



USET

SOVEREIGNTY PROTECTION FUND

Washington, DC Office
1730 Rhode Island Ave., NW, Suite 406
Washington, DC 20036

Nashville, TN Office
711 Stewarts Ferry Pike, Suite 100
Nashville, TN 37214
P: 615-872-7900 | F: 615-872-7417

*Transmitted Electronically
To TribalConsultation@ed.gov*

September 19, 2024

Dr. Miguel Cardona
Secretary
Department of Education
400 Maryland Ave SW
Washington, DC 20202

Dear Secretary Cardona,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Department of Education's Tribal consultation on Executive Orders (EO) 13175, "Consultation and Coordination with Indian Tribal Governments, and 14112, "Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination." USET SPF appreciates the Department's efforts to consult with Tribal Nations to uphold the directives of these EOs, especially EO 14112. While we acknowledge that the directives of EO 14112 are ambitious, it is also meaningful as it seeks to address many centuries of broken promises through long-sought reforms to the ways in which federal funding is delivered to and used by Tribal Nations and to quantify federal failures to provide full funding in fulfillment of trust and treaty obligations. However, we note that the Department has only just begun to consult with Tribal Nations on the implementation of EO 14112 and that it must move with haste as this Administration concludes. USET SPF offers the following comments with the goal of proper and meaningful implementation by the Department of Education to increase Tribal Nation access to its education programs and services, identifying a methodology for quantifying unmet obligations, and immediate implementation the EO's funding and reporting flexibility mandate.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

General Comments

The development and issuance of EO 14112 is long overdue. We appreciate the ambitious nature and scope of this EO, as it seeks to do more to address the federal government's chronically unmet obligations to Tribal Nations and to advance many of Indian Country's longstanding priority reforms for increasing our inherent exercise of sovereignty and our use of these funds owed to us in perpetuity. This should necessarily include increasing access to and funds available to Tribal Nations for Native language revitalization and retention programs, ensuring equitable access to the Department's programs for all Tribal Nations (regardless of land base and population size), and to the immediate implementation of waivers of grant and reporting requirements. We must also work together to fully address statutory barriers that prevent Tribal Nation access to education programs and services, as well as the exercise of our inherent sovereignty.

Consistent with EO 14112, USET SPF urges the Department of Education to understand and acknowledge that implementation is mandatory and the Department must adhere to its directives to: (1) take specific and concrete steps now to carry out the EO's mandate for flexibility in federal funding, including identification of any statutory and regulatory changes that are necessary to ensure that federal funding and support programs effectively address the needs of Tribal Nations; and (2) ensure that the Department has the necessary resources to assess the full funding of obligations and to develop its recommendations and strategy to fulfill meeting these obligations in a manner consistent with the timeline expressed within the EO.

Methodology for Quantifying Unmet Obligations

Section 4(a) of EO 14112 outlines the development of White House guidance to federal agencies on the calculation of funding shortfalls in federal trust and treaty obligations. Section 4(a) states:

“(a) Within 240 days of the date of this order, the Director of OMB and the Domestic Policy Advisor shall, in consultation with the head of each agency that is a member of WHCNA, and in consultation with Tribal leaders or their designees, develop guidance for assessing the additional funding each agency needs for its existing Federal funding and support programs for Tribal Nations to better live up to the Federal Government's trust responsibilities and help address the needs of all Tribal Nations.”

USET SPF asserts that the scope of unmet obligations under the EO be broad and extend beyond existing Department of Education programs and services to achieve full funding goals. With this in mind, and to comply with the directives of Section 4(a), the Department of Education must focus on supporting the robust funding and service delivery of education programs to Tribal Nations by waiving regulatory or statutory requirements to access federal education funds, as well as submitting the necessary annual budget request to Congress to fully fund these programs. This will require the ability to envision beyond what is currently available to and authorized for Tribal Nations.

Additionally, the Department of Education must do the heavy lifting in generating assumptions that will allow us to arrive at accurate data on unmet obligations. While surveying Tribal Nations will be necessary, it should not be a sole source of data. As history and prior efforts have already proven, such a survey is unlikely to produce the comprehensive, reliable, and uniform data necessary for this effort to be successful. It must not be overlooked that any insufficient Tribal Nation capacity necessary to robustly engage in this effort is the direct result of centuries of the United States' failure to honor its trust and treaty obligations. Therefore, the Department of Education must be discouraged from an overreliance on Tribal Nation-supplied data, especially if a Tribal Nation indicates that it cannot provide sufficient data due to funding and capacity shortfalls.

