in existence were under the supervision of and operated by boards of education of K-12 school districts." (footnote omitted)

The analysis employed in concluding that community colleges are not state agencies for the purpose of Const 1963, art 4, § 53 is also applicable to Const 1963, art 9, § 20. I therefore conclude that state moneys appropriated and transferred to local community college districts are not state monies. By way of caveat, however, I must point out that although community college districts are not subject to any bank deposit limitations either by way of constitutional provision or statute, the board of trustees for such institutions have a responsibility to insure the safety of district funds. Thus, in deciding where and in what proportion to deposit such funds, the trustees must be guided by the limitations imposed upon state agencies or school districts.

State colleges and universities may be distinguished from school districts and community colleges in that the governing bodies of colleges and universities are elected statewide, or, in some cases, appointed by the Governor and that the students thereof are admitted on a statewide basis without discrimination as to admission or fees. In addition, Const 1963, art 8, § 4, indicates that colleges and universities lack taxing authority and must depend on tax monies from legislative appropriations. The Supreme Court has further declared that the governing boards of state colleges and universities are state officers. *Regents of the University of Michigan* v *Employment Relations Commission,* 389 Mich 96; 204 NW2d 218 (1973)

FRANK J. KELLEY,
Attorney General.

760505.1

ADMINISTRATIVE LAW AND PROCEDURE: The Brown-McNeely Insurance Fund is a state agency.

BROWN-McNEELY INSURANCE FUND: The Brown-McNeely Insurance Fund is a state agency.

The Brown-McNeely Insurance Fund is a state agency.

Opinion No. 4934 May 5, 1976.

Thomas C. Jones
Commissioner
Michigan Insurance Bureau
111 North Hosmer
Lansing, Michigan 48912

You have requested my opinion as to the status of the Brown-McNeely Insurance Fund created by 1975 PA 43 which amended the Insurance Code, 1956 PA 218; MCLA 500.100 *et seq;* MSA 24.1100 *et seq* by adding Chapter 25. The fund was created to ". . . provide malpractice insurance to eligible providers . . ." MCLA 500.2502(1); MSA 24.12502(1).

Your question is whether the Brown-McNeely Insurance Fund is a state agency and the answer is yes.

The determination of whether the Brown-McNeely Insurance Fund is a state agency rests upon an examination of "its character, its relation and its function." The Supreme Court in reviewing the status of the state housing development authority said:

> "We must, as has been stated, look behind the name to the thing named. *We must examine its character, its relation, and its functions to determine, indeed, whether it is an agency or instrumentality of State government.* This examination leads us to a consideration of the purposes sought to be accomplished by the law. *If those purposes are public purposes, if the work of the entity is a public work, then the State housing development authority is a State agency or instrumentality* and its creation is a constitutional exercise of legislative power." (emphasis added) *Advisory Opinion re Constitutionality of PA 1966, No. 346;* 380 Mich 554, 571; 158 NW 2d 416, 423 (1968)

With respect to the purposes for which the fund was created:

> "The legislature finds that the health care delivery system being an essential part of the general health, safety, and welfare of the people of this state is in peril as a result of the diminishing availability of malpractice insurance; that it is within the public policy of this state to ensure that the health care delivery system be preserved and that the providers thereof be afforded adequate liability protection; and that it is within the public policy of this state that all providers, being beneficiaries of this protection, bear its cost as provided in this chapter." MCLA 500.2500; MSA 24.12500

Great weight must be given to legislative declarations of public purpose, *Advisory Opinion re Constitutionality of PA 1966, No. 346,* 380 Mich 554, 576; 158 NW 2d 416; 426 (1968). The act is a response to what has become known as a medical malpractice insurance crisis.[1] The legislature

[1] The report to the Governor on the medical malpractice insurance crisis states:

> "Currently the market for individual policy medical malpractice insurance in Michigan is very tight for the high risk doctor. The few licensed companies which offer medical malpractice insurance in Michigan are adopting increasingly restrictive underwriting policies. Specifically, the major licensed companies are accepting no new business and are retaining existing business under the terms of a voluntary moratorium, which will expire July 1, 1975. Under the moratorium, companies have agreed to retain existing policyholders with the agreement to non-renew physicians only under the limited circumstances of proven incompetence, incapacitation or abnormal claims history. As a result, an increasing number of high risk and new doctors are forced to obtain insurance from surplus lines companies, non-licensed companies which are willing to accept risks that the licensed companies will not write, but usually at a substantially higher premium rate.
>
> * * * * *
>
> "The general availability of medical malpractice insurance is also limited by the fact that so few companies are willing to write this line of business. From most companies' point of view, medical malpractice insurance is a

has determined that the public health care delivery system is in peril. The Michigan Constitution provides:

> "The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health." art 4, § 51

The Convention Comment to art 4, § 51 broadly sets forth the intent of that provision:

> "This is a new section, declaratory in character, instructing the legislature to adopt whatever public health measures it deems appropriate."

