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CONSTITUTIONAL LAW: Equal Protection of the Laws.
COLLEGES AND UNIVERSITIES: Powers of governing body.
TUITION: Plan based on ability to pay.

While this office takes no position on the wisdom of such a plan, as to its legality the tuition plan adopted by the Board of Trustees of Michigan State University, based generally upon parental gross annual income, does not violate the Equal Protection Clause of either the Federal or State Constitutions. Burden to establish eligibility for tuition at amount lower than maximum rests upon parents and/or student involved.

Board of Trustees of Michigan State University is without authority to compel production of wage records and/or income tax records of parents of students enrolled at the university or to condition the admission of otherwise qualified students to the university upon the gross income of the parents or production of wage and/or income tax records of parents.

The legislature may not constitutionally enact a statute prohibiting the Board of Trustees of Michigan State University from adopting a tuition plan.

No. 4597

August 18, 1967.

Hon. William P. Hampton
State Representative
2463 Hunt Club Drive
Bloomfield Hills, Michigan 48013

You request my opinion on the following questions:

"1. Does the plan of charging tuition, as adopted by the MSU Board, violate any present Michigan statute or violate any Michigan or federal constitutional provision?

"2. Can a parent of a MSU student legally refuse to disclose his or her income to the MSU administration?

"3. Can the MSU Board require a parent to disclose his income as a condition precedent to the admission of his child to the university?

"4. If the plan is ruled legal in all respects, can the legislature constitutionally pass a statute prohibiting such a method of raising tuition at a state university?"

The minutes of the meeting of the Board of Trustees of Michigan State University for July 21, 1967, furnished by you, show the following item 2 under the category "Special Miscellaneous":

"Fee schedule recommended to become effective with fall term of 1967:

	New Rate	*Current Rate*
Non-residents	$400 per term	$340 per term
Michigan residents	$143 per term	$118 per term
Off-campus students	$ 17 per credit hr.	$ 14 per credit hr.
Graduate thesis credits	$ 40 per unit	$ 30 per unit

The accompanying proposed budget for 1967-68 is based on this proposed schedule.

Vice President Sabine will present a detailed explanation of a proposed plan for extraordinary scholarship help to two groups of Michigan undergraduates: (a) Students coming from families with a gross family income of less than $5,000, and (b) students coming from families with gross family incomes below $8,500. This is to be in addition to our current programs available on an individual basis to all needy Michigan undergraduate students.

After prolonged discussion, *Dr. Smith* moved, seconded by Mr. Harlan, the approval of the following fee schedule to be effective fall term of 1967 for Michigan State University and Oakland University:

	New Rate	*Current Rate*
Off-campus credit	$ 17 per credit hr.	$ 15 per credit hr.
Thesis credits	$ 40 per unit	$ 30 per unit
Out-of-state graduate students	$410 per term	$340 per term
Out-of-state undergraduates	$400 per term	$340 per term
Michigan graduate students	$167 per term	$118 per term
Michigan undergraduates	*$167 per term	$118 per term

*Michigan undergraduates not being subsidized by federal, state, or private grants or scholarships will be charged a lower fee when the gross parental annual income is less than $16,700. In such cases, per term fees will be 1% of gross annual family income as reported on federal income tax returns but not less than $118 per term.

In the event that this fee schedule produces more student fee income than the estimates included in the 1967-68 budgets, the excess income over the estimated amount is to be set aside for possible use for scholarships and student aids.

Motion carried by a vote of 5 to 3.

In favor—Mr. Harlan, Mr. Hartman, Mr. Stevens, Mr. White and Dr. Smith.

Opposed—Mr. Merriman, Mr. Nisbet, Mr. Thompson."

The people have created the trustees of Michigan State University and their successors in office as a body corporate known as the Board of Trustees of Michigan State University in accordance with Article VIII, Sec. 5 of the Michigan Constitution of 1963, and have declared that the "board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds." Constitutional status as a body corporate was first given to such Board of Trustees in Article XI, Sec. 7 of the Michigan Constitution of 1908, as amended by the people on April 6, 1959. The constitutional powers of the Board of Trustees were previously enumerated in Article XI, Sec. 8 of the 1908 Constitution, as amended in 1959.

