

STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

REVISED SCHOOL CODE: Reduction of state school aid for use
STATE SCHOOL AID ACT: of certain mascots or logos.
CONST 1963, ART 8, § 2:
CONST 1963, ART 8, § 3:
CONST 1963, ART 9, § 11:

While the Superintendent of Public Instruction has broad powers under the Revised School Code, 1976 PA 451, MCL 380.1 *et seq.*, and the State School Aid Act, 1979 PA 94, MCL 388.1601 *et seq.*, neither act authorizes the Superintendent to withhold state school aid funds or to cause the forfeiture of such funds by school districts that use an American Indian mascot, logo, or other imagery.

Opinion No. 7296

July 3, 2017

The Honorable Tim Kelly
State Representative
The Capitol
Lansing, MI 48909

Mr. Brian Whiston
Superintendent of Public Instruction
Michigan Department of Education
608 W. Allegan Street
P.O. Box 30008
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You have asked whether the Superintendent of Public Instruction
(Superintendent) may withhold state school aid that is distributed to school
districts using American Indian mascots or logos.

In Michigan and elsewhere, the debate continues regarding the use of American Indian mascots and logos by schools.¹ Some see the use of such imagery as a source of pride and respect, while others view its use as culturally insensitive and discriminatory.² There have been state and local efforts to discourage or prohibit Michigan schools from using American Indian mascots and logos.

For example, the State Board of Education adopted a resolution in 2003 recommending that schools eliminate use of American Indian mascots and logos, and reaffirmed that resolution in 2010.³ In 2013, the Michigan Department of Civil Rights filed a complaint on behalf of American Indian students with the U.S. Department of Education alleging discrimination by Michigan schools using American Indian mascots or logos, and asking that these schools be prohibited from receiving federal funding.⁴ But the complaint was dismissed for lack of sufficient

¹ This opinion uses the term American Indian rather than Native American because that is the term used by the State Board of Education and the Michigan Department of Civil Rights in documents referred to in this opinion.

² See Justin P. Grose, *Time to Bury the Tomahawk Chop: An Attempt to reconcile the differing viewpoints of Native Americans and Sports Fans*, 35 Am Indian L Rev 695 (2011). Compare *Spirit Lake Tribe of Indians v NCAA*, 715 F3d 1089 (CA 8, 2013) (Spirit Lake Tribe supporting university's continued use of "Fighting Sioux" mascot) with *Illinois Native American Bar Ass'n v Univ of Illinois Bd of Trustees*, 368 Ill App 3d 321 (2006) (bar association challenging university's continued use of "Chief Illiniwek" mascot).

³ The 2003 and 2010 resolutions are available on the State Board of Education's website at http://www.michigan.gov/documents/mascots_69612_7.res.pdf, (last accessed May 17, 2017), and http://www.michigan.gov/documents/mde/Mascots_330690_7.pdf, (last accessed May 17, 2017).

⁴ The complaint is available on the Department of Civil Rights' website at http://www.michigan.gov/documents/mdcr/MDCR_2-8-13_Discrimination_Complaint_410856_7.pdf, (last accessed May 17, 2017).

evidence that the use of American Indian mascots or logos created a racially hostile environment.⁵

At the local level, some school boards have addressed whether use of American Indian mascots and logos should be discontinued. In December 2016, the Belding School Board voted unanimously to eliminate use of its “Redskins” mascot.⁶ But in February 2017, the Paw Paw School Board voted to continue use of its “Redskins” mascot.⁷

With this background in mind, you ask whether the Superintendent has authority to withhold state school aid from schools that use American Indian mascots, logos, or other imagery.

The powers of state agencies and governmental officers are limited by the Constitution and statutes that confer those powers and may not be extended by implication beyond what may be necessary for the reasonable execution of the power. *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582, 590 (1951).

⁵ The dismissal letter is available on the Department of Civil Rights’ website at http://www.michigan.gov/mdcr/0,4613,7-138-4952_4995-304950--,00.html, (last accessed May 17, 2017).

⁶ December 19, 2016, Minutes, Belding Area Schools Board of Education, available at <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50216712&fn=minutes.pdf>, (last accessed May 17, 2017). See also, Lynsey Mukomel, *Belding School Board Votes to Drop Redskins Mascot*, <http://woodtv.com/2016/12/19/belding-school-board-votes-to-drop-redskins-mascot/>, (last accessed May 17, 2017).

