

**Written Statement of Therese E. Yanan  
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**Examining the Bureau of Indian Education's School Reopening Guidance  
During the COVID-19 Pandemic**

**House Committee on Natural Resources  
Subcommittee for Indigenous Peoples of the United States**

Chairman Gallego, Ranking Member Cook, Members of the Committee – thank you for the opportunity to testify today regarding reopening schools funded and operated by the Bureau of Indian Education. My name is Therese Yanan and I am an attorney and the Executive Director of the Native American Disability Law Center.

Introduction and Background

The Native American Disability Law Center (Law Center) is a private non-profit legal organization that serves Native Americans with disabilities in the Four Corners region of Arizona, Colorado, New Mexico and Utah. The Law Center's mission is to advocate so that the rights of our clients are enforced, strengthened, and brought in harmony with their communities. With offices in Farmington, New Mexico and Flagstaff, Arizona, our advocates work to ensure that Native Americans with disabilities have access to justice and are empowered and equal members of their communities and nations. The issues we address include civil rights, special education, health care, and access to public and private services. Our staff investigate abuse and neglect in care facilities, and provide rights-based training for people with disabilities, their families, educators and service providers.

The Law Center is a part of the federal Protection and Advocacy (P&A) System, which is a nationwide system of legal organizations dedicated to promoting and protecting the rights of people with disabilities living in every state and U.S. territory. The Law Center is the only P&A that is dedicated to meeting the unique needs of Native Americans with disabilities. While we focus our direct services in the Four Corners, as national leaders in the field, the Law Center routinely consults with other legal organizations, including in the national P&A network, to address the legal issues facing Native Americans with disabilities. The Law Center is often invited to speak at regional and national disability rights conferences. In 2019, the Law Center was recognized as the organizational recipient of the annual National Disability Rights Network Advocacy Award for its efforts to address the educational needs of Native American students with disabilities attending a BIE school.

For over 25 years, I have had the pleasure and privilege of working with the various tribal communities of the Four Corners, primarily the Navajo Nation and Hopi Tribe. Since its inception in 1994, a primary focus of the Law Center's services and a major concern of our community has been the education of Native American children with disabilities.

The Law Center addresses the special education needs of Native American students with disabilities in the Arizona, New Mexico, Colorado and Utah public school systems and the federal Bureau of Indian Education (BIE) system. The Law Center provides services that can include informal advocacy, technical assistance, and legal representation to its clients. The Law Center has been working to address the unique legal issues facing Native American students with disabilities attending BIE schools for 25 years including in the seminal education civil rights cases *Bitsilly v. Bureau of Indian Affairs*, 253 F. Supp.2d 1257 (D.N.M. 2003) and *Stephen C. v BIE*, No. 3:17-cv-08004-SPL (D. Ariz. 2017). The legal issues Native American students with disabilities face in BIE schools are often more complicated because of jurisdiction and tribal sovereignty issues, inconsistent practices across BIE schools, persistent failure to adequately staff schools, and a lack of formalized special education policies and procedures.

### History of Indian Education in the U.S.

The history of Indian education in the United States has a painful past that has left a long-lasting impact on many Native American communities. With the passage of the Civilization Fund Act on March 3, 1819, the U.S. government ushered into practice forced assimilationist policies that led to an era often referred to as the “Indian boarding school era.” This era created boarding schools that were run by the federal government and religious officials and designed to assimilate Native Americans into the dominant culture. During this shameful era, Native American students were coerced into attending the boarding schools where they were stripped of their cultural practices, language, and appearances. The federal government has recognized that it was federal policy to “acculturate and assimilate” Native American communities by eradicating their tribal cultures through the boarding school system. In 1928 the Meriam Report documented the conditions of the boarding school system as overcrowded, without adequate food or medical care, with a uniform and ineffective curriculum and low teacher standards, and with child labor being used to keep the schools running. Many may not know that for some the disruption of the boarding school era has not ended since many Native American students who do have a high school in their community attend BIE boarding schools since it is their only option if they want to obtain a high school diploma.

The Indian boarding schools were originally operated by the U.S. Department of Interior's Bureau of Indian Affairs. This system of schools was later taken over by the Office of Indian Education Programs, which was renamed and reestablished as the BIE in 2006. The BIE is headed by a director, who is responsible for the direction and management of all education functions, including the formation of policies and procedures, the supervision of all program activities and the approval of fund expenditures appropriated for education functions.

