# LEGAL SERVICES

**DIVISION OF LEGAL AND RESEARCH SERVICES**
**LEGISLATIVE AFFAIRS AGENCY**
**STATE OF ALASKA**

(907) 465-2450
LAA.Legal@akleg.gov
120 4th Street, Room 3

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329


**M E M O R A N D U M** February 21, 2022

**SUBJECT:** State-tribal education compact schools; employment and admission preference policies (CSSB 34( ); Work Order No. 32-LS0309\B)

**TO:** Senator Roger Holland
Chair, Senate Education Committee
Attn: Ed King

**FROM:** Marie Marx
Legislative Counsel

You asked whether there are any constitutional issues with SB 34's hiring and admissions preference provisions. SB 34 allows a state-tribal education compact (STEC) school the ability to prioritize hiring and admissions of tribal members and members of federally recognized tribes and tribal organizations. Specifically, SB 34 allows a STEC school to prioritize the admission of tribal members when the school's capacity is insufficient to enroll all eligible students that apply, and allows a STEC school to adopt a policy that gives employment preference to tribal members and members of federally recognized tribes or tribal organizations.

Because STEC schools may give a preference under SB 34 to members of federally recognized tribes in admission, and to members of federally recognized tribes and tribal organizations in employment, the preferences are vulnerable to challenge on equal protection grounds. As described in greater detail below, if challenged, a court would apply a high level of scrutiny to determine whether these preferences violate the equal protection clause and the state would need to demonstrate an important state interest that is closely related to each preference in order to withstand scrutiny. In my opinion, there is a strong argument that the state has important interests in allowing a tribe or tribal organization operating STEC schools to prioritize the employment and admission of its members because the underlying purpose of a state-tribal education compact is to allow tribes and tribal organizations more control over educating tribal members and their children. However, note that an admission preference could also be challenged under the Alaska Constitution's mandate that the system of public schools be open to all children. It's difficult to predict the outcome of litigation if these preferences were challenged under art. I, sec. 1 or art. VII, sec. 1 of the state constitution.

Article I, sec. 1, of the Alaska Constitution declares "that all persons are equal and entitled to equal rights, opportunities, and protection under the law." The law mandates equal treatment for those who are "similarly situated" and evaluates equal protection

claims using a three-step sliding scale test that "places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake."[1] The Alaska Supreme Court is more protective of the right than federal courts and has explained:

> [W]e first determine the importance of the individual interest impaired by the challenged enactment. We then examine the importance of the state interest underlying the enactment, that is, the purpose of the enactment. Depending upon the importance of the individual interest, the equal protection clause requires that the state's interest fall somewhere on a continuum from mere legitimacy to a compelling interest. Finally, we examine the nexus between the state interest and the state's means of furthering that interest. Again depending upon the importance of the individual interest, the equal protection clause requires that the nexus fall somewhere on a continuum from substantial relationship to least restrictive means.[2]

In *Malabed v. North Slope Borough*, the Alaska Supreme Court found that a local hiring preference for Native Americans required a higher level of scrutiny, based on the Court's previous holding that the right to engage in an economic endeavor within a particular industry is an important right.[3] In *Malabed*, the Court considered an equal protection challenge to an ordinance enacted by the North Slope Borough that instituted a "mandatory preference for hiring, promoting, transferring, and reinstating Native Americans in borough government employment."[4] In considering this issue, the Court referred to a U.S. Supreme Court case, *Morton v. Mancari*, in which the U.S. Supreme Court upheld a policy implemented by the Bureau of Indian Affairs (BIA) that gave preference to members of federally recognized tribes for employment with the BIA.[5] In discussing *Mancari*, the Alaska Supreme Court noted that based on "the 'unique legal status of Indian tribes under federal law' and the BIA's special interest in furthering Native American self-government, the Court held that the hiring preference was 'reasonably and directly related to a legitimate, nonracially based goal.'"[6] Applying this ruling to the North Slope Borough ordinance, the Alaska Supreme Court found that "the

---

[1] *Malabed v. North Slope Borough,* 70 P.3d 416, 420 - 421 (Alaska 2003).

[2] *State v. Enserch Alaska Construction, Inc.,* 787 P.2d 624, 631 - 32 (Alaska 1989).

[3] *Malabed*, 70 P.3d at 421.

[4] *Id.* at 418. The ordinance at issue defined "Native American" to include "any person belonging to an Indian tribe under federal law."

[5] *Morton v. Mancari*, 417 U.S. 535, 538, 551, 554 (1974).

