

April 7, 2022

Program on Freedom of Religion
and Belief
915 15th Street, NW
Washington, DC 20005
(202) 675-2330

Daniel Mach
Director

National Office
125 Broad Street
18th Floor
New York, NY 10004
aclu.org

Deborah N. Archer
President

Anthony D. Romero
Executive Director

VIA EMAIL

Catherine E. Lhamon
Assistant Secretary for Civil Rights
Office for Civil Rights
Department of Education
Catherine.Lhamon@ed.gov
OCR@ed.gov

Re: Title VI Protections for Graduating Indigenous Students

Dear Assistant Secretary Lhamon:

We write to request that your office take action supporting Indigenous students' rights to wear tribal regalia during their 2022 high school graduation ceremonies.¹ Specifically, we ask that you issue a fact sheet or other guidance to remind qualifying schools of their non-discrimination obligations under Title VI of the Civil Rights Act of 1964, and that you commit to swiftly investigating complaints made against schools that restrict students' tribal regalia in possible violation of federal law.

Tribal regalia, such as eagle feathers and beadwork, have tremendous cultural and spiritual significance for many Indigenous people. Many believe, for example, that eagles have a special connection with God and carry followers' prayers to the heavens.² Bald and golden eagle feathers are considered sacred religious objects representing honesty, truth, majesty, strength, courage, wisdom, power, and freedom.³ In fact, some Indigenous people "equate them to the cross or the Bible" in Christianity.⁴ Many Indigenous students thus believe that graduation from high school—a pivotal, once-in-a-lifetime achievement—cannot be properly or fully celebrated, from a spiritual and cultural perspective, unless they are permitted to wear a sacred eagle feather or other ceremonial tribal regalia.

¹ In this letter, the term "Indigenous" refers to and includes students with Native American, American Indian, Alaska Native, Native Hawaiian, or other Indigenous backgrounds and identities.

² Antonia M. De Meo, *Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion*, 22 Hastings Const. L.Q. 771, 774-75 (1995).

³ See, e.g., Press Release on Policy on Tribal Member Use of Eagle Feathers, Department of Justice (Oct. 12, 2012), <https://www.justice.gov/opa/pr/justice-department-announces-policy-tribal-member-use-eagle-feathers> ("From time immemorial, many Native Americans have viewed eagle feathers and other bird parts as sacred elements of their religious and cultural traditions.").

⁴ De Meo, *supra* n.2, at 774.

Some schools still prohibit Indigenous students from wearing tribal regalia during graduation.

Despite the unique role that tribal regalia plays for graduating Indigenous students, seniors across the country have been prohibited from wearing eagle feathers, beadwork, and other religious and cultural items during graduation. Under the threat of reprimand by school officials, many students have been forced to relent to these restrictions in order to take part in their commencement ceremonies.⁵ Students who have resisted these rules, meanwhile, have had their sacred objects confiscated,⁶ have been expelled or excluded from the graduation ceremony,⁷ or have been denied their diploma.⁸

For example, LaRissa Waln, a senior at Valley Vista High School in Arizona, was turned away from her 2019 graduation ceremony because her graduation cap was decorated with traditional beadwork and an eagle feather.⁹ As an enrolled member of the Sisseton-Wahpeton Sioux Tribe, and consistent with her family's spiritual and cultural practices, Ms. Waln's personal achievement

⁵ See, e.g., Brooke Crum, *Midway ISD offers to settle religious rights suit stating Cherokee student forced to remove eagle feather graduation cap*, Waco Tribune-Herald (Nov. 2, 2019), https://wacotrib.com/news/education/midway-isd-offers-to-settle-religious-rights-suit-stating-chokeee-student-forced-to-remove-eagle/article_75876837-a4d2-5b5d-8acb-ec47b3e28e7f.html (assistant principal at Texas high school refused to allow Cherokee student to walk in the opening processional unless student removed graduation cap adorned with beadwork and eagle feather); Courtney Tanner, *Student forced to take off Navajo feathers at graduation*, AP State News (June 28, 2019), <https://apnews.com/article/1c7128cd6fb849e09c41a41c7505a716> (Navajo student forced to remove eagle feathers from graduation cap after teacher demanded they be taken off, threatened to confiscate them, and warned that student would not be able to participate in graduation).

