

**To: The Honorable Jack Jackson**  
**Chairman, Citizens Clean Elections Commission**

**February 15, 2001**  
**Re: Application of**  
**Proposition 203 to**  
**Schools Serving the**  
**Navajo Nation**  
**101-006 (R00-062)**

### **Question Presented**

You have asked whether Proposition 203, which generally prohibits bilingual instruction, applies to Native American language programs in schools serving the Navajo Nation. <sup>(1)</sup>

### **Summary Answer**

If a school is run by the tribe or the federal government, then the school is not subject to Proposition 203. State public schools, in contrast, are generally subject to Proposition 203, but the State law must be applied in a manner consistent with federal law, including principles of tribal sovereignty and the federally-recognized right of Native Americans to express themselves through the use of Native American languages. Proposition 203 cannot prohibit a State public school located on the Reservation or elsewhere from teaching students Native American language and culture.

### **Background**

#### **Navajo Law and Tribal Sovereignty**

Principles of tribal sovereignty provide the backdrop for any analysis of the application of a State law on tribal land. Native American tribes have generally retained their power of self-rule:

It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. . . . "The relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position . . . with the power of regulating their internal and social relations. . . ."

*McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172-73 (1973) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)).

The Navajo have adopted specific laws recognizing the importance of the Navajo language to the "life, culture and identity of the Navajo People." Navajo Tribal Code, T. 10 § 111. Under the Navajo Code, "instruction in the Navajo language shall be made available for all grade levels in all schools serving the Navajo Nation." *Id.* Navajo law encourages competence in both English and Navajo. *See id.* at T.10 § 102(2), (3).

#### **Proposition 203**

In November 2000, Arizona voters passed Proposition 203, an initiative regarding teaching English in public schools. The Proposition notes that "[i]mmigrant parents are eager to have their children acquire a good knowledge of English." *Id.* at ¶ 2. Hence, it is the duty of Arizona schools "to provide all of Arizona's children, regardless of their ethnicity or national origins, with the skills necessary to become productive

members of our society," and the Proposition states that English literacy is one of the most important such skills. *Id.* at ¶ 3. The law is based on the idea that "immigrant children" can gain full fluency in English by heavy exposure to that language at a young age. *Id.* at ¶ 5. Proposition 203 states that, subject to certain exceptions, "all children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms."<sup>(2)</sup> A.R.S. § 15-752 (as amended by Proposition 203 hereinafter "Prop. 203"). Students who are "English learners" or "limited English proficient" are generally educated through "sheltered English immersion during a temporary transition period not normally intended to exceed one year."<sup>(3)</sup> A.R.S. § 15-752 (as amended by Prop. 203). In sheltered English immersion classes, teachers may use only "minimal amount[s]" of a student's native language in teaching English. A.R.S. § 15-751(5) (as amended by Prop. 203).

Proposition 203 has certain limits. For example, Proposition 203 provides that "[f]oreign language classes for children who already know English shall be completely unaffected." A.R.S. § 15-752 (as amended by Prop. 203). In addition, the requirements of English immersion and placement in English language classrooms may, in certain circumstances, be waived upon the request of a student's parents or guardians. A.R.S. § 15-753 (as amended by Prop. 203) (allowing parental waivers from requirements of section 15-752 for children who "already know English," and children over ten years old and special needs children whose educational needs would be better met by alternate teaching methods).

### **Native American Languages Act**

The history of United States government policy towards tribal languages, including Navajo, is long and troubled. Historically, federal Indian boarding schools outlawed the use of Native American languages. *See, e.g.,* Dep't of the Interior, Remarks of Kevin Gover, Assistant Secretary-Indian Affairs, Sept. 8, 2000, <http://www.doi.gov/bia/as-ia/175gover.htm> (acknowledging previous policy of outlawing traditional tribal ways and vowing "never again" to attack Native American religions, languages or rituals).

That policy has now been reversed as a matter of law. In addition to extensive statutes dealing with Indian education and the right of Indians to self-determination generally, Congress enacted the Native American Languages Act ("NALA") in 1990 to protect and promote the rights of Native Americans to preserve their native languages. 25 U.S.C. §§ 2901-06. In NALA, Congress declared that "the traditional languages of Native Americans are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values." 25 U.S.C. § 2901(3). Similarly, the law states that "there is convincing evidence that student achievement and performance, community and school pride, and educational opportunity is clearly and directly tied to respect for, and support of, the first language of the child or student." 25 U.S.C. § 2901(6). Congress also found that "acts of suppression and extermination directed against Native American languages and cultures are in conflict with the United States policy of self-determination for Native Americans." 25 U.S.C. § 2901(8).