[6] *Malabed*, 70 P.3d at 420 (quoting *Mancari*, 417 U.S. at 554).

borough, unlike the BIA in *Mancari*, has no obvious governmental interest, as a borough, in furthering Native American self-government; and Native Americans have no explicitly established 'unique legal status' under borough law, as *Mancari* found them to have under federal law."[7] The Alaska Supreme Court therefore went on to analyze the ordinance under Alaska's equal protection clause.

The *Malabed* Court found that the right to seek and obtain employment in one's profession was an "important" right, requiring an "important" state interest and a close nexus between that important interest and the enactment in order to withstand scrutiny.[8] The North Slope Borough asserted that its "interest" in enacting the ordinance was primarily to reduce Native American unemployment.[9] The Court ultimately found the ordinance unconstitutional under Alaska's equal protection clause because the borough lacked "a legitimate governmental interest to enact a hiring preference favoring one class of citizens at the expense of others and because the preference it enacted is not closely tailored to meet its goals."[10]

In a 2003 attorney general opinion considering a Native hiring preference for a state transportation project, the Department of Law opined that "Alaska courts would probably regard as unconstitutional any employment preference required on state projects whose objective was to economically assist Alaska Natives or Indians over other citizens."[11] The Department of Law further concluded that "[a] hiring preference designed to economically assist an ethnic class over other citizens would probably not withstand the rigorous scrutiny of Alaska's sliding scale equal protection analysis, absent evidence of a past pattern of racial discrimination in public contract employment."[12]

Based on the above guidance, a policy implemented by a STEC school that establishes an employment preference authorized under SB 34 could generate litigation on equal protection grounds. If challenged, a court would apply a high level of scrutiny because a policy that gives employment preference at STEC schools to members of federally recognized tribes or tribal organizations implicates the important right to engage in employment in a particular industry. Thus, to withstand scrutiny, the employment preference would need to be closely related to an important state interest. The terms of the policy and the context in which it was adopted would likely also be reviewed. As

---

[7] *Id.* at 420.

[8] *Id.* at 421.

[9] *Id.* at 427.

[10] *Id.* at 427 - 28.

[11] 2003 Op. Att'y Gen. No. 13 at p. 10 (July 23).

[12] *Id.*

described above, an interest in reducing Alaska Native unemployment or economically assisting Alaska Natives over other citizens would be insufficient to withstand scrutiny. The state would therefore need to show that it has an important non-economic interest in allowing tribes to prioritize the employment of members of federally recognized tribes or tribal organizations in STEC schools. For instance, a strong argument can be made that the state and a tribe or tribal organization operating a STEC school have an important interest in hiring tribal or tribal organization members because a purpose of a state-tribal education compact is to give tribes and tribal organizations substantial control over education in their communities and to provide education in a manner consistent with the tribe's culture. Thus, the statutory authority for a tribe or tribal organization to establish a preference for employment of tribal or tribal organization members seems closely related to the concept of a tribe-operated school. If you are concerned about the potential for later litigation, you should ensure that the state's important interests in allowing STEC schools to give employment preference to members of federally recognized tribes or tribal organizations are made part of the legislative record and limit a policy established under SB 34 in a way that requires it to be closely related to those interests.

Similarly, the admission preference provisions in SB 34, which allow a STEC school to prioritize the admission of tribal members if capacity is insufficient to admit all eligible students, could also result in litigation on equal protection grounds. If challenged, a court would apply a high level of scrutiny because the admission preference implicates the fundamental right to education. Thus, to withstand scrutiny, the admission preference would need to be closely related to an important state interest. As with the employment preference policy, the state would need to demonstrate an important interest in allowing tribes to prioritize the enrollment of tribal members in STEC schools. Again, a strong argument can be made that a tribe operating a STEC school has an important interest in admitting students who are tribal members because a purpose of a state-tribal education compact is to give tribes more control in educating their children. Thus, the state allowing a tribe to prioritize the enrollment of tribal members seems closely related to the concept of a tribally-operated school. As above, if you are concerned about the potential for later litigation, you should ensure that the important state interests for allowing STEC schools to implement an admission preference policy are articulated in the legislative record.

Additionally, art. VII, sec. 1, of the Alaska Constitution requires the state to "maintain a system of public schools open to all children of the State." If an admission preference policy implemented by a STEC school under SB 34 interferes with a non-tribal member student's access to public education, the preference could also be challenged and potentially invalidated under art. VII, sec. 1.

Please let me know if I may be of further assistance.

MYM:mjt
22-093.mjt