The Michigan Supreme Court has held that the constitutional powers of the governing board of Michigan State University, as to the college and its funds, are the same as those reposed by the people in the Board of Regents

of the University of Michigan. *State Board of Agriculture v. Auditor General,* 180 Mich. 349 (1914).

In *Sterling v. Regents of the University of Michigan,* 110 Mich. 369 (1896), the Michigan Supreme Court declared unconstitutional an act of the legislature requiring the Regents of the University to establish a branch of the medical school as violative of the constitutional power of the governing body of the University of Michigan to control and manage the university. The court ruled that the power to control the expenditure of university funds was vested in the regents in absolute and unqualified terms and could not be controlled directly or indirectly by the legislature. The sole control and general supervision of the university was held to be in the people to be exercised by a constitutional body elected by them.

The moneys available for the support of the University of Michigan was held by the Michigan Supreme Court in *Board of Regents of the University of Michigan v. Auditor General,* 167 Mich. 444 (1911), to include fees received from students and appropriations made from time to time by the legislature. To their judgment and discretion as a body the people have committed the financial and all other interest of educational institutions. *The People v. The Regents of the University of Michigan,* 4 Mich. 98 (1856). The entire control and management of university affairs and property have been conferred by the people to the governing body of the educational institution. *Weinberg v. Regents of the University of Michigan,* 97 Mich. 246 (1893).

Relying upon such holdings the Michigan Supreme Court has held in *State Board of Agriculture v. Auditor General,* supra, that the legislature could not constitutionally impose a condition in an appropriation act limiting appropriations to the governing body of Michigan State University, then known as the State Agricultural College, if a sum in excess of $35,000 from all sources shall be expended to maintain the mechanical and engineering departments. The court found that the imposition of such a condition constituted legislative supervision of the college in violation of the constitutional provision giving the governing body of such college power to generally supervise the university and to direct and control its funds.

Section 23 of Act 269, P.A. 1909, being C.L. 1948 § 390.123; M.S.A. 1959 Rev. Vol. § 15.1143, provides:

> "The state board of agriculture shall have power to determine and establish the qualifications of students for admission to the college, and all students having a lawful residence in this state and meeting the established requirements for admission, shall have the privileges of the institution without the payment of tuition, but the board may require tuition of students from other states and countries and fix the amount thereof."

Section 2 of Act 269, P.A. 1909, as last amended by Act 50, P.A. 1963, Second Extra Session, being M.S.A. 1965 Cum. Supp. § 15.1122, provides that any reference in the act to the "state board of agriculture" shall be construed to mean Board of Trustees of Michigan State University.

Under the clear pronouncements of the Michigan Supreme Court cited herein, the legislative mandate found in Sec. 23 of Act 269, P.A. 1909, supra,

which would give all resident students the privilege of attendance at Michigan State University without payment of tuition, would constitute legislative supervision of Michigan State University and direct control of the funds of the university, contrary to Article VIII, Sec. 5 of the Michigan Constitution of 1963. Such a provision cannot stand.

It is necessary to consider pertinent constitutional provisions. The 14th Amendment to the United States Constitution contains a guarantee that no state shall deny to any person within its jurisdiction the equal protection of the laws.

The Michigan Constitution of 1963 contains a guarantee of equal protection of the laws found in Article I, Section 2 thereof, which provides:

"No person shall be denied the equal protection of the laws."

The United States Supreme Court in *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78, 79 (1911), has adopted the following clear test of the equal protection clause of the 14th Amendment (speaking there in connection with the exercise of the police power):

> "1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

The Michigan Supreme Court in *Naudzius v. Lahr,* 253 Mich. 216 (1931), has ruled that the equality of rights protected by the Michigan Constitution of 1908 is the same as that guaranteed by the 14th Amendment to the United States Constitution, and the court adopted the standards of classifications laid down in *Lindsley v. Carbonic Gas Co.,* supra.