Accordingly, Congress declared that our national policy is to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages." 25 U.S.C. § 2903(1). The law encourages schools to use Native American languages as a medium of instruction to support "increased student success." 25 U.S.C. § 2903(3)(C). The law also encourages all schools to offer Native American language courses as foreign language courses, and expressly reserves the right of Native Americans to use their language as a medium of instruction in any school funded by the Department of Interior. 25 U.S.C. § 2903(5), (8). Finally, NALA also provides that "[t]he right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, *including publicly supported education programs.*" 25 U.S.C. § 2904 (emphasis added).

### **Analysis**

### **A. Proposition 203 Does Not Apply to Federal or Tribal Schools.**

Proposition 203 applies only to "Arizona public schools." A.R.S. § 15-752 (as amended by Prop. 203). "Arizona" public schools are, by definition, created by State law and financed by the State. *See generally* 15 A.R.S. §§ 101-2201 (establishing Arizona public schools). In contrast, federal (BIA) schools and tribally-run schools are created by federal or tribal law and generally maintained by federal or tribal funds. *See, e.g.*, 25 U.S.C. §§ 271-304, 2501-2651 (establishing federally and tribally-run Native American schools). Thus, by its own terms, Proposition 203 does not apply to federal or tribal schools. A.R.S. § 15-752 (applying to "all children in *Arizona public schools*") (emphasis added); *see also, e.g.*, Ariz. Att'y Gen. Op. I79-128 (a federally-run school is not under the jurisdiction of a State school district).

### **B. State Public Schools Must Apply Proposition 203 in a Manner Consistent with Federal Law.**

Arizona public schools, even those located on tribal land, are created and governed by State law.<sup>(4)</sup> As the Arizona Court of Appeals explained in finding that traditional Indian sovereign immunity did not extend to tribal members sued in their capacity as trustees of an on-reservation State public school:

Creation of school districts and their powers is governed by State law; likewise are the powers and duties of the trustees of the school district. It would be anomalous indeed if the [Native American] trustees on the one hand could exercise authority derived from State statutes and, when such authority is challenged, question the jurisdiction of the State courts.

*Indian Oasis Sch. Dist. No. 40 v. Zambrano*, 22 Ariz. App. 201, 202, 526 P.2d 408, 409 (1974); *see also* Ariz. Att'y Gen. Op. I86-019 (tribe has no right to assert its tribal preference in employment ordinance over State public school located on Indian reservation).

Although State law generally governs the operation of State public schools, it is still necessary to determine if federal law itself, including concerns for tribal sovereignty, bars the application of Proposition 203 to Native American students in State public schools located within or outside the Reservation. As a general proposition, "even on reservations, State laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). The test is different with regard to the application of state laws to Native Americans outside a reservation. "Absent *express* federal law to the contrary, Indians going beyond reservation boundaries have [] been held subject to non-discriminatory State law otherwise applicable to all citizens of the State." *Id.* at 148-49 (State could impose non-discriminatory tax on off-reservation ski resort operated by Indian tribe) (emphasis added). Under traditional federal law preemption principles, federal law preempts State law if the federal law expressly states that it does, or the federal law is so comprehensive as to leave no room for State law, or if the State law directly conflicts with the federal law and both cannot be followed.<sup>(5)</sup> *See, e.g., Kadera v. Superior Court*, 187 Ariz. 557, 560, 931 P.2d 1067, 1070 (App. 1996).

### **1. Application of Proposition 203 to State Public Schools Outside the Reservation.**

Determining if federal law precludes the application of Proposition 203 to Native American students attending State public schools outside the Reservation requires careful consideration of the specific provisions and general purposes of the State law and NALA. At the outset, it is important to recognize that Proposition 203 does not seek to ban the use of Navajo in State public schools. Indeed, a strong argument can be made that Proposition 203 was not intended to apply to Native American languages at all. For example, Proposition 203 focuses primarily on non-English speaking *immigrant* children. *See, e.g.*, Proposition 203, Section 1: Findings and Declarations at ¶ 2 ("Immigrant parents are eager to have their children acquire a good knowledge of English."); *id.* at ¶ 5 ("Immigrant children" can gain full fluency in

English by heavy exposure to that language at a young age). Despite the expressions of intent, however, the actual language in Proposition 203 directs that "all children . . . shall be taught English by being taught in English," and, thus, its requirements are not limited to immigrant children. A.R.S. § 15-752 (as amended by Prop. 203).