⁶ See, e.g., Charlotte West, *Native students fight to wear traditional regalia at graduation*, High Country News (June 16, 2021), <https://www.hcn.org/articles/education-native-students-fight-to-wear-traditional-regalia-at-graduation> (Anchorage public-school teacher seized Indigenous student's sealskin cap before graduation ceremony); Elle Cabrera, *Canyon View graduate says she was forced to remove cap with Native American decorations*, The Spectrum (May 28, 2021), <https://www.thespectrum.com/story/news/2021/05/28/graduate-says-she-had-remove-cap-native-american-decorations/7472800002/> (Indigenous Utah student told just before graduation ceremony that "she would not be allowed to walk if she did not give up her cap, which she had decorated with beadwork along the edges and an eagle feather"); Nick Lowrey, *Native American students left behind by S.D. education system*, Argus Leader (Nov. 22, 2019), <https://www.argusleader.com/story/news/education/2019/11/22/native-american-students-left-behind-south-dakota-education-system/4269896002/> (South Dakota public-school principal confiscated eagle feather attached to a Native American student's cap right before the school's graduation ceremony).

⁷ See, e.g., BrieAnna J. Frank & Lorraine Longhi, *Native American protests graduation cap restriction*, Arizona Republic (May 17, 2019), <https://www.pressreader.com/usa/the-arizona-republic/20190517/281642486627694>.

⁸ See, e.g., Sally Pearsall Ericson, *Feather ruffles high school graduation*, Press-Register (June 9, 2013) 2013 WLNR 14211394 (private school fined Native American student \$1,000 for wearing eagle feathers at graduation and withheld diploma until fine was paid); cf. *Native American Student Challenges Ban on Ceremonial Feathers During Graduation*, ACLU of Northern California (June 1, 2015), <https://www.aclunc.org/news/native-american-student-challenges-ban-ceremonial-feathers-during-graduation> (before settling lawsuit, public school threatened to exclude Native American student from graduation ceremony, withhold his diploma, and impose other punishments if he wore eagle feathers at graduation).

⁹ Frank & Longhi, *supra* n.7.

in graduating was honored through the gift of an eagle feather to wear to the ceremony.¹⁰ But school officials repeatedly refused to accommodate Ms. Waln’s cultural and religious practice.

Ms. Waln’s protest, and protests by other students across the country, have led eight states, including Arizona, to adopt laws ensuring that public-school students may, in recognition of their cultural and spiritual heritage, wear tribal regalia during graduation ceremonies.¹¹ Despite these protections, however, students in these states still face barriers in exercising their rights.¹² Meanwhile, students in other states may have no state-law recourse at all. More must be done at the federal level to protect Indigenous students’ rights.

Title VI protects against intentional and disparate impact discrimination.

Title VI of the Civil Rights Act of 1964,¹³ as enforced by the Department’s Office for Civil Rights (OCR), prohibits both intentional and disparate impact discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Moreover, OCR has made clear that it “does not tolerate,” and will not hesitate to investigate, “race or national origin harassment commingled with aspects of religious discrimination[.]”¹⁴

¹⁰ Letter to Dysart Unified School Board Re Native American Religious Dress Accommodation, ACLU (May 15, 2019), https://www.aclu.org/sites/default/files/field_document/2019.05.15_dysart_religious_accommodation_letter_larissa_waln.pdf.

¹¹ Ariz. Rev. Stat. Ann. § 15-348 (2021) (public schools “may not prohibit a student who is a member of a federally recognized Indian tribe or who is eligible to be enrolled as a member of a federally recognized Indian tribe from wearing traditional tribal regalia or objects of cultural significance at a graduation ceremony”); Or. Rev. Stat. Ann. § 332.112 (2021) (public schools “may not prohibit a student from wearing Native American items of cultural significance at a public school event”); Wash. Rev. Code Ann. § 28A.600.500 (2020) (public schools “may not prohibit students who are members of a federally recognized tribe from wearing traditional tribal regalia or objects of Native American cultural significance along with or attached to a gown at graduation ceremonies or related school events”); N.D. Cent. Code Ann. § 15.1-19-28 (2019) (public schools may not prohibit students “from wearing traditional tribal regalia or objects of cultural significance at a graduation ceremony”); Kan. Stat. Ann. § 60-5321 (2018) (“No state agency or municipality shall prohibit an individual from wearing traditional tribal regalia or objects of cultural significance at a public event.”); S.D. Codified Laws § 13-1-66 (2018), *amended* Mar. 3, 2022 (state “may not prohibit any Native American student from wearing an eagle feather, eagle plume, or an appropriate beaded graduation cap at a school honoring or graduation ceremony”); Cal. Educ. Code § 35183.1 (2019) (“A pupil may wear traditional tribal regalia or recognized objects of religious or cultural significance as an adornment at school graduation ceremonies.”); Montana Code § 2-1-315 (2017) (government “may not prohibit an individual from wearing traditional tribal regalia or objects of cultural significance at a public event”). *Cf.* Letter from Okla. Att’y Gen. to Sec’y of Educ. (May 3, 2021), <https://sde.ok.gov/sites/default/files/documents/files/Tribal%20Regalia%20at%20Graduation%20Ceremonies%202021%20%281%29.pdf> (interpreting Oklahoma Religious Freedom Restoration Act to require schools to accommodate Indigenous student’s tribal regalia).

