by all schools and education programs under the jurisdiction of the BIA:

There is no resource more vital to [tribes] than their young people and the Federal Government has a direct interest, as trustee, in protecting Indian and Alaska Native children, including their education. The mission of the Bureau of Indian Affairs, Office of Indian Education programs, is to provide quality education opportunities from early childhood through life in accordance with the Tribes' 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. The Bureau shall manifest consideration for the whole person, taking into account the spiritual, mental, physical and cultural aspects of the person within family and Tribal or Alaska Native village contexts.

25 C.F.R. § 32.3.

69. See ACCIP Community Services Report for an overview of the underfunding of California Indian programs in general, as well as an analysis of federal under-counting of California Indians eligible for such programs.

70. Act of April 16, 1934, 48 Stat. 596, *amended* by the Act of June 4, 1936, 49 Stat. 1458, *codified as amended* at 25 U.S.C. §§ 452-457.

71. California State Advisory Commission on Indian Affairs, Final Report to the Governor and Legislature, 1969, at 9-10.

72. Senate Joint Resolution No. 4, 1954.

73. See, e.g., Santa Rosa Band of Mission Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1976).

74. Bryan v. Itasca County 425 U.S. 373; see, also, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

75. See Senate Joint Resolution No. 3, relative to the reinstatement of federal services for California Indians, filed with the Secretary of State in the State of California, April 2, 1968.

76. "The Status of the Indian in California Today," report by John G. Rockwell, Superintendent of the Sacramento Agency, to the Commissioner of Indian Affairs, 1944.

77. See § I of the ACCIP Historical Overview Report.

78. 25 U.S.C. § 450(a)-450(n).

79. See § VI, *infra*.
80. See § IV, *infra*.
81. 60 Fed. Reg. 39,786 (1995).
82. Id.
83. 60 Fed. Reg. 53,932 (1995).
84. Twenty-nine terminated California tribes have been restored by litigation or legislation since 1981. See Appendix B to the Termination Report. One California tribe has been recognized through 25 C.F.R. Part 83, at least 40 have begun the administrative recognition process, and one has had its status confirmed by the Assistant Secretary of Indian Affairs. See “Summary Status of Acknowledgment Cases (as of February 13, 1997),” Exhibit 1 to the ACCIP Recognition Report.
85. Angle v. United States, 709 F.2d 570, 575 (9th Cir. 1983).
86. See 25 U.S.C. § 1679.
87. Pub. L. No. 103-382, *codified at* 20 U.S.C. §§ 6301, et seq. (1994).
88. “The Indian is despised, exploited, and discriminated against—but always held in check by the white power structure so that his situation will not change. At the heart of the matter, educationally at least, is the relationship between the Indian community and the public school and the general powerlessness the Indian feels in regard to the education of his children...” Indian Education: A National Tragedy, A National Challenge, 91st Cong., 1st Sess., Report No. 91-501 (1969).
89. Id., as paraphrased in Timothy La France, Handbook of Federal Indian Education Laws Indian Law Support Center of the Native American Rights Fund, August 1982, at 26-27.
90. The Indian Education Act was formerly codified at 20 U.S.C. § 241aa et seq. It now constitutes Title IX of the Improving America’s Schools Act, 20 U.S.C. §§ 6301 et seq.
91. See the former 45 C.F.R. Part 186 (1983).
92. 1986 Update to Handbook of Federal Indian Education Laws, Indian Law Support Center, Native American Rights Fund, at 24-25.
93. 20 U.S.C. § 6301 et seq.
94. 20 U.S.C. § 7812(a)(2).
95. 20 U.S.C. § 7881 sets forth the definitions for the program and defines “Indian” as an individual who is:

- (A) a member of an Indian tribe or band, as membership is defined by the tribe or band, including —
 - (i) any tribe or band terminated since 1940; and
 - (ii) any tribe or band recognized by the State in which the tribe or band resides;
- (B) a descendant, in the first or second degree, of an individual described in subparagraph (A);
- (C) considered by the Secretary of the Interior to be an Indian for any purpose;
- (D) an Eskimo, Aleut, or other Alaska Native; or
- (E) a member of an organized Indian group that received a grant under the Indian Education Act of 1988 [25 U.S.C.A. 2601 et seq.] as it was in effect the day preceding Oct. 20, 1994.

96. The five tribes are the La Jolla Band of Mission Indians, the Pala Band of Mission Indians, the Pauma Band of Mission Indians, the Rincon Band of Luiseno Mission Indians, and the San Pasqual Band of Indians.

97. 20 U.S.C. § 7812(b).

98. Id.

99. 20 U.S.C. § 7881(4).

100. Public Laws 81-874 and 81-817 (1950). The laws have continued to be reauthorized with periodic amendment and are now codified as Subchapter (Title) XIII of the Improving America's Schools Act of 1994. 20 U.S.C. §§ 7701 et seq.