Application of Proposition 203 to Native American students in State public schools does not mean that the Navajo language cannot be taught. Even in sheltered immersion programs, Proposition 203 permits a limited use of languages other than English. Specifically, the Proposition provides only that "nearly all classroom instruction is in English" and expressly permits "use of a minimal amount of the child's native language when necessary." A.R.S. § 15-751(5) (as amended by Prop. 203). In addition, bilingual programs are permitted if parental waivers are obtained. A.R.S. § 15-753 (as amended by Prop. 203). Proposition 203 also does not prohibit the use of languages other than English outside the classroom. *See Calif. Teachers Ass'n v. Davis*, 64 F. Supp. 2d 945, 953 (C.D. Cal. 1999) (noting that California's Proposition 227 "involves a policy decision on curriculum" and does not limit the use of languages other than English in disciplining students, emergency training, social interactions, tutoring, parent-teacher conferences, and other matters).

In addition, Proposition 203 does not prohibit a State public school from teaching students Native American language and culture. Proposition 203 provides that "foreign language classes for children who already know English shall be completely unaffected" by the Proposition's requirements.<sup>(6)</sup> A.R.S. § 15-752 (as amended by Prop. 203). Foreign language studies necessarily include related cultural studies. *See Ariz. Dep't of Educ., Arizona Academic Standards & Accountability, Foreign Language Standards*, <http://www.aazdes.gov/standards>.

Proposition 203 and NALA thus are directed at different, and not necessarily conflicting, purposes. Proposition 203 aims to ensure that Arizona students learn English. NALA, on the other hand, aims to "preserve, protect, and promote" the "use, practice, and develop[ment]" of Native American languages. 25 U.S.C. § 2903(1). One reason for the unique treatment of Native American languages under federal law is that many Native American languages are threatened with extinction. *See Scott E. Ferrin, Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda*, 28 J. L. & Educ. 1, 13 (1999) (contrasting "potential for language extermination that threatens Native American languages" with the "demographic vitality" of Spanish, most Asian languages and other minority languages in this country); *see also Allison M. Dussias, Waging War with Words: Native Americans Continuing Struggle Against the Suppression of Their Languages*, 60 Ohio St. L. J. 901, 978-977 (1999) (discussing risk of extinction of Native American languages). Thus, while Proposition 203 seeks to ensure that students with limited ability in English become proficient in that language, NALA aims to protect and promote knowledge of Native American languages. *Cf. Navajo Tribal Code, T.10 § 102(2), (3)* (recognizing that an "appropriate education" includes competence in English as well as Navajo).

The provisions of NALA do not indicate that this federal law generally precludes a State from requiring structured immersion programs to teach English to children who are "limited English proficient." As noted above, NALA recognizes the importance of Native American languages, encourages schools to use Native American languages as a medium of instruction and to offer foreign language classes in such languages, and specifically reserves the right of Native Americans to use their languages as a medium of instruction in schools funded by the Department of Interior. The provisions of NALA, however, do not expressly preempt State law and do not attempt to comprehensively regulate State public school curricula involving instruction to Native American students.

In one of the few reported cases addressing NALA, the court noted that the Act "merely speaks in terms of general policy goals and does not create a new set of regulations which might lend itself to enforcement through suits by private citizens." *Office of Hawaiian Affairs v. Dep't of Educ.*, 951 F. Supp. 1484 (D.

Hawaii 1996) (holding that NALA did not create a private cause of action). In trying to determine what types of restrictions are subject to NALA, the Hawaii district court noted:

It would appear impracticable for public schools to not impose any restrictions on Native American languages, such as requiring students to speak English in a class taught in English. If not, in application the statute would effectively require teachers to be bilingual (or multilingual as the case may be) in order to understand their students who are allowed to respond in their native tongue. This would defeat Congress' apparent intention that NALA would not impose affirmative obligations on states, as evidenced by the other provisions in NALA.

*Id.*

The court also indicated that "§ 2904 is the only provision of NALA which could conceivably be interpreted to impose requirements on states." *Id.* at 1494. Although the case did not decide the issue, the court noted "it is unclear whether this provision extends to state public education, rather than federally funded education programs discussed in other portions of the Act." *Id.* at 1495. Assuming this provision applies to the states, the court commented that "at most it prevents the state from barring the use of . . . [native] languages in schools." *Id.* This analysis supports the conclusion that NALA leaves room for State policy concerning the use of the English language for instruction in State public schools. <sup>(7)</sup>

There is a significant difference, however, between allowing room for State policy and interpreting Proposition 203 in a way that would conflict with NALA. To avoid any such conflict, State public schools should not restrict "[t]he right of Native Americans to express themselves through the use of Native American languages" in publicly supported education programs. 25 U.S.C. § 2904. Moreover, the congressionally-recognized purpose of preserving Native American languages, and the tribe's strong interest in preserving its language and culture, indicate that Proposition 203 should be construed to allow a State public school to make Navajo classes available to all children, regardless of whether the children technically "already know English." This accommodation is necessary to ensure that Proposition 203 is applied in a manner consistent with federal law.

