Office of the Attorney General
State of Michigan

*1 Opinion No. 6581
May 8, 1989

CONSTITUTIONAL LAW:

Const 1963, art 8, § 2 -- appropriation of state funds to nonpublic school

WORDS AND PHRASES:

"Public school"

Const 1963, art 8, § 2, prohibits a legislative appropriation of state funds to the Hannaville Indian School.

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My opinion has been requested on two questions concerning the desire of the Hannaville Indian School to receive funding from the State of Michigan for its educational activities. Your first inquiry is whether there is any relationship between the Hannaville request for state aid monies and the 1934 letter from Michigan Governor Comstock to Harold Ickes, Secretary of the Interior, accepting the Mt. Pleasant Indian School from the federal government. Secondly, you inquire whether a legislative appropriation of state funds to the Hannaville Indian School would violate Const 1963, art 8, § 2, which prohibits state funding of nonpublic elementary and secondary schools.

Addressing your first question, in 1934 the Congress passed 48 Stat 353 (1934) granting the Mt. Pleasant Indian School to the State of Michigan. A condition precedent to the grant was that "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." In his 1934 letter accepting this grant of property from the federal government, Governor Comstock wrote:

"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."

Clearly, the commitment made by Governor Comstock was to provide equal treatment to Indians in institutions operated by the State of Michigan.

Indeed, the report from the Committee on Indian Affairs accompanying S2152, which became PL 93, stated:

"The Indian school in question is no longer needed for school purposes for which it has heretofore been maintained by the Federal government. It is soon to be closed in pursuance of the policy adopted by the Indian Office of providing for the education of Indian children in the public schools whenever the same may be feasible. Practically all Indian children in the State of Michigan are now attending the public schools and the 45 cared for in the Mount Pleasant School can well be accommodated in the public schools.

"In the past the State of Michigan has freely cooperated with the Indian Office in providing educational facilities for Indian children. It expresses its desire and intention of continuing that cooperation. In fact, the transfer of the property
in question is conditioned upon assurance that Indian children will be cared for in the public schools of the State upon an entire equality with the white children."
(Emphasis added.)

*2 As this report demonstrates, the grant of property was pursuant to the policy of the federal government that Indian children be educated in public schools whenever feasible. Governor Comstock's 1934 letter merely promised that Indian children would be treated equally in the public schools. There was no commitment to fund the education of Indian children in separate Indian schools.

It is my opinion, in answer to your first question, that there is no legal relationship between the Hennahville Indian School's request for state funding and the 1934 letter of Governor Comstock.

Turning to your second question, in Const 1963, art 8, § 2, as amended by Proposal C in 1970, the people have provided:

"The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

"No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school."

In order to answer your question, it is necessary to determine whether the Hennahville Indian School is a "nonpublic" school. I am informed that the Hennahville Indian School is owned by the Hennahville Indian Community and is operated by its school board, which is composed exclusively of members of the tribe. It is generally open only to those persons who are enrolled or entitled to be enrolled as members of a federally recognized Indian tribe. I am further informed that the Michigan Department of Education does not and has not attempted to exercise any authority over the operation of this school.

Although no Michigan case has defined the term "public schools," the court in New Haven v Torrington, 43 A2d 455 (Conn. 1945), used a two-part test to determine whether a school is a public school. First, the school must be under the exclusive control of the state through the state's constituted agencies. Second, the school must be free from sectarian instruction.

The term "public schools" was defined by the court in Newman v Schlarb, 184 Wash 147, 50 P2d 36, 39 (1935), as "'schools established under the laws of the state, usually regulated in matters of detail by the local authorities in the various districts, towns, or counties, and maintained at the public expense by taxation, and open without charge to the children of all the residents of the town or other district.' Litchman v. Shannon, 90 Wash. 186, 155 P. 783, 785."

*3 Based upon the rulings of these two cases, it is clear that the Hennahville Indian School is not a public school, since it is not under the exclusive control of the State of Michigan, and it is not generally open to all children in the school district in which it is located. [FN1]

The effect of Proposal C was described by the court in Traverse City School Dist v Attorney General, 384 Mich 330, 406-407; 185 NW2d 9 (1971), as follows:

"Article 8, § 2, as amended by Proposal C, now prohibits the use of public funds 'directly or indirectly to aid or maintain' a nonpublic school. The language of this amendment, read in the light of the circumstances leading up to and
surrounding its adoption, [footnote omitted] and the common understanding of the words used, prohibits the purchase, with public funds, of educational services from a nonpublic school." (Emphasis added.)

The application of this amendment to all nonpublic schools was reiterated by the court in Advisory Opinion re Constitutionality of 1974 PA 242, 394 Mich 41, 54; 228 NW2d 772 (1975), wherein it was stated:

"Proposal C does not speak of religion but of nonpublic schools." [Footnote omitted.] Proposal C, in contrast with the First Amendment, does not preclude establishment or interference with religion.

"We therefore have no need to consider whether the challenged program unduly benefits or burdens religion but only whether it directly or indirectly aids or maintains a nonpublic school."

Levin, J., dissenting in part.

The Hannahville Indian School is located on Indian land, is owned by the Hannahville Indian Community, and is operated by a school board composed exclusively of tribal members. It was not established by or under the laws of this state. Furthermore, the school is not generally open to all children in the school district in which it is located. It can, thus, be concluded that the Hannahville Indian School is a "nonpublic" school as that term is used in Const 1963, art 8, § 2.

It is my opinion, in response to your second question, that Const 1963, art 8, § 2, prohibits a legislative appropriation of state funds to the Hannahville Indian School.

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[FN1]. Compare, Prince v Ed of Ed of Central Consolidated Independent School Dist No 22, 88 NM 548; 543 P2d 1176 (1975), where the expenditure of state funds to construct school buildings on an Indian reservation was found to be permissible where the state leased the land from the tribe and maintained operation and exclusive control of the school.


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