The Supreme Court has held that the legislature has broad discretion in measures to protect the public health: ". . . In safeguarding the public health, the legislature is granted a large area of discretion as to measures to be used . . ." *Ecorse* v *Peoples Community Hospital Authority*, 336 Mich 490, 501; 58 NW 2d 159, 164 (1953). The objective of promoting the public health "is not only constitutionally permissible but is constitutionally encouraged." *Foote Memorial Hospital, Inc.* v *City of Jackson Hospital Authority*, 390 Mich 193, 210; 211 NW 2d 649, 655 (1973).

I am also mindful that historically the business of insurance has been held to be a business affected with the public interest, *Dearborn National Insurance Co.* v *Commissioner of Insurance*, 329 Mich 107; 44 NW 2d 892 (1951); *Commissioner of Insurance* v *American Life Insurance Co.*, 290 Mich 33; 287 NW 368 (1939).

In view of the legislature's declaration of purpose and bearing in mind both the nature of the problem and the public interest in the business of insurance I am of the opinion that the purpose sought to be accomplished by the Brown-McNeely Insurance Fund is a public purpose.[2]

---

specialty line involving high, largely unpredictable risks; extensive administrative costs, and unsure returns for their efforts. It is also a small dollar volume of business . . . Because of the unpredictability of claims and the small premium volume, most companies are simply not interest [sic] in writing medical malpractice insurance at any premium level. If a company does offer the coverage, it is careful to limit its potential losses by offering coverage primarily to the good risks and by non-renewing any questionable high risk doctor. The nervousness of the companies writing this line of business is demonstrated by one company's willingness in another state to withdraw from a medical society sponsored plan and forego the premium income guaranteed under the plan when, what they considered to be adequate rate increases were not granted."

Medical Malpractice in Michigan, A Report to Governor William G. Milliken, February 18, 1975, p 4.

[2] Justice Cooley in *People ex rel Detroit and Howell Railroad Co.* v *Township of Salem*, 20 Mich 452, 475 (1870) made the following observation:

> "I do not understand that the word *public*, . . . is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the Legislature from taking broad views of State interest, necessity or policy, or from giving those views effect by means of the public revenues. Necessity alone is not the test by which the limits of State authority in this direction are

In examining the character, relation and functions of the Brown-McNeely Insurance Fund I note first the following: The fund was created by the legislature[3] without necessity of participation by existing insurers or the creation of a separate entity by insurers. It is not an organization or association of insurers mandated by law as a condition of doing business in the state to provide certain kinds of insurance[4] to qualifying applicants. Thus, the Brown-McNeely Insurance Fund, while created to solve an insurance availability crisis, does not resemble the Michigan Basic Property Insurance Association, under Chapter 29 of the Insurance Code, MCLA 500.2901 *et seq;* MSA 24.12901 *et seq,* nor the Michigan Automobile Insurance Placement Facility under Chapter 33 of the Insurance Code, MCLA 500.3301 *et seq;* MSA 24.13301 *et seq.*[5]

---

to be defined, but a wise statemanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people. . . ."

Justice Cooley's statement is particularly pertinent in view of the authority of the fund to make assessments as discussed later.

[3] MCLA 500.2502(1); MSA 24.12502(1). That section provides: A malpractice insurance fund *is* created to provide malpractice insurance.

[4] The traditional approach to insurance availability problems was rejected in view of the limited number of insurers writing malpractice insurance:

"In developing an insurance mechanism to guarantee the availability of medical malpractice insurance to all Michigan health care providers, the unique aspects of both the Michigan market and the national market must be considered. *Traditional insurance solutions developed to assure availability have centered on the establishment of risk sharing pools (such as assigned risk plans of reinsurance facilities) in which licensed insurance companies pool their resources to cover normally undesirable risks. Depending on the structure of this 'residual market mechanism,' those seeking insurance will have coverage either with the existing companies or with the specifically created pool.* Furthermore, under these residual market plans, participating companies are usually required to either accept all business and pass the unwanted business on to the pool or accept the business the company desires and arrange for coverage of the undesired risk with the special facility.