101. 20 U.S.C. §§ 7704 et seq.

102. 20 U.S.C. §§ 6301 et seq.

103. The Hoopa Valley Tribe in northwest California and the Quechan Indian Tribe in southeast California have both been forced to file complaints with the U.S. Department of Education against the school districts serving their children. In both cases, the districts involved admitted non-compliance and entered into settlement agreements with the Tribes to overhaul the implementation of their Indian Policies and Procedures with the aid of temporary independent Compliance Liaisons partially paid for by the Tribes.

104. Paul V. Crosbie, Educational Needs Assessment of the Hoopa Valley Reservation, study conducted by Center for Indian Community Development, Humboldt State University (February 1, 1993) at 58-9.

105. Interview with Laura Lee George, Director, Indian Teacher and Educational Personnel Program (ITEPP), Humboldt State University, June 1997.

106. A report prepared for the Hoopa Valley Tribe indicated that too few teachers sought involvement in the project, raising questions about their commitment to the project's goals, namely "to help students learn by bringing course materials closer to their everyday lives, to show concern for students' lives." Crosbie, *supra* note 104, at 59.

107. Advisory Council on California Indian Policy, Education Task Force Dialogues Conference Report (Appendix B).

108. 20 U.S.C. § 7704(e).

109. 20 U.S.C. § 238(c).

110. 20 U.S.C. §§ 6301-6514.

111. 20 U.S.C. § 6331.

112. 20 U.S.C. § 6641.

113. 20 U.S.C. § 6642.

114. Interview with Laura Lee George, *supra* note 105.

115. 20 U.S.C. §§ 8621-22.

116. 20 U.S.C. § 8621.

117. 20 U.S.C. § 7403(c)(1).

118. 20 U.S.C. § 7402(a)(6).

119. 20 U.S.C. § 7404.

120. See § IV of the ACCIP Cultural Resources Report for a discussion of language preservation efforts in California.

121. Cal. Educ. Code § 33380.

122. See 20 U.S.C. § 7881. The definition of Indian contained in that section is set out in full in note 95, *supra*.

123. The creation of public charter schools is authorized at Cal. Educ. Code §§ 47600 et seq., which sets forth the procedure for their establishment and specifically allows such schools to waive applicability of portions of the education code. The process can be initiated by members of the public but must be approved by the local school district with jurisdiction over the particular region to be served by the school.

124. Telephone interview with Judy Strang, Associate Director, Four Winds of Indian Education, Inc., April 9, 1997.
125. Id.
126. Id.
127. In 1997, eight out of 23 candidates for Associate Degrees were California Indians or descendants; three out of four Academic Basic Skills Certificates went to California Indians or descendants; and two out of four Soboba Campus Certificates went to California Indians.
128. See § III of the ACCIP Community Services Report.
129. 25 C.F.R. § 41.1.
130. Report of the California Indian Task Force, (1984). The task force was appointed by Secretary of the Interior William Clark during the Reagan Administration.
131. 25 C.F.R. § 40.1 provides that “[f]unds appropriated by Congress for the education of Indians may be used for making educational loans and grants to aid students of one-fourth or more degree of Indian blood attending accredited institutions of higher education or other accredited schools offering vocational and technical training who reside within the exterior boundaries of Indian reservations under the jurisdiction of the Bureau of Indian Affairs or on trust or restricted lands under the jurisdiction of the Bureau of Indian Affairs.” The regulation goes on to state a secondary priority to fund such Indian students who reside “near” a reservation and, under certain circumstances, Indian students who reside off-reservation.
132. Zarr v. Barlow, 800 F. 2d 1484 (9th Cir. 1986).
133. 25 U.S.C. § 13.
134. Malone v. Bureau of Indian Affairs, 38 F.3d 433 (9th Cir. 1994).
135. 25 U.S.C. § 13.
136. See 59 Fed. Reg. 18,460, April 18, 1994 (Higher Education); 59 Fed. Reg. 44,016, August 25, 1994 (Adult Education).
137. 25 C.F.R. § 40.1.
138. See the memorandum of July 12, 1968, from Wesley L. Barker, BIA Community Services Officer, announcing that the Commissioner of Indian Affairs had promised that a limited number of college scholarships would be made available through the BIA that year: “These [scholarships] will be for California Indians of one-fourth or more Indian blood, who are in economic need, and show promise of benefitting from college training.” A copy of the memorandum is included as Exhibit 1.

139. Memorandum of August 14, 1970, from William E. Finale, Area Director, Sacramento Area Office, to Commissioner of Indian Affairs Re: Services to California Indians; a copy of the memorandum is included as Exhibit 2.

140. Memorandum of January 16, 1970, from Harrison Loesch, Assistant Secretary - Public Land Management, to Commissioner of Indian Affairs; a copy of the memorandum is included as Exhibit 3.