The BIE's current obligation to meet the educational needs of its students, including students with disabilities, is rooted both in its unique trust responsibility to tribes and federal law. The federal government's trust responsibility to provide for the education of Native American students is established primarily through treaties between the federal government and tribes, but also through federal statutes, court decisions and executive actions. The BIE's obligations to meet the educational needs of Native American students are detailed in the Indian Education Act, the Indian Self-Determination and Education Assistance Act and other numerous federal statutes and

regulations, such as the Every Student Succeeds Act. In its own regulations, the BIE has declared its mission is to provide “quality education opportunities from early childhood through life in accordance with a tribe’s needs for cultural and economic well-being, in keeping with the wide diversity of Indian tribes and Alaska Native villages as distinct cultural and governmental entities.” In addition to funding and operating its own schools, the BIE is the State Education Agency (SEA) for tribally-controlled schools funded by the BIE, but operated by other tribal entities like tribal school boards or departments of education. Currently, there are 183 BIE-funded elementary and secondary schools, located on 64 reservations in 23 states serving roughly 43,000 students, including 6,000 students with disabilities. In addition, the BIE funds or operates off-reservation boarding schools and dormitories near reservations to support students who attend public schools far from their homes.

For Native American students with disabilities, the BIE must comply with the requirements of the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (Section 504) in addition to other applicable federal education laws. The BIE has never promulgated its own regulations implementing the IDEA. Its IDEA policies and procedures have been in draft form since 2012. Importantly, on July 17, 2020, the BIE for the first time issued a national policy providing interim guidance to its operated elementary and secondary schools and dormitories on the “nondiscrimination prohibitions based on disability found in Section 504 [.]” Prior to issuing this policy, the BIE had no written policy regarding its obligations to comply with Section 504, a provision passed in 1973.

### BIE’s Failure to Meet Needs of Students with Disabilities and General Concerns

As an agency, the BIE struggles to meet the needs of students with disabilities attending its schools. Well documented in a series of U.S. Government Accountability Office (GAO) Reports, Inspector General reports, the U.S. Department of Education State IDEA Determinations and related communications, internal reports and corrective action plans, the BIE is plagued with high staff turnover, lack of staff training, lack of special education and related service providers, and an inability to properly monitor its special education program. These inadequacies impact the BIE’s ability to meet even the basic educational needs of students with disabilities often resulting in students’ being owed compensatory or “make up” education services.

According to a June 2020 GAO Report, the United States Department of Education, which provides approximately \$78 million annually to the BIE to meet the educational needs of Native American students with disabilities, raised significant concerns about BIE’s implementation of IDEA including concerns about BIE’s long-standing noncompliance with the IDEA’s requirements and repeated failure to take the Department of Education’s required corrective actions. The Report ultimately determined BIE was not complying with the IDEA. Troublingly, the GAO found that the BIE did not provide or did not account for 38 percent of special education and related time for students with disabilities. One school did not provide any service to three of its students. Furthermore, the BIE has not established whether and when missed service should be made up, which has led to inconsistent practices among schools.

For nine consecutive years, the Department of Education has found that the BIE “needs intervention” based on its repeated failure to comply with corrective action plans to properly implement the IDEA. Students attending BIE schools have the lowest outcomes of any students in the country.

In practice, this means that Native American students with disabilities are not provided with the critical special education and related services they are entitled to receive in their Individual Education Plans (IEPs), the document that defines a student with a disability's education program under the IDEA. Families who avail themselves of the IDEA's procedural safeguards like filing informal and formal complaints against the BIE often wait many months or in extreme circumstances, years, for resolution. Many of the Law Center's clients do not contact the Law Center with esoteric legal issues: families simply want to schedule an IEP Meeting with their school and can't get a response, are concerned their student's IEP is not being properly implemented with fidelity, or want to access their student's educational records, which they have been denied. These issues are fundamental to the student's ability to learn and access his or her educational program and their parents' ability to fully participate in their child's education contrary to the clear mandates of the IDEA.

The BIE's longstanding inability to comply with the IDEA and Section 504 made education advocacy for Native American students with disabilities attending BIE schools challenging under the best of circumstances. Then the pandemic hit.

