TUITION WAIVER FOR NATIVE AMERICANS:

LEGAL AND HISTORICAL ANALYSIS

July 27, 1995

In 1976 the Michigan Legislature enacted Public Act 174, "An act to provide free tuition for North American Indians" in public colleges and universities of the state. This tuition waiver program, codified as MCL §§390.1251 through 390.1252a, has provided almost a full generation of Michigan's Native Americans with free higher education, in fulfillment of a commitment made by Governor Comstock in 1934, and enshrined by a federal statute of that year as a mandate to the state.

On July 9, 1995 -- a few short weeks ago -- Governor John Engler expressed a desire to renege on this commitment and called the continued vitality of the tuition waiver program into question. While accepting the appropriation for the program for this year, Governor Engler stated:

> As Michigan public colleges and universities begin the 1995-96 school year, they must understand that I will not support further appropriations to reimburse them for tuition waived for native American students.

This action had no legal significance, but it has caused turmoil in the lives of several thousand Native American students who depend on this waiver for their education, and confusion among the state's public colleges and universities as to their proper course of action.

We think that the only morally proper and legally mandated course of action is for the public colleges and universities of the state to continue to honor the tuition waiver program for the coming school year. To do otherwise would be to abandon a program still on the books which enjoys considerable legislative support, acquiesce in gubernatorial interference with university autonomy, and ignore the state's legal commitment backed by a federal legislative mandate.

The statutory scheme of the tuition waiver is still intact and is quite simple. The waiver is provided for in MCL §390.1251(1),which provides:

> A Michigan public community college or public university ... shall waive tuition for any North American Indian who qualifies for admission as a full-time, part-time, or summer school student, and is a legal resident of the state for not less than 12 consecutive months.

The beneficiaries of the waiver are defined as persons of at least ¼ degree Indian blood, as certified by the student's tribe and verified by the Michigan Commission on Indian Affairs. MCL §390.1252.

The program is funded on a retrospective basis as provided in MCL §390.1252a:

> The Michigan commission on Indian Affairs shall annually, upon application therefore, reimburse each institution for the total amount of tuition waived during the prior fiscal year under section 1 of the act. The commission shall report to the legislature annually the number of American Indians for whom tuition has been waived at each institution and the total amounts paid under this act.

The Governor has taken no official action regarding this tuition waiver program. His announcement might be construed as an intention to line item veto the tuition waiver appropriation next year, but that is all it is. It might constitute a political and public relations "bully veto", but it has no legal consequence. *See* UAW Local 6000 v. State of Michigan, 194 Mich. App. 489; 491 N.W.2d 855 (1992).

Even if the Governor were to line item veto the tuition waiver appropriation next year, and the veto were not overridden, it is less than clear whether this would affect reimbursement for the colleges and universities. A line item veto would not affect the statutory duty of the Michigan Commission on Indian Affairs to reimburse colleges and universities for the amount of the tuition waived. The line item veto power is wholly negative and destructive, and it cannot rewrite the authorizing legislation involved. It seems likely under the circumstances that the statutory obligation to reimburse could be enforced despite the line item veto. *See* Stopczynski v. Governor, 92 Mich. App. 191; 285 N.W.2d 62 (1979).

There remains the issue of university compliance with the statutory mandate. We are well aware that enforcement of the tuition waiver statute against public colleges and universities implicates their autonomy guaranteed by the Michigan Constitution. Mich. Const. 1963, art. 8, §§5, 6. The tuition waiver statute, viewed in a vacuum, might seem to invade this constitutional independence, Regents of the University of Michigan v. State of Michigan, 395 Mich. 52; 235 N.W.2d 1 (1975); Regents of the University of Michigan v. State of Michigan, 166 Mich. App. 314; 419 N.W.2d 773 (1988), although the tuition waiver might qualify under the public policy exception to this independence, Regents of the University of Michigan v. Employment Relations Comm., 389 Mich. 96, 204 N.W.2d 218 (1973); Branum v. Board of Regents of the University of Michigan, 5 Mich. App. 134; 145 N.W.2d 860 (1966).