Legislation has been held to be constitutional even though its object was to benefit a particular class where the law operated equally upon those within the particular class. *In re Brewster Street Housing Site,* 291 Mich. 313 (1939). However, where a classification is based upon no reason but is purely arbitrary, the classification cannot meet the test of the equal protection clause of the Constitution. *Tribbitt v. Village of Marcellus,* 294 Mich. 607 (1940).

There must be reasonable grounds for making distinction between those who fall within a class and those who do not. *Godsol v. Unemployment Compensation Commission,* 302 Mich. 652 (1942).

Equal protection of the laws extends not only to classification but subclassification and if the latter is unreasonable or arbitrary it comes within the constitutional prohibition against class legislation. *Haynes v. Lapeer Circuit Judge,* 201 Mich. 138 (1918).

It has been held that the fundamental rule of classification is that it shall not be arbitrary and must be based on substantial distinctions and be germane to the purpose of the laws. *Kelley v. Judge of Recorder's Court of Detroit,* 230 Mich. 204 (1927).

There is no recorded decision of a Michigan court passing upon a classification of students for tuition purposes by Michigan colleges and universities. Research fails to reveal any precedent in other jurisdictions on the question.

Classification for tax purposes may be based on the ability to pay without offending the equal protection of the laws clause. *Dimke v. Finke,* 295 NW 75 (Minn. 1940), and cases listed on page 79.

A state statute imposing a tax on automobiles on the basis of their weight and use was upheld by the Utah Supreme Court in *Carter v. State Tax Commission,* 96 P 2d 727 (Utah, 1939). The court said on page 732:

> "The legislature determines the lines of separation between classes. That is their prerogative, and the courts have no right to interfere on any theory that those lines were improperly placed—that the weights selected for a division into classes were not properly selected. Presumably the Legislature had the necessary information before it to justify such segregation into classes."

Some guidance may also be obtained from an examination of authorities in other jurisdictions passing upon the constitutionality of statutes under test of "equal protection of the laws" providing for state assistance to certain needy persons.

In *People ex rel Heydenreich v. Lyons,* 30 N.E. 2d 46 (Ill. 1940), the Illinois Supreme Court upheld a statute providing public assistance for certain needy persons based upon resident requirement, that the classification of beneficiaries of the bounty of the state must be reasonable, and the court will not interfere with such classification unless it is clearly unreasonable. The court observed that the classification need not be accurate, scientific, logical or harmonious so long is it is not arbitrary and will accomplish the legislative design. The Court concluded that the constitutional guarantee of the equal protection of the laws is interposed against discrimination that is purely arbitrary.

A state statute providing public assistance to persons over the age of 65, possessing not over $2,000 worth of property, was held not to violate a state constitutional requirement of equality in *In Re Opinion of the Justices,* 154 A 217 (N. H. 1931). The Court ruled that classification may not be sustained where the selection and grouping is so arbitrary as to serve no useful purpose of a public nature. Classification will be sustained where it reasonably promotes some proper object of public welfare or interest.

In *Collins v. State Board of Social Welfare,* 81 N.W. 2d 4 (Iowa 1957), the Court struck down a statute providing public assistance based upon the number of children, but without consideration as to the financial need of the recipient family, as arbitrary and unreasonable. The Court indicated that a classification on the basis of need is proper.

Certain controlling legal principles can be distilled from these judicial precedents. To be sustained the classification and sub-classification must be

reasonable and cannot be arbitrary. The equal protection of the laws is offended where a selection and grouping is so arbitrary so as to serve no useful purpose of a public nature. A classification on the basis of need does not offend the equal protection of the laws. For certain purposes classification on the basis of ability to pay is not offensive to the equal protection of the laws. There must be substantial distinctions germane to the purpose of the laws to sustain differences in classifications.

The trustees of Michigan State University are state officers. *Attorney General ex rel Cook v. Burhans*, 304 Mich. 108 (1942). Their actions would clearly constitute state action under the Equal Protection Clause of the 14th Amendment to the Constitution of the United States and under Article I, Sec. 2 of the Michigan Constitution of 1963.