¹² *See, e.g.,* Lowrey, *supra* n.6 (although confiscation of Native American student’s eagle feather at graduation “was illegal under a state law passed in 2018[,]” principal nevertheless “insisted that the student give up the feather”). Some state protections are also limited in scope, applying only to a subset of Indigenous students, or applying only to specific items of tribal regalia. For example, South Dakota’s law was recently amended to apply only to “Native American student[s].” S.D. Codified Laws § 13-1-66. The law allows students to wear an “eagle feather, eagle plume, or an appropriate beaded graduation cap” but no other items of cultural or religious significance. *Id.*

¹³ 42 U.S.C. § 2000d *et seq.*

Intentional discrimination against Indigenous students in violation of Title VI may arise in various situations. Despite an existing policy permitting religious exemptions from graduation dress rules, a school official could deny requests made by Indigenous students based on the official’s animus toward the students’ faith or culture. Or schools could deny some Indigenous students the right to wear tribal regalia even as they allow other students to wear comparable items. For example, in 2019, a Utah school allowed one student to wear a flower lei in recognition of the student’s cultural heritage but demanded that a Navajo student remove feathers attached to her graduation cap, warning that the feathers would be confiscated and she would not be allowed to walk for commencement if she did not comply.¹⁵ Schools must permit all Indigenous students to wear tribal regalia to the same extent they permit students to wear other comparable cultural, religious, or non-religious clothing, jewelry, and accessories.¹⁶

In many cases, however, the refusal to allow students to wear tribal regalia stems from a policy that is neutral, prohibiting students from embellishing their graduation robes and caps with any decoration or message. These policies may be motivated by a misguided effort to quell disruption or distraction during graduation ceremonies,¹⁷ or they may be carry-overs from a time when schools reflexively demanded visual conformity of graduates, notwithstanding students’ cultural and religious heritages and differences. Whatever their motivation, such policies have resulted in disparate impacts on Indigenous students in violation of their federal civil rights.

As the Department of Justice (DOJ) has explained in its Title VI manual, “even benignly-motivated policies that appear neutral on their face may be traceable to the nation’s long history of invidious race discrimination in employment, education, housing, and many other areas.”¹⁸ Policies and

¹⁴ *Title VI and Title IX Religious Discrimination in Schools and Colleges*, Letter from Kenneth L. Marcus to Colleagues (Sept. 13, 2004), <http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>. See also Letter from Russlynn Ali to Colleagues (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (“While Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith.”).

¹⁵ Tanner, *supra* n.5.

¹⁶ Unequal treatment of this sort would also violate Title IV of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c *et seq.*, which is enforced by the Educational Opportunities Section of the Department of Justice Civil Rights Division. The statute prohibits discrimination on the basis of race, color, sex, religion, or national origin by public elementary and secondary schools and public institutions of higher learning. The law “authorizes the Attorney General to address certain equal protection violations based on religion, among other bases, in public schools and institutions of higher education” in an effort to “ensure that all persons regardless of their religion are provided equal educational opportunities.” Types of Educational Opportunities Discrimination, Dep’t of Justice, <https://www.justice.gov/crt/types-educational-opportunities-discrimination> (last visited Apr. 7, 2022).

¹⁷ “[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

¹⁸ Section VII: Proving Discrimination—Disparate Impact, Title VI Legal Manual, Dep’t of Justice, <https://www.justice.gov/crt/fcs/T6Manual7> (last visited Apr. 7, 2022).

practices that have the effect of discriminating “must be eliminated unless they are shown to be necessary to the program’s operation and there is no less discriminatory alternative.”¹⁹

Although there is no private right of action for unintentional discrimination under Title VI,²⁰ the Department of Education and other agencies retain the ability to enforce the statute’s robust protections against disparate impact discrimination.²¹ In connection with this enforcement, the Department has promulgated 34 C.F.R. 100.3, which states that a recipient of federal funds (such as a school) may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”²²

Restrictions on tribal regalia harm Indigenous students and are unnecessary.