### COVID-19 School Closure and BIE Response

In March of 2020, Americans began to come to grips with the fact that we were facing a global pandemic. By late March, many states had announced that schools would be closed for the remainder of the year. New Mexico made this decision on March 27, while Arizona followed suit three days later. State Education Agencies (SEAs) began issuing guidance to school districts concerning the provision of educational services and, in particular, special education services to students with disabilities. The message was clear: schools must continue to provide students with disabilities the supports and services identified in their individualized education plans (IEPs). Should a school be unable to provide those supports and services, it must be prepared to review a student's progress toward goals and provide compensatory services to enable that student to be in a position s/he would have been if services had been provided. While it has not been a smooth road for students with disabilities in state-funded schools, there was at least a map to follow and a general understanding of expectations.

Meanwhile, families of students in schools overseen by the BIE were left in the dark. Schools shut their doors with no communication to students with disabilities about how their services would be provided. In early April, one school sent parents a letter informing them that the school was closed, no education services would be provided, IEP meetings would be held virtually or cancelled, and students with IEPs may be eligible for compensatory education services. Beginning in April and continuing through June, the Law Center checked in with clients in BIE schools across the Four Corners area. One parent was contacted by a school counselor who had been providing ongoing counseling services to her son. The counselor stated that his contract was

terminated by the school. A speech language therapist in another school was told to stop providing services, even though she could do so remotely. Some families were provided with packets for their children to work on, but they were often either far above or below the child's grade level. Occasionally, a special education teacher would call to check on a student, but this check in was typically a cursory call to see how the student was doing. Across the board, the message from these families was clear: we are not receiving any meaningful education or services. Not only were students being denied educational opportunities, but Native American students with disabilities were left without access to critical services. During the pandemic, alternative services in the community were often inaccessible as resources were being directed toward managing an influx of COVID-19 cases at under-resourced health systems.

On April 21, 2020, the Law Center, along with civil rights and disability rights advocates across the country, submitted a request to the BIE to issue guidance to its schools. This request went unacknowledged and unanswered.

On April 30, 2020, the BIE held a public listening session on the disbursement of \$153 million of CARES Act funding. Despite active participation and input from tribal leaders and school representatives, the BIE failed to publicly release any plan concerning the funding.

The school year ended without fanfare, without grades, without progress reports, and without any clear direction moving forward. On June 11, 2020, Margo DeLaune, Acting Associate Deputy Director for the BIE Division of Performance and Accountability (which oversees special education in BIE schools) signed a "Dear School Leader" letter addressing the continued responsibility of schools under the Individuals with Disabilities in Education Act (IDEA). The letter reminded schools of their obligations to students with disabilities and highlighted the need for schools to assess their obligation to provide compensatory services during the time that school facilities have been closed due to COVID-19, to conduct annual evaluations, and to figure out how to provide extended school year (ESY) services to students if schools remained closed through the summer. This guidance instructed schools to contact families and schedule IEP meetings or provide notice that an IEP meeting would be scheduled in the future to discuss these issues. Many of our clients have not been contacted by schools concerning compensatory services or IEP meetings. It is unclear whether the BIE has provided oversight of its schools on this important requirement.

### BIE Re-Opening Plan

In July, the BIE held three listening sessions on the topic of a school re-opening plan. The stated purpose of these listening sessions was to allow stakeholders input on the needs of their individual schools and communities. Concerns were expressed about reopening too early in areas with high rates of COVID-19 transmission, not having reliable technology to support distance learning, lack of safe and reliable bus transportation, mental health needs of students, and lack of training for staff on how to educate students in a remote learning environment. While the BIE agreed to take all these comments and concerns under consideration, they quickly issued a letter on August 6, 2020 suggesting that all schools return to in-person learning as soon as possible. The letter referenced a Return to Learn plan, which was located on a new BIE website:

returntolearn.bie.edu. This 76-page document provides very little substantive guidance on the actual reopening of schools for the 2020-2021 school year.

While the clear goal of the BIE is for students to return to in-person learning as soon as possible, the plan outlines three possible learning environments for students:

1. In person for the full school day;
2. Distance learning through a Learning Management System (LMS); or
3. Alternative education programs as determined by each school leader for students without capability to connect to distance learning instruction.