⁷ February 8, 2017, Minutes, Paw Paw Public Schools Board of Education, available at <https://v3.boardbook.org/Public/PublicItemDownload.aspx?mk=50216712&fn=minutes.pdf>, (last accessed May 17, 2017). See also, Lynsey Mukomel, *Paw Paw Schools will stay with Redskins Mascot*, <http://woodtv.com/2017/02/08/paw-paw-redskins-mascot-decision/>, (last accessed May 17, 2017).

Article 8, § 3 of the Constitution establishes a State Board of Education, which is vested with “[l]eadership and general supervision over all public education . . . except as to institutions of higher education granting baccalaureate degrees.” Const 1963, art 8, § 3. It also serves “as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.” *Id.* The State Board of Education appoints “a superintendent of public instruction” who functions as “the chairman of the board without the right to vote,” and is “responsible for the execution of its policies.” *Id.* The Superintendent is the “principal executive officer of [the] state department of education which shall have powers and duties provided by law.” *Id.*

In 1996, Executive Order 1996-12⁸ transferred from the State Board of Education to the Superintendent administrative powers as set forth in approximately 100 sections of the Michigan Compiled Laws. See *Straus v Governor*, 459 Mich 526, 530–31 (1999) (discussing transfer of powers under Executive Order 1996-12). The Executive Order further transferred statutory rule-making powers of the State Board of Education to the Superintendent in an additional 39 sections of the Michigan Compiled Laws. *Id.* As a result, many of the statutory powers and responsibilities previously exercised by the State Board of Education are now carried out by the Superintendent. These powers and responsibilities are codified in

⁸ Executive Order 1996-12 is available on the Michigan Legislature’s website at <http://www.legislature.mi.gov/documents/1995-1996/executiveorder/htm/1996-EO-12.htm>, (last accessed May 17, 2017).

the Revised School Code, 1976 PA 451, MCL 380.1 *et seq.*, and the State School Aid Act, 1979 PA 94, MCL 388.1601 *et seq.*

Article 8, § 2 of the Constitution provides that the “legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.” The Revised School Code, MCL 380.1 *et seq.*, governs the operation of Michigan schools, and reflects the Legislature’s implementation of article 8, § 2. In it, the Legislature granted school districts broad powers of self-governance. See MCL 380.11a(3) (“A general powers school district . . . may exercise a power incidental or appropriate to the performance of a function related to operation of a public school and the provision of public education . . .”); *Baumgartner v Perry Pub Sch*, 309 Mich App 507, 526 (2015) (“*local authorities—not state officials—are primarily responsible for the governance of school districts*”) (emphasis in original). Thus, for the most part, the “actual intricacies of the delivery of specific educational services” are left to the local school districts. *LM v State*, 307 Mich App 685, 697 (2014).

The Revised School Code also sets forth the responsibilities of the Superintendent, which include: approving deficit elimination plans; issuing decisions related to treasury certifications; suspending or revoking teaching and administrator certificates; suspending or revoking licenses, certificates, approvals, or other evidence of qualifications to hold a particular position issued by the State Board of Education or Superintendent; adopting a variety of rules and policies, including those related to special education programs, continuing education, and

licensure and certificate requirements; and granting limited waivers from a state board or department rule interpreting a provision of the Code. See MCL 380.1220, 380.1211a, 380.1535a, 380.1539b, 380.1701, 380.1281(3), 380.1246, 380.1531; see also Mich Admin Code, R 340.18.

Article 9, § 11 of the Constitution provides that there “shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education, and school employees’ retirement systems, as provided by law.” Const 1963, art 9, § 11. That section provides for the funding source and distribution from the state school aid fund, and states that “[p]ayments from this fund shall be made in full on a scheduled basis, as provided by law.” *Id.* The State School Aid Act implements this constitutional provision. Under the act, the Superintendent’s responsibilities include: approving supplemental payments to rural districts based on a spending plan developed by the intermediate superintendents of each intermediate district; consulting with the state treasurer to determine the amount of a distressed district emergency grant; and approving the appeal process for complaints related to reproductive health- or sex-education programs. See MCL 388.1611r, 388.1622d, 388.1766a.

As demonstrated above, the Superintendent has broad authority under the Revised School Code and the State School Aid Act. Neither act, however, expressly authorizes the Superintendent to withhold funding or otherwise reduce state school aid provided to a school district based on its use of a particular mascot or logo.