Along with undertaking survey efforts, the Department of Education must measure and quantify its own failures, while also taking Tribal input into account. This includes the incorporation of existing data achieved through Tribal consultation and other efforts. A significant amount of work has already been conducted in this space, and the Department of Education must coordinate with these efforts as part of the analysis required under this EO. This should allow the Department to focus on gaps in data, rather than “reinventing the wheel” or producing data that is inconsistent with these efforts. In addition, the Department must utilize federal staff who have relevant subject matter expertise in order to come to reasonable assumptions and defensible estimation methodologies around Tribal education funding shortfalls. It must also enlist appropriate experts, such as actuaries and economists, to arrive at well-informed figures. When the federal government does the research to create appropriate assumptions in consultation with Tribal Nations and pairs those assumptions with data provided by a Tribal Nation, accurate data can result.

Finally, USET SPF stresses that the economic success of Tribal Nations should have no influence on full Tribal education funding calculations. Trust and treaty obligations exist in perpetuity, and are the result of the cession of vast land holdings and natural resources, oftentimes by force, to the United States. These obligations are not extinguished by restored Tribal economies. Economic success must not subsidize federal failures to fully fund Tribal education programs and services.

Dedication of Sufficient Resources

In order for the federal government to do the work to ensure this EO makes the meaningful change in federal funding that it promises, substantial and adequate federal resources must accompany this effort so that appropriate research and Tribal consultation can be undertaken. During our 2024 USET SPF Impact Week meeting, a panel of federal officials serving in the Tribal Affairs offices for various federal agencies expressed anxiety over their agencies’ existing capacity to implement the EO. Tribal liaison offices are critically understaffed and under resourced. Their concern underscores the pervasive critical necessity of dedicating both financial and human resources to this historic endeavor.

Recognizing that this is a Presidential Executive Order, it is imperative that the weight of this tremendous lift not be left solely to federal Tribal liaison staff or the “Indian affairs” desk in each federal agency. Instead, those charged in each federal agency with quantifying unmet financial obligations under the EO must have full access to other federal resources. The Department of Education and its Tribal affairs staff must identify the necessary funding required to succeed in its mandate. In addition, we reiterate that the necessary funds to meet these obligations must be reflected in the Department of Education’s annual budget requests to OMB and Congress.

The challenges we are up against are centuries in the making. To date, the goals and objectives of the EO have never been attempted. This, coupled with both federal and Tribal Nation resource, capacity, and infrastructure limitations, causes us to have concerns about whether the deadlines outlined in the EO are realistic. As described above, in order to comprehensively and reliably quantify full funding numbers for trust and treaty obligations to appropriately support Tribal education efforts, appropriate research and consultation must be undertaken.

If substantial and adequate resources are not immediately dedicated to this effort, USET SPF is concerned that the specificity required to be precise may warrant longer deadlines. At the same time, a deadline of 540 days for federal agency reporting of full funding numbers exceeds the length of this Administration, potentially jeopardizing deliverables central to the EO. We urge the Department of Education to ensure that it prioritizes accurate and actionable data while balancing the need to move quickly—with the key ingredient necessary to meet both objectives being immediate dedication of significant resources.

Immediate Implementation of EO's Funding Flexibility Mandate

Tribal Nations have long been seeking a full accounting of the federal government's unmet financial obligations, as well as the type of funding flexibilities and deference to Tribal decision-making reflective of trust and treaty obligations and a recognition of our inherent sovereignty. Department of Education officials and staff must understand that the Administration has issued a call to action for them to remove barriers for delivering Tribal education funds immediately. We are aware of numerous instances in which agencies and departments are failing to apply the EO's directives to their funding processes and not demonstrating the flexibilities mandated by this EO. The Department must seriously consider Tribal Nations' requests for specific funding flexibilities to resolve issues that get in the way of program delivery or the exercise of our inherent sovereignty. These increased flexibilities will allow more funding to flow directly to Tribal Nations and facilitate how we choose to direct and spend federal monies to meet our communities' education priorities. The Department must fully take these issues into consideration and reform programs and service delivery practices to increase access and flexibility for Tribal Nations.

Conclusion

USET SPF and our member Tribal Nations are wholly invested in the success of this EO. Its correct and thorough implementation has the potential to produce lasting change in the U.S.-Tribal Nation relationship, and for our communities. It is our expectation that moving forward, the Department of Education will dedicate the necessary time and resources to ensuring the EO produces meaningful results, especially since the deliverable directives, and the deadlines associated with them, extend beyond this Administration. Please count us as a partner in your efforts to better acknowledge our inherent sovereignty and self-determination. This can be accomplished by empowering Tribal Nations to pursue our education, training, and workforce development priorities, as well as fully delivering upon the Department's trust and treaty obligations to support these priorities in perpetuity. The Department of Education must act with haste to remove systemic regulatory and statutory barriers to achieve these objectives. In addition, since the conclusion of this Administration is imminent, USET SPF urges the Department to expeditiously compile the necessary budget figures required to ensure it has the appropriate staff and resources to fulfill trust and treaty obligations and meet the directives of EO 14112. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Chief Kirk Francis
President



Kitcki A. Carroll
Executive Director