MICHIGAN DEPARTMENT OF CIVIL RIGHTS

# MEMORANDUM

**DATE:** July 14, 2010

**TO:** Harold Core
Director of Public Affairs

Melissa Claramunt
American Indian Specialist

**FROM:** Daniel H. Krichbaum
Interim Director

**SUBJECT:** Michigan Indian Tuition Waiver Act Policy/Procedure

For the reasons delineated in the (attached) memorandum, the Michigan Department of Civil Rights will verify as eligible for tuition waiver, only applicants who are certified by their US federally recognized tribal association to be enrolled members who are not less than ¼ quantum blood Indian.

The (also attached) MITW Application form and instructions reflect this policy and should be made available to all interested parties (including the colleges and universities, tribal and other American Indian organizations, educational and student assistance organizations, and of course prospective students) as expeditiously as possible. Completed applications should be processed as described in the Application Instructions as soon as they are received.

Persons who inquire about the basis of the policy may be provided a copy of the memorandum. Persons who wish to question the policy, AFTER having received and reviewed it, may be directed to contact our Director of Law and Policy Daniel Levy by mail, email (ask that they include MITW in subject matter) or by calling 313-456-3809 (Camille Vandegrift).

Thanks so much to all who helped develop this policy for the Michigan Department of Civil Rights.

MICHIGAN DEPARTMENT OF CIVIL RIGHTS

# MEMORANDUM

**DATE:** July 13, 2010

**TO:** Daniel H. Krichbaum
Interim Director

**FROM:** Daniel M. Levy
Director for Law and Policy

**SUBJECT:** Michigan Indian Tuition Waiver Act Policy/Procedure

Based upon the (attached) memorandum, it is my recommendation that you adopt the policy/procedure as described in the (also attached) MITW Application and direct that the Michigan Department of Civil Rights will verify as eligible for tuition waiver, only applicants who are certified by their US federally recognized tribal association to be enrolled members who are not less than ¼ quantum blood Indian.

Melissa Claramunt should be instructed that she may begin using the MITW Application form reflecting this decision, and that she proceed to process any applications received accordingly.

**Michigan Department of Civil Rights Legal Determination**
**Applicant Eligibility Under the Michigan Indian Tuition Waiver Act**
**July 13, 2010**

Michigan Public Act 174 of 1976, which is commonly referred to as the Michigan Indian Tuition Waiver Act (MITWA), provides that Michigan's public colleges and universities "shall waive tuition for any North American Indian who qualifies for admission . . . and is a legal resident of the state for not less than 12 consecutive months.[1]"

The statute, which can be found at MCL 390.251 et. Seq., defines a North American Indian as "a person who is not less than ¼ quantum blood Indian as certified by the person's tribal association and verified by the [Michigan Department of Civil Rights]."[2]

When originally enacted in 1976, the Act did not provide for reimbursement[3]. It merely required that the universities waive tuition for qualified students, leaving the schools to absorb all costs associated with doing so.[4]

Two years later, the legislature, recognizing that absorbing the costs unfairly burdened some institutions more than others, added a provision requiring that the state reimburse schools whatever costs they incurred.[5] As part of the reimbursement process, the amended Act required that a student's eligibility first be "certified" by the appropriate tribal association and then "verified" by the Michigan Commission on Indian Affairs (MCIA).[6]

The MCIA verified the eligibility of students for whom the State was providing reimbursement until approximately 1997. In passing the FY 1996/97 budget, the legislature removed the budget line item for reimbursement and folded reimbursement funding into the general base per pupil funding provided to the institutions. Based upon this change, the MCIA role in providing the direct reimbursement was terminated. Verification of the individual tribal certifications has subsequently been conducted by the Inter-Tribal Council of Michigan (an organization consisting of the 12 federally recognized tribes with a presence in Michigan).

In November of 2006, Michigan voters passed Proposal 2 of 2006, which added Article I, Section 26, to the Michigan Constitution. It provides that Michigan colleges and universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin."[7]

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[1] MCL 390.251(1).
[2] The Act specifies that this responsibility falls to the Commission on Indian Affairs, but if was abolished by Executive Order 1999-9, which also transferred "the statutory authority, powers, duties, functions, and responsibilities of the Indian Affairs Commission…" to the Department of Civil Rights.
[3] 1976 PA 174
[4] *Indian Tuition Waiver Program*, Michigan Legislative Service Bureau, Legislative Research Division, Research Report Volume 20, Number 3, May, 2000, pp 2-3.
[5] *Id.* at p. 3.
[6] PA 1978 PA 505
[7] *Michigan Constitution, Article 1, Section 26(1).*

In the March 7, 2007 report *"One Michigan" at the Crossroads: An Assessment of the Impact of Proposal 06-02*, the Michigan Civil Rights Commission and Michigan Department of Civil Rights determined 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, the Indian Tuition Waiver Act is based upon a political classification and therefore does not violate Article I, Section 26.

