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STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P.O. Box 30212
LANSING, MICHIGAN 48909

July 9, 2007

Honorable Michael G. Sak
State Representative
The Capitol
Lansing, MI

Dear Representative Sak:

This office has been reviewing your recent opinion request asking whether the Indian Tuition Waiver Program provided for under 1976 PA 174, MCL 390.1251 *et seq*, is constitutional following the passage of Proposal 2, now Const 1963, art 1, § 26.

In relevant part, subsection 1 of art 1, § 26 prohibits any public college, university, or community college from granting preferential treatment to any individual or group on the basis of certain classifications, including race, ethnicity, or national origin, in the operation of public education. Subsection 7 of art 1, § 26 further provides, however, that, if any part or parts of section 26 are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution or federal law permits. The law you have asked me to examine in light of these provisions requires Michigan public community colleges, public universities, or a federal tribally controlled community college to waive tuition costs for North American Indians meeting certain admissions and residency requirements. MCL 390.1251(1). "North American Indian" is defined by the statute to mean "a person who is not less than ¼ quantum blood Indian as certified by the person's tribal association and verified by the Michigan commission on Indian Affairs." MCL 390.1252.

In the course of providing expedited review of your question, my staff has been examining a number of different legal and historical sources in an effort to determine, as a matter of law, the extent to which Michigan's Indian tuition waiver statute may be regarded as having arisen out of political relationships based on federal treaties or similar enforceable promises or obligations sufficient to trigger the federal exemption of art 1, § 26 (7) or to take it outside the scope of art 1, § 26 altogether because it is not based on a prohibited classification. For example, among the sources consulted thus far is the legislative history of House Bill 4130, which became 1976 PA 174. The House Legislative Analysis explained one of the arguments favoring passage of the bill as follows:

The history of Michigan and the country includes many promises and treaty guarantees to the North American Indians, including a guarantee to the Michigan Indians of state supported education in return for certain parcels of Indian controlled land which were transferred to the state. Since free tuition at post-secondary institutions is not now statutorily provided for Indian students, most of whom have very limited financial resources, some believe that the state is renegeing on yet another of the various promises made to the Indian population." [House Legislative Analysis, HB 4130, March 22, 1976.]

In addition, one of the duties of the Indian Affairs Commission when first created was to "assist [Native Americans] in realizing the educational guarantees assured them by treaty and under appropriate state laws." 1965 PA 300, section 4.

Over the years, various interested parties have identified and characterized a number of treaties as providing the source of a guarantee to Michigan Indians of state-supported post-secondary education. It is not argued that Michigan is a party to these treaties.¹ But a state can be subject to tribal rights reserved or created by a federal treaty under certain circumstances. See, e.g., *United States v Michigan*, 471 F Supp 192 (WD, Mich 1979) (recognizing Native American fishing rights in the Great Lakes).

It has also been argued, albeit unsuccessfully, that the State must perform obligations derived from a treaty entered into between Indian tribes and the federal government. In one of the few reported Michigan cases addressing this latter theory, the Court of Appeals rejected the claims of the plaintiff tribe members that the treaty at issue there – known as the Treaty of Fort Meigs, 7 Stat 160 (September 29, 1817) – required the University of Michigan to provide certain Michigan Indian tribes free post-secondary education. *Children of the Chippewa, Ottawa and Potawatomy Tribes v Regents of the University of Michigan*, 104 Mich App 482, 492-493; 305 NW2d 522 (1981), *cert den* 459 US 1088 (1982). The issue in this case was whether a treaty granting land to a non-Indian for American Indian educational purposes imposed a constructive trust on the property to use it for American Indian education when the school owning the property became the University of Michigan.

In order to make that determination, the Court reviewed the factual record compiled before the trial court, noting how the trial court's "task of leaping back over 160 years in time [was] most difficult." 104 Mich App at 487. The trial court's opinion, reproduced by the Court of Appeals as an appendix to its decision, similarly described the case as "exceedingly complex." The trial court explained that resolution of the case was dependent upon analysis of historical documents, including primary and secondary sources, and the testimony of history experts. It reviewed the extensive testimony offered by the various experts along with voluminous historical exhibits, made findings of fact based on that extensive record, and then rendered its judgment after applying the law to those findings. This reflects the experience common to any litigation

¹ The United States Constitution expressly prohibits states from entering into treaties without the consent of Congress. US Const, art 1, § 10.

involving treaty rights – these cases are driven by the facts and analysis of historical documents and opinion testimony of experts specializing in history and ethnography. See, e.g., *United States v Michigan*, *supra*.

Other treaties have been identified as the possible source of an obligation to provide state-funded college education to Native Americans, including the *1836 Treaty with the Ottawa and Chippewa*, 7 Stat 491 (March 28, 1836); the *1855 Treaty with the Ottawa and Chippewa*, 11 Stat 621 (July 31, 1855); the *1855 Treaty with the Chippewa of Saginaw*, 11 Stat 633 (August 2, 1855); and the *1864 Treaty with the Chippewa of Saginaw, Swan Creek, and Black River*, 14 Stat 657 (October 18, 1864). Each of these treaties contains a provision requiring the United States to spend a sum certain to further the education of members of the Tribe signing the treaty. See Article 4, *1836 Treaty with the Ottawa and Chippewa*, 7 Stat at 492; Article 2, *1855 Treaty with the Ottawa and Chippewa*, 11 Stat at 623; Article 2, *1855 Treaty with the Chippewa of Saginaw*, 11 Stat at 634; Article 4, *1864 Treaty with the Chippewa of Saginaw, Swan Creek, and Black River*, 14 Stat at 658-659.

