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GENERAL MEMORANDUM 21-002

COVID-19 Response Law Includes Key Provisions to Strengthen Tribal Schools and Education Programs

The recently enacted Consolidated Appropriations Act, 2021 (P.L. 116-260, "the Act"), which combines the fourth phase of COVID-19 relief with FY 2021 appropriations, contains three key provisions to expand the authority of tribes and tribal school boards and to increase resources available to tribally-controlled schools funded by the Bureau of Indian Education.

These important provisions came about thanks to the shared, sustained effort of tribes, tribal organizations, and allies in Congress. In this memorandum, we provide background and a summary of each of the three provisions enacted in the Consolidated Appropriations Act.

Background. Years of inadequate federal funding for the Bureau of Indian Education (BIE) school system paired with the remote location of many schools have heightened the challenges for schools as they seek to attract and retain highly qualified teachers and to provide a safe and appropriate learning environment for their students. These very factors have in turn created impediments for tribes who are considering assuming the responsibility for administering these schools pursuant to the Tribally Controlled Schools Act (P.L. 100-297).

Summary. The recently enacted COVID-19 and FY 2021 appropriations law contains three key provisions designed to help address these impediments. The Act:

- 1) Empowers tribally-controlled grant schools to participate in the Federal Employee Health Benefits (FEHB) and Federal Employee Group Life Insurance (FEGLI) programs for their teachers and staff, which will enable schools to expand employee benefits programs, while reducing the costs of those benefits programs;
- 2) Requires the BIE to appropriately quantify and request fixed cost increases to ensure the compensation for BIE teachers and counselors keeps pace with that of their counterparts in the Department of Defense school system; and
- 3) Creates "Payments for Tribal Leases" as a separate account with an indefinite appropriation (like Contract Support Costs) within the Bureau of Indian Affairs (BIA) budget to pay for full service leases entered into pursuant to section 105(l) of the Indian Self-Determination and Education Assistance Act (ISDEAA), or pursuant to the Tribally Controlled Schools Act (P.L. 100-297).

In addition, the Act, like appropriations laws since FY 2016, continues to acknowledge and to appropriate sufficient funding to fully fund Tribal Grant Support Costs (essentially the Contract Support Costs of tribally-controlled grant schools). The Act also continues funding for the repair and replacement of schools in the BIE school system, which the previous Administration sought to eliminate despite the critical and widespread need for improvements to school facilities.

FEHB/FEGLI ACCESS FOR TRIBALLY-CONTROLLED GRANT SCHOOLS

A long-sought amendment to the Indian Health Care Improvement Act (IHCIA) was included in the Act (as Section 1114 of Title XI of Division FF) extending eligibility for tribally-controlled grant schools to participate in the Federal Employee Health Benefits (FEHB) and Federal Employee Group Life Insurance (FEGLI) programs. This amendment provides grant schools with access to higher quality and lower cost insurance options for teachers and staff through the federal employee benefits system—at no cost to the federal government. One grant school has estimated that this amendment alone will save \$1 million per year for its school in insurance costs while offering greater choice and better options. Enactment of this provision extends to tribally-controlled grant schools (operated pursuant to P.L. 100-297) the same access to FEHB/FEGLI as is available to BIE-operated schools and programs operated by tribes and tribal organizations pursuant to P.L. 93-638 contracts. We note that of the 187 schools in the BIE school system, over 130 are tribally-controlled grant schools and could thus benefit.

This amendment is the result of years of efforts by the Oglala Lakota Nation Education Coalition (OLNEC) and the Oglala Sioux Tribe as well as many other supporters. For example, the Dine' Grant Schools Association passed a resolution of support and included it as a priority in FY 2021 appropriations testimony; and the National Congress of American Indians (NCAI), the National Indian Education Association (NIEA), and the National Indian Health Board (NIHB) all wrote letters and testimony of support.

Prior to its inclusion in the Act, this amendment had been introduced as standalone, bipartisan legislation in the House and Senate: H.R. 895 (Rep. Dusty Johnson (R-SD)) and S. 279 (Sen. John Thune (R-SD)) with key support from the New Mexico and Arizona Congressional Delegations, particularly Sen. Tom Udall (D-NM), Rep. Ben Ray Lujan (D-NM), Sen. Martha McSally (R-AZ) and Rep. Tom O'Halleran (D-AZ).

PAY PARITY FOR BIE TEACHERS AND COUNSELORS

Federal law requires that teachers and counselors in the BIE-funded school system be paid equivalent salaries to their counterparts in the Department of Defense school system. For several years, the BIE failed to request fixed cost increases to cover this requirement, even though BIE-operated schools were still required to pay the salary increases, which resulted in schools having to absorb these escalating costs at the expense of other program requirements. Although tribally-controlled schools are not required to provide pay parity, they are eligible to receive the fixed cost increases and they depend on those funds to help keep their teachers' compensation rates competitive with other jurisdictions.

Representatives from the Dine' Grant Schools Association informed the House and Senate Appropriations Committees as well as the New Mexico and Arizona Congressional Delegations of the BIE's failure to include pay parity increases in its annual budget requests. Both the Joint Explanatory Statement, which accompanied the Act, and the section of House Report 116-448 referenced by the Joint Explanatory Statement discuss the implications of the BIE's failure to request these necessary fixed cost increases. Accordingly, Congress directed the

BIE to analyze the past 10 years of budget requests to determine the extent and impact of this failure to request the necessary fixed costs increases. Congress also directed the BIE "to clearly display funding amounts required to comply with Defense Department-equivalent pay rates as part of future budget justifications and to include sufficient funding in its budget request to fully fund these requirements."

PAYMENTS FOR TRIBAL LEASES

Division G, Title I of the Act includes language establishing an indefinite appropriation for payment of Tribal leases under section 105(l) of the Indian Self-Determination and Education Assistance Act (ISDEAA), which are estimated to be \$21,593,000 in fiscal year 2021. The terms include amounts necessary to fully fund such costs without the need for reprogramming, if actual costs exceed the current estimate. The Joint Explanatory Statement, which accompanies the Act, speaks in detail about the creation of this new indefinite appropriation. The Joint Explanatory Statement refers to the case of *Maniilaq Ass'n v. Burwell* (which Hobbs, Straus, Dean & Walker litigated in federal court to establish the right of tribes and tribal organization to full compensation from the federal government for leases of facilities used to carry out ISDEAA agreements). The Joint Explanatory Statement explains that the rulings in that case "appear to create an entitlement to compensation for 105(l) leases". The Joint Explanatory Statement directs the Department of Interior and the Indian Health Service to develop guidelines relating to lease costs, in consultation with Tribes and Tribal organizations.

The Tribally Controlled Schools Act incorporates numerous provisions of the ISDEAA, including Section 105(l), which allows tribes and tribal organizations operating BIE-funded grant schools to negotiate this type of lease agreement with the federal government. Importantly, by leasing facilities back to the federal government, tribes and tribal organizations can generate critically-needed facilities funding. Under the regulations, compensation for leases between the Secretary and an Indian tribe or tribal organization may include amounts to cover operation, maintenance and facility repairs costs, as well as to pay depreciation and use allowances. Compensation for leases may also be used to make contributions to a reserve for future replacement costs of facilities, and for principal and interest paid on the facility.

Conclusion. These important provisions offer tribes and tribal schools critical tools to strengthen their schools and education programs. Please let us know if we may provide additional information or if you would like assistance with respect to these provisions or education matters more generally.

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