The State Universities of Michigan Presidents Council recently expressed to the Michigan Department of Civil Rights its concern that there was no Michigan government entity involved in the MITW process ensuring that it was not permitted to exceed the Art. I, Sect. 26, constitutional restrictions. MDCR has determined that, as the entity given the duties and powers formerly held by the MCIA,[8] it will assume the responsibility of verifying all MITW applicants beginning with the fall 2010 term.

Having assumed this responsibility, MDCR must resolve the question, left open in the 2007 "*One Michigan*" report, of whether MITW eligibility must be restricted to only American-Indians who are affiliated with federally recognized tribes. We find multiple reasons to conclude the answer must be yes.

First, we look to the plain meaning of the language used in the MITW Act.[9] MCL 390.251(1), which limits waiver to persons "not less than ¼ quantum blood Indian as certified by the person's tribal association." This clearly indicates the legislature's intent that the tribal affiliation of applicants for tuition waiver be attested to by the applicable tribal organization. It strains reason to suggest that the legislature would require such verification, but accept it from organizations that were not properly recognized. In particular, the use of the word "certified" evidences the intent to involve a recognized entity that the State can rely upon.[10]

Moreover, the only case under the MITW Act to be litigated specifically turned on the question of federal recognition. Lumbees v Robeson, involved a claim for tuition waiver by students affiliated with the "Lumbee Tribe."[11] The Lumbee tribe is unique in that it is the only American Indian tribe that the US government has formally recognized as American Indians while also denying them the services provided to recognized tribes by the US Bureau of Indian Affairs.[12] The principle issue in the case was whether the Lumbee could be recognized for the purpose of tuition waiver as a "tribal authority" in the absence of a clear declaration of federal recognition. Based upon the unique situation of the tribe, which was formally recognized by the State of North Carolina and the National Congress of American Indians, Michigan entered into a Consent Judgment. As incorporated by the Court's Final Order[13], the Michigan agreed to treat the Lumbee "as a bona fide Indian tribe" for purposes of MITW, even though federal government had "taken no clear and dispositive action either recognizing or refusing to recognize" them. The Lumbee, who per the Court order are therefore treated as federally recognized for the purpose of receiving tuition waiver under the MITW Act, also remain the only American Indian entity in this unique gray area of partial federal recognition.

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[8] See *fn*. 2.
[9] **Add appropriate MSC citation.**
[10] *Ballentine's Law Dictionary* defines "certify" as: "To authenticate by a certificate; to vouch for a thing in writing; a certificate is an *authoritative* attestation. . . "(LexisNexis, 2010, emphasis added).
[11] Macomb County District Court Case Number 80-8073-AW.
[12] HR 4656, "*The Lumbee Act,*" was passed by congress and signed by President Eisenhower in 1956.
[13] Entered by the Court on April 15, 1982.

Even if the MITW Act independently is not read to limit tuition waiver only to persons affiliated with recognized tribes, the addition of Article I, Section 26 to Michigan's Constitution requires that the waiver not be provided to others.

First and most clear, if the MITW Act is considered to be the fulfillment of a treaty agreement enforceable under federal law, it would fall under the exception to I/26's "preferential treatment" prohibition.[14] Such treaty obligations would obviously only exist with tribes that are federally recognized.

Furthermore, determination that the MITW Act survived enactment of Art. I, Sect. 26, was based upon the United States Supreme Court's determination that tribal status is a political category based on the relationship between the US government and the tribes as sovereign entities.[15] It is based upon the Supreme Court's determination that "preferences" granted by the Bureau of Indian Affairs were not based upon an individual's race or national origin, but upon their affiliation with quasi-sovereign tribal entities, that the Michigan Civil Rights Commission and Department of Civil Rights have determined that the provisions of the MITW are also not based upon the characteristics covered by I/26's prohibition. The conclusion that the MITW Act is based upon "political" relationships, however, limits its application to only those persons affiliated with tribal entities with which political recognition exists.

It has long been held that, "When there are two possible interpretations of a statute, by one of which it would be constitutional and by the other it would be constitutionally suspect, it is our duty to adopt the one that will save the statute.[16] Therefore, the mere fact that the MITW Act might be read to apply to American Indians not affiliated with federally recognized tribes, does not render it void. It merely limits the Act's application to those recognized tribes.

The Michigan Department of Civil Rights is thus required to "verify" as eligible, only applicants who are certified by their *federally recognized* tribal association to be enrolled members who are not less than ¼ quantum blood Indian.

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[14] Subsection (7) of the provision states "If any part or parts of this section 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 and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section."

[15] See e.g., *Morton v. Mancari*, 417 U.S. 535 (1974) The Supreme Court explained in *Mancari* that granting a statutory employment preference for Indians working in the Bureau of Indian Affairs did not constitute racial discrimination or even a racial preference because the preference, as applied, is granted to Indians as members of quasi-sovereign tribal entities. This was reaffirmed in *Rice v. Cayetano*, 528 U.S. 495 (2000) where the court stated that a statutory preference which favored individuals who were one-forth or more degree Indian blood and members of a federally recognized tribe was not a preference directed

[16] *People v. Nyx*, 479 Mich. 112 (2007) referencing *Blodgett v. Holden* 275 U.S. 142, (1927)

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