The situation is different here, though, because the tuition waiver program implements a federal statute, which supersedes state law considerations under the Supremacy Clause. The federal statute involved in Pub. A. 73rd Cong., 2nd Sess., Ch. 15; 48 Stat. 353 (Feb. 15, 1934). This law authorized the transfer of the Mount Pleasant Indian School, a Bureau of Indian Affairs (BIA) boarding school located in Mount Pleasant, Michigan, to the State of Michigan. The law contained two important provisos:

> ... *Provided*, That this grant shall be effective at any time prior to July 1, 1934, if, before that date, the Governor of the State of Michigan on behalf of the State files an acceptance thereof with the Secretary of the Interior: . . . *Provided further*, That as a condition precedent to this grant Indians resident within the State of Michigan will be accepted in State institutions on entire equality with persons of other races, and without cost to the Federal government.

Interpretation of this statute begins with the canons of construction applicable to interpretation of federal laws dealing with Indians. Such legislation is to be construed liberally in favor of the Indians, and doubtful expressions are to be resolved in their favor. Felix S. Cohen, *Handbook on Federal Indian Law* (1982 ed.), pp. 221-225. Applying these canons to a review of the statute and its surrounding circumstances, it is clear that the statute shifted the financial burden of providing for Indian education from the federal government to the state, and that this included free tuition at all levels of public education.

The transfer of the Mount Pleasant Indian School was initiated by the Michigan Legislature in House Concurrent Resolution No. 14 (1934), which authorized the governor to request transfer of the property. Governor William A. Comstock made the request by telegram to the Secretary of the Interior on January 4, 1934. A bill for the transfer was introduced in the Senate less than a week later, and it was enacted barely 1½ months after the process was initiated.

After its enactment, and well within the time period prescribed in the legislation, Gov. Comstock formally filed the state's acceptance on May 28, 1934. This is often referred to as the "Comstock Agreement", and it stated in part:

> As Governor of this State, in accepting this grant, I acknowledge the condition that the State of Michigan will receive and care for in State institutions Indian residents within the state on entire equality with person of other races and without cost to the Federal government.

This is nothing more than a repetition, almost verbatim, of the statutory language.

After the transfer was accepted, state and federal officials began planning for the transfer of students from the Mount Pleasant Indian School to state schools. The BIA gradually reduced its educational presence in Michigan to the vanishing point. There is no record that the BIA paid the tuition of any Indian student in Michigan throughout this transition period.

The meaning of the statute was twice addressed by Acting Commissioner of Indian Affairs William Zimmerman within a short time after its passage. On the first occasion, the Ottawas of High Island in Lake Michigan requested a BIA school for their island. Zimmerman directed that the request be denied because of the Mount Pleasant Indian School legislation. In doing so, he stated:

> This law ... provides that Indians should be accepted in State institutions on entire equality with persons of other races and without cost to the Federal Government. **We interpret that to mean that public schools in Michigan shall not charge tuition for Indian pupils.**
> (emphasis added)

William Zimmerman to Frank Christy, October 29, 1934, CCF-Tomah 35574-1934: 310.

Zimmerman took the same position the next year with respect to a request on behalf of the Grand Traverse Band of Ottawas and Chippewas, who also sought federal finding for their education. In a letter to Congressman Albert J. Engel, Zimmerman again raised the legislation as a barrier to federal funding, this time explicitly including higher education in his observations:

> We are not overlooking the educational needs of Michigan Indian children although we think it is in their best interest to attend public schools, high schools, colleges and trade schools with members of other races than to establish separate schools for the Indians. Of course, under existing law providing for their education by the state, such separate schools would be impracticable....

William Zimmerman to Albert J. Engel, November 11, 1935, CCF- General Services 45653-1934: 806.

These contemporaneous interpretations of the statute by the highest federal official in Indian affairs must carry considerable weight. Since they are not contradicted by any other opinion by any state or other federal official of the time, they are the only source of contemporaneous construction of the statute.