Neutral school policies that restrict Indigenous students from wearing tribal regalia during graduation ceremonies subject these students to significant adversity and harm.²³ As discussed above, these policies are enforced through the threat of substantial penalties for students who disobey them, including exclusion from the graduation ceremony itself, confiscation of regalia items, and denial of a diploma. Students who ultimately comply with these restrictions under threat of punishment may nevertheless suffer cultural, psychological, or spiritual harm. Other students who successfully protest these rules do so at great personal expense: At a time when they should be focused on finishing their schooling and enjoying their senior year, they must instead devote significant effort and resources to navigating local administrative processes and appeals and enduring the media spotlight that often comes with such challenges.²⁴ And still others will meet the same fate as Ms. Waln: They will be excluded from their graduation ceremonies and subjected

¹⁹ *Id.*

²⁰ See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

²¹ See Catherine E. Lhamon, Letter to Comm’r on U.S. Comm’n on Civ. Rts., Dep’t of Educ. (Feb. 8, 2016), <https://www2.ed.gov/about/offices/list/ocr/correspondence/federal-entities/20160208-t6-disparate-impact.pdf> (“urging federal agencies ‘to remember that [we] serve an especially critical role in enforcing Title VI disparate impact regulations . . . [Because] [v]ictims can only turn to the administrative complaint process, . . . agencies must be particularly vigilant in ensuring strong enforcement in this area’”) (quoting 2009 Memorandum from the Acting Assistant Att’y Gen. on Strengthening of Enforcement of Title VI of the Civil Rights Act of 1964); DOJ Title VI Manual, *supra* n.18 (“Federal funding agencies play a vital role in enforcing the prohibition on disparate impact discrimination through complaint investigations, compliance reviews, and guidance on how to comply with Title VI.”)

²² 34 C.F.R. 100.3(b)(2).

²³ See DOJ Title VI Manual, *supra* n.18 (noting that “courts frequently assume that the impacts alleged were sufficiently adverse, impliedly recognizing a wide range of harms, including physical, economic, social, cultural, and psychological” and that “threatened or imminent harm” also may satisfy the disparate impact harm requirement).

²⁴ See, e.g., Alyssa Hardy, *How One Native American Student Is Fighting Back After Her School Banned Navajo Moccasins*, Teen Vogue (May 31, 2016), <https://www.teenvogue.com/story/native-american-student-graduation-moccasins>; David Norris, *Sapulpa teen’s fight to wear moccasins pays off*, KTUL.com (May 20, 2016), <https://ktul.com/news/local/sapulpa-teens-fight-to-wear-moccasins-pays-off>.

to other repercussions—merely for practicing their cultural and religious beliefs, which cause no harm to anyone else.

The present-day harms that these policies cause to Indigenous students cannot be fully understood unless they are placed into the historical context of the multifaceted efforts to separate Indigenous children from their families and tribes and to deny them their rights of cultural and religious expression. To take just one example:

Beginning with the Indian Civilization Act of 1819 and running through the 1960s, the United States enacted laws and implemented policies establishing and supporting Indian boarding schools across the Nation. During that time, the purpose of Indian boarding schools was to culturally assimilate Indigenous children by forcibly relocating them from their families and communities to distant residential facilities where their American Indian, Alaska Native, and Native Hawaiian identities, languages, and beliefs were to be forcibly suppressed. . . . [T]he legacy of Indian boarding schools remains, manifesting itself in Indigenous communities through intergenerational trauma, cycles of violence and abuse, disappearance, premature deaths, and other undocumented bodily and mental impacts.²⁵

Because of this history and because Indigenous students have a special and specific cultural and religious belief and practice pertaining to graduation and ceremonial dress,²⁶ in many instances the harms that they bear are unfair or disproportionate compared to non-Indigenous students, who do not have the same cultural or religious obligations vis-à-vis graduation ceremonies.²⁷ Where this is true, schools that continue to prohibit Indigenous students from wearing tribal regalia are unlikely to be able to demonstrate that their policies are necessary to achieving a goal that is legitimate, important, and integral to their institutional mission.²⁸ Quite the opposite—Indigenous

²⁵ Memo from Sec. of the Interior Deb Haaland Regarding Federal Indian Boarding School Initiative (June 22, 2021), <https://www.doi.gov/sites/doi.gov/files/secint-memo-esb46-01914-federal-indian-boarding-school-truth-initiative-2021-06-22-final508-1.pdf> (“Over the course of the Program, thousands of Indigenous children were removed from their homes and placed in Federal boarding schools across the country. Many who survived the ordeal returned home changed in unimaginable ways, and their experiences still resonate across the generations.”).

²⁶ The “Every Student Succeeds Act” recognizes that Indigenous students have “unique cultural, language, and educational needs.” 20 U.S.C. § 7421.

