



STATE OF MICHIGAN
EXECUTIVE OFFICE
LANSING

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March 23, 2018

Bill Schuette
Attorney General
G. Mennen Williams Building
525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909

Dear Attorney General Schuette:

The State Treasurer and I write to request your formal opinion concerning a matter of paramount statewide importance. Like many other states, Michigan has established a program to encourage parents to save for college as contemplated under Section 529 of the Internal Revenue Code, 26 USC § 529. The Income Tax Act of 1967, 1967 PA 281, MCL 206.1 *et seq.*, provides certain tax advantages for education savings plans created under the Michigan Education Savings Program Act, 2000 PA 161, MCL 390.1471 *et seq.*

Under the Michigan Education Savings Program (the "MESP"), total contributions to an education savings plan that exceed qualifying withdrawals for a given tax year are deductible in computing annual Michigan taxable income. Deductions are subject to a \$5,000 maximum limitation for single filers, and \$10,000 for joint filers. In addition, under the MESP, investment earnings are tax free if used for eligible college expenses as defined in Section 529 of the Internal Revenue Code. MCL 390.1472(m). And under Section 529 of the Internal Revenue Code, "eligible expenses" include "tuition, fees, books, supplies, and equipment required for the enrollment or attendance" at a "college, university, vocational school, or other post-secondary institution."

As you are aware, sweeping tax reform enacted at the federal level, the Tax Cuts and Jobs Act, has affected the Michigan Income Tax Act in many ways. The Legislature recently passed, and I recently signed legislation to restore, and increase, the personal exemption for Michigan taxpayers and provided substantial tax relief to our residents. But in addition to impacting Michigan's personal exemption portion of the Income Tax Act, the Tax Cuts and Jobs Act may have also affected the MESP.

Federal tax reform included amendments to section 529 of the Internal Revenue Code to expand the definition of "eligible expenses" for which the 529 savings plans like the MESP could be used. Specifically, Congress added the following new language into Section 529 at 529(c)(7):

Any reference in this subsection to the term “qualified higher education expense” shall include a reference to expenses for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school.

As a result of the new language, questions have arisen about whether inclusion of private and religious elementary or secondary schools in the MESP would violate the prohibition on aid to nonpublic schools contained in Art VIII, § 2, ¶ 2 of the Michigan Constitution. In 1970, Michigan became one of many states to adopt Blaine Amendments to prevent public aid to private religious schools. Michigan’s version, however, is much broader, and prohibits aid to *any* nonpublic school, not just those that are religiously affiliated. Article VIII, § 2, ¶ 2 of the Michigan Constitution provides as follows:

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.¹

The Michigan Supreme Court considered the contours and reach of this provision in *Traverse City School District v Attorney General*, 384 Mich 390 (1971). There, the Court held, among other things, that Art VIII, § 2, ¶ 2 did not prohibit the use of public funds to provide shared-time services or auxiliary services to nonpublic schools because such services provided only incidental aid or support.

While *Traverse City School District* offers beneficial guidance concerning what Art VIII, § 2, ¶ 2 does and does not permit, the Court was not called upon to address the specific question presently at hand. That question is:

Given that federal law has expanded the definition of “eligible expenses” for which 529 plans may be utilized to include eligible expenses incurred at private and religious elementary or secondary schools, would the inclusion by the State of private and religious elementary or secondary schools in 529 plans violate Art VIII, § 2, ¶ 2 of the Michigan Constitution?

¹ That portion of the amendment set out above in brackets was declared unconstitutional as violative of the Free Exercise Clause of the First Amendment. *Traverse City School District v Attorney General*, 384 Mich 390 (1971).

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Prompt review of this matter would be greatly appreciated as it will provide needed direction to me, the State Treasurer, and the people of Michigan. It also may have the beneficial effect of forestalling costly litigation. Therefore, we respectfully request that you issue a formal opinion concerning this matter.

Sincerely,



Rick Snyder
Governor



N.A. Khouri
State Treasurer