141. See Exhibit 2, at 1.

142. Id. at 3.

143. Id. at 7.

144. Memorandum of December 9, 1971, from Charles M. Soller, Assistant Solicitor, Division of Indian Affairs, to Commissioner of Indian Affairs; a copy of the memorandum is included as Exhibit 4.

145. Id. at 2.

146. Id. at 4.

147. Memorandum of May 13, 1971, from Roderick H. Riley, Assistant to the Commissioner, to the Commissioner of Indian Affairs. A copy of the memorandum is included as Exhibit 5.

148. Id. at 6-7.

149. Id. at 7.

150. Department of the Interior, "Indian Eligibility for BIA Services—A look at Tribal Recognition and Individual Rights to Services," (hereinafter referred to as "Interior Report"). The report was prepared by an 8-member committee: Ernest L. Stevens, John Jollie, Alexander McNabb, Jim Edgar, David Eteridge, Lou Conger, Peter Three Stars and Velma Garcia. The report, undated, appears to have been prepared in 1972. A copy of the report should be available in the Federal Archives. A poor quality copy is on file with California Indian Legal Services in Oakland, Ca.

151. Id. at 29.

152. Id. at 21-22.

153. Id. at 22.

154. Id. at 31.

155. Id. at 14.

156. This section was formerly designated 25 C.F.R. § 32.1. Part 32 of Title 25 C.F.R. was redesignated as Part 40 on March 30, 1982, 47 Fed. Reg. 13327.

157. Zarr, 800 F.2d 1484 (9th Cir. 1986).

158. Id. at 1492.

159. Memorandum of November 26, 1986, from Ross O. Swimmer to all Area Directors and other BIA and tribal officials involved in Indian education programs.

160. Memorandum of February 21, 1989, from Wilson S. Babby, Deputy to Assistant Secretary—Indian Affairs/Director (Indian Education Programs), to all Area Education Program Administrators and other BIA and tribal officials involved in Indian education programs.

161. Malone, 38 F.3d at 437.

162. 25 U.S.C. § 1679 (1994).

163. Malone, 38 F.3d at 438.

164. Section 1679 defines “California Indian” as:

- (1) Any member of a federally recognized Indian tribe.
- (2) Any descendant of an Indian who was residing in California on June 1, 1852, but only if such descendant -
 - (A) is living in California,
 - (B) is a member of the Indian community served by a local program of the [Indian Health] Service, and
 - (C) is regarded as an Indian by the community in which such descendant lives.
- (3) Any Indian who holds trust interests in public domain, national forest, or Indian reservation allotments in California.
- (4) Any Indian in California who is listed on the plans for distribution of the assets of California rancherias and reservations under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian.

165. These figures were obtained from the BIA, Central Area Office.

166. See § III of the ACCIP Community Services Report for an overview of the undercounting of the California Indian service population and inequitable funding by the BIA.

167. 20 U.S.C. § 7833.

168. 25 U.S.C. § 1613a.

169. Id.

170. See 59 Fed. Reg. 44,016 (1994).

171. See § IV, *infra* for a discussion of how California Indian tribal governments are often forced to reallocate education funds to tribal government functions because of inadequate funding of essential governmental functions.

172. The only real alternative for small tribes that wish to operate their own AEP is to pool funding with other tribes through a tribally-created education consortium. Even this approach, however, is limited by the overall lack of AEP funding.

173. 25 C.F.R. § 27.2.

174. Id.

175. Id.

176. 25 C.F.R. § 27.1(i).

177. Id.

178. 25 C.F.R. § 27.5(a).

179. 20 U.S.C. § 6111.

180. 20 U.S.C. § 6103.

181. 20 U.S.C. § 6161.

182. 20 U.S.C. § 6235(b)(2).

183. Final Report of the Joint Tribal/BIA/DOI Advisory Task Force on Reorganization of the Bureau of Indian Affairs to the Secretary of the Interior and the Appropriations Committees of the United States Congress (August 1994), at 7.

184. See § IV(A)(2)(a), *supra*.

185. There has been no dissenting voice in the budget process because Indians who are not members of a federally recognized tribe have no say in the Joint Tribal/BIA/DOI Task Force. Thus, Congress has never heard from these Indians in the debate over budget reform within the BIA.

186. See § III of the ACCIP Community Services Report.

187. In describing the TPA process, one commentator observed that the TPA was “in essence, a block grant of funds to tribes—a block grant which in no way meets tribal needs. These funds cover an enormous range of services, and tribes can move these funds among categories, and so there is no assurance that the funds will be used for [the purpose intended].” Letter to Ron Haskins, Majority Staff Director, Ways and Means Subcommittee on Human Resources, dated February 21, 1996, from Karen J. Funk, Hobbs, Straus, Dean & Walker, at 3.

188. Id.

189. Interview with Fayette Babby, Office of Education, Bureau of Indian Affairs.

190. Id.

191. Id.

192. Interview with Javier Kinney, Yurok college student.