²⁷ As discussed in the DOJ’s Title VI Manual, “disparity” for disparate impact purposes can be established by various means. While statistical evidence can be instructive, it is not the exclusive means of proof available. Rather, “[t]he requisite unfair share of harm can also be shown by evidence of impact on specific individuals” and, in some instances, the disparate effect of a policy or practice “is sometimes so obvious or predictable that comparative statistics are simply unnecessary to draw the requisite connection between the policy and harm to a Title VI protected group.” DOJ Title VI Manual, *supra* n.18.

²⁸ *See id.* (noting that, to determine whether there is a “substantial legitimate justification” for a policy that causes a disparate effect, the agency must determine whether “the challenged policy [was] necessary to meeting a goal that was legitimate, important, and integral to the recipient’s institutional mission”).

students are already much less likely to graduate than their peers,²⁹ and policies that prohibit significant cultural and religious practices, such as wearing tribal regalia at graduation, may further diminish these students' sense of belonging and success in school,³⁰ thereby *undermining* schools' educational mission.

And any claims that allowing these practices would cause disruption or difficulty would be speculative at best.³¹ There is simply no evidence that schools have experienced disruption or difficulty as a result of allowing students to wear tribal regalia at graduation. Moreover, there are a number of less discriminatory alternatives that schools could pursue to alleviate any concerns they may have, including advanced review of the tribal regalia that will be worn and imposing and enforcing behavioral rules during the ceremony.

The government has an obligation to protect Indigenous students' rights.

Of course, the reach of Title VI's disparate impact protections will depend on the particular circumstances of each individual case. We understand that there are some situations where these protections will not apply. But many schools seem unaware that policies denying Indigenous students the right to wear tribal regalia during graduation ceremonies could violate this federal law. We believe that the Department could play an important role in educating qualifying schools and students about this concern. Indeed, given the federal government's historical involvement in practices that stripped Indigenous students of their cultural and religious heritage in the name of assimilation, the Department has a special obligation to address ongoing deprivations of these students' educational and expressive rights.

Accordingly, as noted above, we urge the Department to issue a fact sheet or other guidance reminding schools that they must remain sensitive to the rights of Indigenous students as graduation approaches. For example, a document similar to the Department's recently released "Supporting Intersex Students" fact sheet could be quite helpful.³² Whatever form it may take, this guidance should also affirm that the Department places a high value on the rights of Indigenous

²⁹ See, e.g., Sanne Godfrey, *Native students to wear tribal regalia at graduation ceremonies*, The News-Review (June 2, 2021), https://www.nrtoday.com/news/education/native-students-to-wear-tribal-regalia-at-graduation-ceremonies/article_5cc06dbd-9cc7-5806-a24c-45ab6b3d3e17.html ("Graduation rates among Native American students [in Oregon] have historically been lower than those of their white peers, and lower than the state average. For the 2019-2020 school year the on-time graduation rate was 67.2% for Native American students, down half a percentage point from the previous year and significantly below the 82.6% statewide average."); *Lowrey, supra* n.6 ("On-time graduation rates for Native American students [in South Dakota] also are lower than for every other racial group in the state at just 54%, compared with the rate of 85% for students of all backgrounds, according to the state report card.").

³⁰ See, e.g., *Lowrey, supra* n.6 ("One step in the right direction . . . would be to create school environments where Native American students can be unapologetically indigenous. . . . [T]he state's schools need to do a better job of creating an environment where Native American students can celebrate and be proud of who they are.").

³¹ See DOJ Title VI Manual, *supra* n.18 (The justification "must be supported by evidence and may not be hypothetical or speculative.").

³² Supporting Intersex Students, Dep't of Educ., <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf> (October 2021).

students and will be prepared to immediately investigate any complaints it receives from seniors whose schools prohibit them from wearing tribal regalia at graduation.

We appreciate your consideration of this request and would be pleased to discuss this matter further with you at your convenience. However, time is of the essence: The complaint procedures available to Indigenous students and families are often too slow to make a difference in many cases, and these procedures often place the burden of fighting restrictions on tribal regalia solely on the shoulders of the students and their families. By reminding schools of their obligations in advance, they are more likely to respect Indigenous students' rights in the first place and students will not be forced to undertake a time-consuming and emotionally exhausting complaint process during what should be a celebratory time.

Sincerely,



Heather L. Weaver, Senior Staff Attorney
Daniel Mach, Director
American Civil Liberties Union Foundation
Program on Freedom of Religion and Belief
hweaver@aclu.org
dmach@aclu.org



Ian S. Thompson
Senior Legislative Advocate
American Civil Liberties Union
National Political Advocacy Department
ithompson@aclu.org