Public Schools, Indians. Indians, Attending Public Schools, Admission to.

No Indian child of school age is entitled to admission to the public schools of this state unless living under the guardianship of white persons, or unless the parents thereof are citizens of the United States or have taken land in severalty, and severed tribal relations.

February 21st, 1914.

Honorable Commissioner Indian Affairs,
Washington, D. C.

Dear Sir:

Under date of the 12th ultimo you addressed the following letter to this office:

> "In furthering Indian education it has been the policy of this office to encourage the enrollment of Indian children in the public schools. One of the ways by which this has been done has been to pay a tuition of ten cents or fifteen cents per day, based upon actual attendance. However, owing to a recent decision of the comptroller of the treasury of October 23rd, 1913, a copy of which is enclosed herewith, this method must necessarily be modified, for the comptroller decided that in those states where Indian children were legally entitled to attend the public schools any contract for the payment of tuition therefor by the general government would be illegal.
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> "In order that this office may be fully informed on the matter of enrolling Indian children in the public schools of your state, it would be very much pleased if you would furnish it with a statement of the law of Montana on this subject. If all Indian children are not entitled to attend, then the office would be glad to know what Indians under the law of Montana if any, may attend with the same privileges as white children. This information if furnished will enable the Indian office to determine the proper action to take in connection with the payment of tuition for Indian children in the public schools of the State of Montana, in view of the comptroller's decision above referred to."

You are advised that under existing school laws Indian children are not regarded as school census children, except as provided in Sec. 2003, Session Laws of the Thirteenth Legislative Assembly, page 282, which reads:

"All school moneys apportioned by county superintendents of common schools shall be apportioned to the several districts in proportion to the number of school census children between six and twenty-one years of age, as shown by the returns of the district clerk for the next preceding school census. Provided, that Indian children, who are not living under the guardianship of white persons, shall not be included in the apportionment list, unless the parents thereof are citizens of the United States or have taken land under the allotment and severalty act of congress and have severed their tribal relations."

It is patent from a reading of this section that Indian children to be entitled to public school privileges must either be living under the guardianship of white persons, or their parents must be citizens of the United States or have taken land by allotment under the severalty act of congress, and in either event have severed their tribal relations. Sec. 604, Idem, page 238, provides in general terms:

"Every public school not otherwise provided for by law shall be open to the admission of all children between the ages of six and twenty-one years residing in the school district, and the board of trustees shall have the power to admit children not residing in the district as hereinbefore provided."

It is my judgment that the term "all children between six and twenty-one years," as used in this section has reference to children who, as well as their parents or guardians, are wholly amenable to the jurisdiction and laws of this state. And this cannot be said of any Indian who may be subject to the jurisdiction or control of the federal government. It certainly may not be legally contended that such a thing as qualified citizenship is recognized by law; that Indians, whose property is secured from the taxing power of the state, in whole or in part, may nevertheless secure the benefits of its public school system, supported by the people who are amenable to state laws. Your attention is directed to a former opinion of this office (Vol. 4, Opinions Atty. Gen. '10-'12, page 109), wherein it is held that it is necessary for the federal government to relinquish all control and supervision over the Indians by removing the Indian agent and releasing control of the trust fund before tribal relations are severed.

See also Opinions Attorney General, Vol. 3, '08-'10, p. 413, from which I take the liberty of quoting:

"Sec. 2072, Revised Statutes of the United States, provides for the education of Indian children, which enactment is at least an indication that the federal government does not depend upon a state to provide education for Indians who have not severed their tribal relations."

From an early day it has been recognized that a state is prohibited from interfering with or controlling Indians in any manner whatsoever.

Cherokee Nation v. State of Georgia, 9 Curtin 178.

Worcester v. State of Georgia, 10 Curtis, 214.

In the face of this doctrine it would operate as a paradox to hold that Indians may nevertheless enjoy the benefits of a state's public school system, maintained by taxation, operating equally against all its inhabitants save Indians.

It occurs to me that, in view of the federal legislation upon the subject, (Secs. 2071 et seq. Rev. Stat. of the U. S.) it was never intended to impose upon the state the burden of educating Indians so long as they remained wards of the general government, hence I conclude that only such Indians as have the status of those mentioned in our school law, supra, may be enrolled as students in our public schools.

Yours very truly,

D. M. KELLY,
Attorney General.