## **2. Application of Proposition 203 to State Public Schools Within the Reservation.**

The question remains whether Proposition 203 applies to State public schools within the Navajo reservation as it does to State public schools outside the reservation boundaries. As explained above, State laws may apply to State public schools within reservations unless such application would interfere with tribal self-government or would impair a right granted or reserved by federal law.

The importance of the Navajo language to the Navajo People and culture is well-established. Under Navajo law, the Navajo language is considered an "essential element of the life, culture and identity of the Navajo People." Navajo tribal code, t. 10 § 111. Moreover, the Navajo Code recognizes "the importance of preserving and perpetuating [the Navajo] language to the survival of the Nation." *Id.* Congress also has recognized the importance of Native American language to the survival of Native American culture and political institutions. *See* 25 U.S.C. § 2901(3). Proposition 203, however, does not directly interfere with the Navajo Nation's right to self-government, but instead directs how students with limited English skills are taught to become proficient in that language.

Proposition 203, as construed in this Opinion, can generally be applied to State public schools located within the Reservation. Possible conflict between the State law and the interests of the Tribes and Congress in promoting and protecting tribal languages is avoided by allowing State public schools on the Reservation to provide classes in Native American culture and language to all students, regardless of their level of English ability. If in other circumstances Proposition 203's focus on English language acquisition and the lack of protection for Native American languages would be "incompatible with federal and tribal interests reflected in federal law," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334, Proposition 203 must yield to the federal law. That determination cannot be made in the abstract but requires school districts to assess the particular educational program in question, the community needs, and the requirements of applicable State and federal law.

In short, all State public schools must apply Proposition 203 in a manner that complies with NALA, as well as the requirement under the federal Equal Educational Opportunities Act that schools take appropriate action to overcome language barriers that impede equal participation by students in instructional programs. 20 U.S.C. § 1703(f), 25 U.S.C. §§ 2901-06. In making good faith judgments regarding the implementation of Proposition 203 in a manner consistent with federal law, educators should not be subject to personal liability for "willful and repeated failure" to implement Proposition 203. *See* A.R.S. §§ 15-754 (personal liability under Proposition 203); 38-446 (no public officer or employee shall be personally liable for acts taken in good faith reliance on Attorney General opinions).

## Conclusion

Federal and tribal schools are not subject to Proposition 203. Although State public schools are generally subject to Proposition 203, they must comply with Proposition 203 in a manner that is consistent with the federal law protecting Native American language rights as well as the Equal

Educational Opportunities Act. State public schools may offer students classes in Native American languages and culture, whether or not such children are already proficient in English.

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Janet Napolitano  
Attorney General

1. Although your opinion request referred only to the Navajo Nation, the analysis in this Opinion also applies to other recognized Native American tribes.
2. An "English language classroom" is "a classroom in which English is the language of instruction used by the teaching personnel, and in which such teaching personnel possess a good knowledge of the English language. . . ." A.R.S. § 15-751(2) (as amended by Prop. 203).
3. An "English learner" or "limited English proficient student" is "a child who does not speak English or whose native language is not English, and who is not currently able to perform ordinary classroom work in English." A.R.S. § 15-751(4) (as amended by Prop. 203).
4. This Opinion does not address the application of Proposition 203 to charter schools, which are a type public school under Arizona law. A.R.S. § 15-181. Although charter schools are public schools, they are also exempt from many of the statutory requirements that generally govern State public schools. *See* A.R.S. § 15-183(E)(5).
5. Federal preemption is based on the Supremacy Clause of the United States Constitution, which provides that "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, Cl. 2. Arizona's Constitution also incorporates this principle. *See* Ariz. Const. art. 2, § 3 ("The Constitution of the United States is the supreme law of the land.").
6. Although one might question whether Navajo is a "foreign language" when it involves Navajo children who reside on the Navajo Nation, in the context of Proposition 203 any language other than English appears to be a "foreign language." *Cf.* 25 U.S.C. § 2903(5) (encouraging schools to offer Native American language courses as foreign language courses).

7. Given the broad language in NALA and the general principle of liberal construction in favor of Native Americans, this analysis assumes that NALA applies to State public schools. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("statutes are to be construed liberally in favor of . . . Indians, with ambiguous provisions interpreted to their benefit").

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