Notably, the State School Aid Act includes conditions for receiving state aid and specific circumstances in which a school district may be required to forfeit state aid. For example, a district is required to forfeit state aid if it does not meet the required minimum hours and days of pupil instruction, if it fails to comply with rules related to sex education, or if it purchases, leases, or rents a car for board members. MCL 388.1707, 388.1766a, 388.1764. Also, the Department of Education may make a deduction or adjustment if the Department determines, as the result of an audit or updated information, that the amount of school aid paid to a district was incorrect. MCL 388.1615(2)–(3). The Department may withhold funds if it determines that money received under the State School Aid Act is not applied to salaries and other compensation of teachers and other employees, tuition, transportation, lighting, heating, ventilation, water service, the purchase of textbooks, other supplies, and any other school operating expenditures. MCL 388.1618(1). And the Department may withhold state school aid if a district or intermediate district fails to adopt an annual budget, fails to provide financial and pupil accounting audits, fails to submit annual comprehensive finance data, or fails to file a transportation expenditure report. MCL 388.1618.

In reviewing statutory language, the primary goal is “to give effect to the intent of the Legislature by reviewing the plain language of the statute.” *Tuggle v Dep’t of State Police*, 269 Mich App 657, 663 (2005), quoting *People v Perkins*, 473 Mich 626, 630 (2005). A rule of statutory interpretation used in determining the intent of the Legislature is the doctrine of *expressio unius est exclusio alterius*, or

the expression of one thing means the exclusion of another. *Tuggle*, 269 Mich App at 663. Applying this rule here, the State School Aid Act's inclusion of specific circumstances that allow for the withholding or forfeiture of state aid means that no other circumstances—including a school district's use of American Indian mascots or logos—may be used as a basis for the withholding or forfeiture of state aid from a school district.

Outside the statutory context, the State Board of Education's 2003 resolution simply recommends that schools discontinue use of American Indian mascots or logos; it does not require schools to do so. Even if it did, the resolution, as a policy statement, does not have the force of law. See, e.g., *Danse Corp v City of Madison Heights*, 466 Mich 175, 181 (2002) ("In order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule."); *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 239–241 (1993) (discussing necessity of rule promulgation). Thus, the resolution does not require schools to eliminate American Indian mascots or logos, nor does it purport to give the Superintendent authority to withhold funding from schools that do not comply with the Board's resolution.

Finally, while article 8, § 2 of the Constitution states that all schools "shall provide for the education of its pupils without discrimination as to religion, creed,

race, color or national origin,”⁹ that provision does not expressly or impliedly grant the Superintendent authority to withhold from or cause the forfeiture of state school aid for schools using American Indian mascots or logos. Const 1963, art 8, § 2. And although subsection 1281(1)(a) of the Revised School Code, MCL 380.1281(1)(a), obligates the Superintendent to require schools to “observe the laws relating to schools,”¹⁰ including nondiscrimination laws, the entity primarily responsible for enforcing such laws is the Michigan Civil Rights Commission. See Const 1963, art 5, § 29 (“It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution[.]”).

In sum, there is no express or implied legal authority for the Superintendent to withhold or cause the forfeiture of state school aid from school districts that use American Indian mascots or logos. Article 9, § 11 mandates that “payments” from the state school aid fund “shall be made in full . . . as provided by law.” Const 1963, art 9, § 11. While the Legislature has expressly authorized the withholding or

⁹ See also Const 1963, art 1, § 2 (no person shall “be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin”).

¹⁰ This statute refers to the State Board of Education, but the duties set forth in section 1281, MCL 380.1281, were transferred to the Superintendent by Executive Order 1996-12.

forfeiture of school aid under certain circumstances, it has not done so on the basis of a school's use of a particular mascot or logo.¹¹

It is my opinion, therefore, that while the Superintendent of Public Instruction has broad powers under the Revised School Code and the State School Aid Act, neither act authorizes the Superintendent to withhold state school aid funds or to cause the forfeiture of such funds by school districts that use an American Indian mascot, logo, or other imagery.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill Schuette", written in dark ink.

BILL SCHUETTE
Attorney General

¹¹ Some states have addressed the use of American Indian mascots and logos through legislation. See, e.g, Wis Stat § 118.134 (authorizing school district residents to file administrative complaints regarding school use of race-based nicknames or logos with the Wisconsin State Superintendent); ORS 332.075 (permitting Oregon school boards to enter into agreements with Native American Tribes for use of mascots); Cal Educ Code § 221.3 (prohibiting California schools from using the term "Redskins" for school or athletic team names, mascots or nicknames).