The plan instructs schools that they must provide students with disabilities all services identified in their IEPs, regardless of whether they choose the distance learning or alternative education option. There is no mention of the June 11<sup>th</sup> letter instructing schools on their obligations to provide compensatory education services, annual evaluations, or ESY. The Law Center is not aware of any BIE funded school that was able to provide ESY to any student. We also have serious concerns about whether schools have communicated with parents about ESY or their child's right to these services.

The Law Center has significant concerns with the options available to families. First, with such a heavy focus on a return to in-person learning, the BIE has failed to construct an effective method of delivering educational services through distance learning. Many students in BIE schools lack the technology necessary to fully participate in an online learning platform. Even if they have a computer, internet service is often unavailable, unreliable or slow. The BIE has not released any plan to ensure students have adequate technology to access distance learning platforms or, in the case of students with disabilities, special education and related services. Further, by giving schools the choice of providing an "alternative education program" to families who do not have access to technology, the BIE is contributing to the already existing inequities in tribal communities. There is no guidance on how special education services would fit into the "alternative education program" or how students would be connected to service providers. The BIE assumes that in person education and services will be possible; however, as we see school reopening play out across the country, this goal seems unrealistic.

Another concern is the BIE's statement that "schools should assist families in understanding their responsibility in supporting their child's education in this environment." While families play an important role in a child's life both in and outside of school, they cannot be held responsible for their education. This is especially true for families of students with disabilities. Special education teachers receive specialized training in working with students with disabilities; it cannot fall on parents to provide these services in the home. Further, as previously mentioned, many of these students rely on the school for assistance with basic needs that require specialized knowledge and training. A parent cannot be expected to be a speech therapist, occupational therapist, and teacher – particularly when they are likely facing the additional stresses that have come with the pandemic and their own work responsibilities.

Recent outreach to families revealed that schools have not been in contact with students with disabilities to schedule IEP meetings and that families are unsure of what the 2020-2021

school year will look like. Many families remain concerned about returning their students to school for in-person learning. Some, particularly on the Navajo Nation, have experienced loss of close family members to the virus. They should not be forced to send their children back to school simply because the BIE cannot provide a viable distance learning option.

### Action Items

We respectfully request you consider taking the following steps to immediately address the BIE's failure to account for and address the specific and unique needs of students with disabilities during the COVID-19 related school closures and in its Reopening Plan.

First, the BIE should be required to create a COVID-19 Response Team properly staffed with the requisite educational and public health and safety expertise that is responsible solely for addressing the BIE's Reopening Plan. Specifically, this Response Team should be responsible for developing a clear communication plan and strategy that addresses the needs of both school administration and leadership and parents and families. For every school, there should be coordination between the Response Team, the School Leadership, Tribal representatives and parents. Given the history of Indian Education, the BIE should recognize the importance of building partnerships with tribal governments and families. These partnerships are essential to solving the complex problems facing these schools.

The Response Team should have a clear communication plan with concrete implementation strategies for school administration and leadership to follow including how best to communicate with families, document any concerns or issues facing families and how families can contact the school to address them. For families, the Response Team must have a cogent, consistent communication plan that does not rely solely on the BIE's "Return to Learn" Web site in order to meet the needs of families who may not have access to Internet, read English or know about the website. Further, the Response Team should create a system or complaint process where a specific Response Team member is tracking individual family issues in order to connect that family directly with the school to work through the issues for prompt resolution.

Importantly, the Team should have an appropriate level of staffing to successfully "roll out" the Reopening Plan to all of its operated schools and still be available to provide technical and direct assistance to those schools so that Reopening Plan expectations are clearly communicated and issues are addressed quickly and effectively.

Second, the BIE should develop a more robust Distance Learning Plan. As discussed above, the BIE's current iteration of its remote and distance learning plan is not comprehensive, nor does it provide clear guidance on how a student with a disability's educational needs will be served. The plan must first clearly state that distance learning must be made available to all students with disabilities. Further, the plan must clearly require that the schools provide laptops (or other devices) and adequate access to the Internet so all students can access the remote learning plan. Without a more robust remote learning plan with clear direction that the BIE is responsible for ensuring access, students with disabilities will be left behind even more than they already have been.

Lastly, the BIE should be required to demonstrate transparency and release publicly available information about how the BIE's CARES Act funds and other subsequent funding streams have been spent to date and how feedback from the April 20 and 28, 2020 tribal consultations and listening sessions was considered in that process.

We appreciate the Subcommittee's interest in this issue. Thank you for allowing me to speak with you today.