By their terms these treaties do not obligate the State to provide for Native American education and do not expressly address the question of post-secondary education as that term is understood today. But some have argued, for example, that what is commonly referred to as the "Comstock Agreement" committed the State to assume the federal government's treaty obligations to Native Americans.² In OAG, 1989-1990, No 6581, p 103, 104 (May 8, 1989), the Attorney General stated that "Governor Comstock's 1934 letter merely promised that Indian children would be treated equally in the public schools" in the context of determining that the State was not obligated to fund separate Indian schools. But the question of what these treaty obligations actually required the federal government to perform in the first instance has not been litigated, and, as discussed above, a complete determination of this issue would require reviewing, with the input of history experts, all of the historical documents and facts alleged to support the State's assumption of the asserted treaty obligations.

Your opinion request raises an issue of obvious importance. My staff has endeavored to analyze it as a pure question of law within the recognized constraints of the opinions process established by MCL 14.32. See *Michigan Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 300; 370 NW2d 328 (1985). That process has proven difficult, however, in

² The "Comstock Agreement" refers to a letter written in 1934 to Secretary of the Interior Harold Ickes by then Michigan Governor William Comstock accepting a grant of land and buildings from the federal government associated with the operation of an Indian school in Mt. Pleasant that the federal government was planning to close. The letter stated in relevant part: "As Governor of the State, in accepting this grant, I acknowledge the condition that the State of Michigan will receive and care for in State institutions Indians resident within the state on entire equality with persons of other races and without cost to the Federal government." OAG, 1989-1990, No 6581, p 103 (May 8, 1989).

light of the inherently factual issues that may relate to the legal issue to be decided.³ The voluminous factual record compiled before the trial court in the *University of Michigan Regents* case cited above serves to help illustrate how your request presents a mixed question of fact and law beyond the scope of the opinions process. In other words, in contrast to the way the opinions process is limited to the examination of strictly legal issues, the judicial process allows competing parties with the greatest personal interest in the matter to present expert and other testimony, to submit relevant evidence and documents, and to file legal briefs concerning the issues for the court's consideration in resolving both the factual and legal issues. Thus, consistent with the recommendation of my Opinion Review Board, I have now determined that my duty in this matter is best discharged by respectfully declining to answer the question presented.

Before making this determination, the discussion concerning the Indian tuition waiver program presented by the Civil Rights Commission in its March 7, 2007 *"One Michigan" at the Crossroads: An Assessment of the Impact of Proposal 06-02 By the Michigan Civil Rights Commission* (CRC Report) was also examined. In its report, the Commission concluded that Michigan's statutory Indian tuition waiver "remains valid under Proposal 2 because it does not grant preferential treatment based on race, sex, color, ethnicity, or national origin." (CRC Report, page 26).⁴ The Commission further explained that "because the United States Supreme Court has specifically held that tribal status is a *political category* based on the relationship between the federal government and the tribes as sovereign entities, it is a political classification, not a racial classification, and therefore does not violate Proposal 2." [CRC Report, pages 26-27; emphasis in original.]⁵

The Supreme Court cases that have regarded tribal status as involving a "political" and not a "racial" classification, however, analyzed equal protection under the Federal Constitution

³ It is difficult to predict the precise context in which the question you raise might be presented in litigation and the issues that might become relevant depending on the particular parties involved. Thus, while it is possible that your question might be presented in a context that would call for resolution of legal issues exclusively, it is my judgment that the most prudent course to follow under the present circumstances is to decline to answer your question in the context of the opinions process.

⁴ It is important to clarify, however, that the CRC expressly recognized that its Report "does not constitute legal advice" and that any final decisions regarding the application of Proposal 2 for state agencies rested with the Attorney General. CRC Report, p 2 and n 2.

⁵ In stating its conclusion, the Commission refers the reader to Attachment 4 to the CRC Report "for further analysis." Attachment 4 is a memorandum of law submitted by the Nottawaseppi Huron Band of Potawatomi, Little Traverse Bay Bands of Odawa Indians, and the Sault Ste. Marie Tribe of Chippewa Indians that analyzes the United States Supreme Court decisions in which the Court held that the preferences granted Native Americans under the particular circumstances presented in those cases were based on "political" classifications and not on impermissible racial classifications and therefore did not violate equal protection under the Federal Constitution. See, e.g., *Morton v Mancari*, 417 US 535 (1974); *Rice v Cayetano*, 528 US 495 (2000); and *United States v Antelope*, 430 US 641 (1977). The memorandum of law acknowledged, however, that these cases recognized a "racial component" in the federal statute at issue that, like Michigan's Indian Tuition Waiver statute, defined individuals by reference to a stated quantum of "Indian blood." Attachment 4 to CRC Report, pp 3-4.

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and, therefore, are not entirely determinative of the question you raise. Your question involves consideration of the intent of the voters in adopting Proposal 2 and the meaning of the ban on "preferential treatment" based on race, national origin, or ethnicity for purposes of art 1, § 26, not for equal protection purposes. Nevertheless, the Commission's position reflects the reasonable disagreement that often arises in this complicated area of Native American rights and lends further support to the wisdom of leaving this issue to a process that is designed to take into account all factors, legal and factual, if a change in the status quo is desired.

I regret that I must forego answering your question at this time, but the most advisable course under the present circumstances is to honor the long-established policy of this office to leave legal questions involving potentially disputed factual issues for resolution by the judicial branch.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Mike Cox", written in a cursive style.

MIKE COX
Attorney General