Before examining the plan of tuition adopted by the Board of Trustees of Michigan State University against the controlling legal principles of law collected from the authorities cited in this opinion, it should be clear that this opinion passes no judgment upon the wisdom of such tuition plan. The people have entrusted the fixing of tuition to the Board of Trustees and the people will pass judgment upon the plan. We are concerned only with its legality.

The tuition plan when considered as a whole reveals that the Board of Trustees sought to impose a per term fee of 1% of the gross annual income of the parents of the student as reported on federal income tax returns, but not more than $167.00 per term for resident undergraduate students, and not less than $118.00 per term, provided that the resident undergraduates were not being subsidized by federal, state or private grants or scholarships. By applying such formula it is clear that when parental gross annual income is $16,700 or more, the per term tuition to be paid is $167.00, and explains the selection of that sum for computation purposes as requiring the imposition of the maximum tuition rate. So considered, I am constrained to rule that the tuition plan cannot be considered to be arbitrary; rather it represents a reasonable method of sub-classification based upon need and ability to pay to provide educational opportunity to all Michigan resident undergraduate students.

While the tuition plan may contain certain inequities, particularly if more than one student in a family is attending the university, such inequities, if any, do not make the tuition plan purely arbitrary; rather they illustrate that the plan is not scientifically harmonious, but generally appears to accomplish the design of the Board of Trustees to provide educational opportunity based upon need and ability to pay. Nor is it possible for me to say that there is no substantial distinction between a family with income of $17,000 and a family with income of, say, $10,000 relative to their ability to provide educational opportunities for their children. Thus, the distinction in the sub-classification of students is based upon substantial distinction germane to the purpose of the tuition plan.

Because payment of tuition is a payment for educational services to be rendered and not the payment of a tax, Article XI, Sec. 7 of the Michigan Constitution of 1963, has no application. In any event, the tuition rate is *fixed* at 1% per term within the family income range to which it applies

and therefore cannot be repugnant to the constitutional prohibition against a *graduated* income tax.

Without passing on the wisdom thereof, I am constrained to rule and it is therefore my opinion that the tuition plan adopted by the Board of Trustees of Michigan State University does not violate the equal protection clause of either the federal or state constitution.

2 and *3*. Since questions 2 and 3 are related they will be considered simultaneously.

In answer to the first question ruling has been made that the tuition plan is reasonable. It is my opinion that it is also a reasonable requirement for the parent and/or student to support his request for a reduced tuition based upon need and ability to pay, with documentation satisfactory to the university. Certainly tax records and wage earning records are a good source for ascertaining the gross income.

I find no authority in the Board of Trustees of Michigan State University to legally compel a parent of a Michigan State University student to disclose his or her income to the authorities of the university. At the same time it should be observed that if the parent refuses to provide information to show need and ability to pay, the university can rightfully assume that his or her income is $16,700 or in excess thereof.

The Board of Trustees of Michigan State University, under its constitutional grant of authority to generally supervise the university, may adopt rules and regulations for the conduct of its affairs. This power includes the power to determine rules and regulations for the admission of students to the university. Such rules and regulations must be reasonable and not arbitrary. *Newman v. Graham.* 349 P 2d 716 (Idaho 1960); *Foley v. Benedict,* 55 S.W. 2d 805 (Tex. 1932).

While the Board of Trustees of Michigan State University may lawfully adopt a tuition policy based upon need and ability to pay, such authority may not lawfully be extended to condition the admission of students to the university based upon parental gross annual income. Such a rule would be arbitrary as it would have no relation to the educational opportunities afforded students at the university and to the qualifications of the student to avail himself of the educational opportunities so afforded.

Therefore it is my opinion that the Board of Trustees of Michigan State University cannot make the amount of gross parental income or compulsory disclosure thereof a condition of the admission of a student to the university.

4. Under the authorities cited in the answer to the first question, which need not be repeated again, it is my opinion that the legislature cannot constitutionally pass a statute prohibiting a tuition plan based upon need and ability to pay at a state college or university created by the people in the Constitution where the governing body of the college or university is given constitutional power to generally supervise the university and to control and direct all expenditures from the institution's funds. The power over tuition is reserved in the governing body and expressly withheld from the legislature.

FRANK J. KELLEY,
Attorney General.