The Commissioner's interpretation is supported by an examination of federal Indian education policy and enactments in the years surrounding the Comstock Agreement. In the late 19th and early 20th centuries the dominant mode of provision for Indian education was the federal boarding school, such as the Mount Pleasant Indian School. But beginning in 1890, and accelerating thereafter, Congress began to provide for Indian education through the public schools by paying the tuition of Indian students. By 1934 the BIA was getting out of the business of running Indian boarding schools, and payment of tuition in public schools had become an important means of providing for Indian education. This later became the dominant method of funding Indian education until the federal government shifted to impact aid in the early 1950's.

By 1934, federal appropriations for payment of tuition for Indian students had risen nearly twentyfold in 20 years. *Compare* Pub. A. 63rd Cong., 2nd Sess, Ch. 222; 38 Stat 582 (August 1, 1914), *with* Pub. A. 73rd Cong., 2nd Sess., Ch. 38; 48 Stat. 362 (March 2, 1934). Moreover, beginning in fiscal year 1932 Indian tuition funds were specifically earmarked for vocational education

and higher education. Pub. A. 71st cong., 3rd Sess., Ch. 187; 46 Stat. 1115 (Feb. 14, 1931). This continued without break, but with increasing amounts, until at least fiscal year 1950 (the last year reviewed). Thus in 1934 "without cost to the Federal government" would naturally have meant "without payment of tuition," and this would have included tuition for higher education -- exactly the interpretation given the statute by the BIA Commissioner.

This conclusion is greatly bolstered by a comparison of the Michigan statute with similar statutes enacted by Congress at around that time. It was not unusual for Congress to transfer former Indian school lands to states, or to finance construction of public schools that would benefit Indian students. We have identified around 38 such statutes from the period 1926 through 1940. The Michigan legislation is unique among these laws. No other law provided that the state or school district must provide education "without cost to the Federal government." Quite the contrary: most of them specifically provided for the continued payment of tuition for Indian students by the federal government.

For example, just three months after the Michigan legislation, congress authorized transfer of the Genoa Indian School to the State of Nebraska. The law is virtually identical to the Michigan law. It requires gubernatorial acceptance by a date certain, reserves dormitory rights until transfer, and requires the state to take Indian students on "entire equality." There is one major difference, however. Instead of providing that Indian students be taken "without cost to the Federal government," the Nebraska legislation provides just the opposite: "except that tuition for Indian children in the public schools may be paid by the Federal Government." Pub. A. 73rd Cong., 2nd Sess., Ch. 319; 48 Stat. 786 (May 21, 1934).

Many similar provisions were contained in laws financing public school construction or donating Indian land for to public schools that would educate Indian students. For example, a law conveying a site for a public school on the Lac du Flambeau Reservation in Wisconsin required that Indian students be taken on the same terms as white children "except as to payment of tuition." Pub. A. 71st Cong., 2nd Sess., Ch. 122; 46 Stat. 149 (April 8, 1930). The same provision, with slight linguistic variation, occurs in a number of later statutes of the era. *See, e.g.*, Pub. A. 71st Cong., 3rd Sess., Ch. 173; 46 Stat. 1106 (Feb. 14, 1931); Pub. A. 74th Cong., 1st Sess., Ch. 195; 49 Stat. 329 (June 7, 1935). Many more examples could be cited.

Clearly, the norm for the era was for the federal government to continue to pay tuition for Indian students in public schools after the transfer of Indian schools or the financing or other assistance of public school construction. The Michigan statute is the single departure from this norm in the fifteen year span examined. It required Michigan institutions to accept Indian students without tuition payment.

The record of Michigan Indian education in the decades following the 1934 act is a sad one. In the end, it was they who bore the cost of the shift of educational responsibility that occurred in

1934, as the federal government took a hands-off approach based in the law and the state government and local school districts defaulted upon -- or wilfully ignored -- their new responsibilities and obligations. The only official recognition of the state's responsibility under the 1934 law has been the Indian tuition waiver program. It would bring shame upon the state and its institutions of higher learning if this one fulfillment of the promise made six decades ago were to yield to the "bully veto," bringing renewed rancor and contentiousness and the fading of dreams.

JM/ahf 072795
a:\wpwin60\wdak10\tuition.memo