". . . *However, the operational possibilities of these pooling mechanisms are severely limited by the fact that so few companies write medical malpractice insurance and therefore the opportunity to spread the risk over a broad base of companies does not really exist.* The opportunity to spread the risk over medical malpractice writers is further restricted by the movement among insurers to withdraw from this market, reducing the possible number of participating companies."

(emphasis added)

Medical Malpractice in Michigan, A Report to Governor William G. Milliken, February 18, 1975, p 12.

[5] In those two instances every insurer authorized to transact certain defined kinds of insurance is required as a condition of continuing to transact insurance in this state to be a member of an organization or association of such insurers. That organization or association either itself provides insurance to the eligible applicant, as in the case of the Michigan Basic Property Insurance Association, or distributes the applicants among its member insurers for the purpose of providing insurance, as in the case of the Michigan Automobile Insurance Placement Facility.

The fund is not free to insure all classes of health providers but may only insure health providers after a determination has been made by the Insurance Commissioner that the class of health providers in question ". . . cannot readily obtain malpractice insurance or obtain malpractice insurance for a reasonable premium." MCLA 500.2505(1); MSA 24.12505(1). Thus, the fund is limited by law such that its authority to insure is consistent with the declared public purpose of the fund. The fund has the authority to levy assessments upon non-member insurers authorized to write malpractice insurance in this state MCLA 500.2511(1); MSA 24.12511(1). The power to assess as such is sufficiently of the nature of a tax as to constitute the delegation of a sovereign power of the state:

> "To arrive at an ultimate disposition of this matter, we find no better touchstone than the words of the Court in Re Oshkosh Foundry Co. (ED Wis 1939), 28 F Supp 412, . . . There it was said:
>
> " 'Although the legislature did not designate the contributions as a tax, nevertheless the compulsory payments made for a public purpose come within a definition of a tax as is stated in 61 CJ 68: ". . . the essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority." ' " *Employment Security Commission* v *Patt,* 4 Mich App 228, 233; 144 NW 2d 663, 665 (1966)

The affairs of the fund are managed by a board of directors of which the insurance commissioner and state treasurer are members. Members of the board are appointed by the Governor with the advice and consent of the Senate; MCLA 500.2503; MSA 24.12503. The board by statute is vested with certain defined powers and duties under the supervision of the insurance commissioner.[6] The board and the fund by statute have authority to

[6] The commissioner may designate a "servicing insurer", MCLA 500.2501(f); MSA 24.12501(f); the commissioner approves procedures for sharing loss on risks and for making assessments, MCLA 500.2502(2) (b); MSA 24.12502(2)(b); the commissioner is a nonvoting member of the board of directors, MCLA 500.2503(1); MSA 24.12503(1); the commissioner may after public hearing designate a specific class of health providers as eligible providers, MCLA 500.2505(1); MSA 24.12505(1); the commissioner may remove the designation of eligible health provider, MCLA 500.2505(2); MSA 24.12505(2); the commissioner reviews the plan of operations and approves or makes recommendations, MCLA 500.2508(2)(3); MSA 24.12508(2)(3); the commissioner shall review the plan of operations annually and may review the plan of operation more often, MCLA 500.2508(6); MSA 24.12508(6); the commissioner shall submit semiannually to the legislature a report on the status of the fund and a comprehensive summary of the administration of the fund, MCLA 500.2508(8); MSA 24.12508(8); the commissioner may require a malpractice insurer to be a servicing insurer, MCLA 500.2510(1); MSA 24.12510(1); the commissioner may obtain and report to the fund all data concerning a servicing insurer to determine if the servicing insurer's charges are reasonable, MCLA 500.2510(2); MSA 24.12510(2); the commissioner must approve of the servicing of the fund by employees of the fund or organization other than servicing insurers, MCLA 500.2510(4); MSA 24.12510(4); the commissioner resolves disputes between the fund and the servicing insurer, MCLA 500.2510(5); MSA 24.12510 (5); the commissioner and the board approve contracts between the fund and

provide insurance only to health providers doing business within the State of Michigan:

> ". . . Designation of a class of health providers as eligible providers *shall entitle a health provider functioning in that class to obtain malpractice insurance from the fund if the health provider is legally entitled to provide services in this state, has a primary place of business in this state, and pays the appropriate premium charged by the fund . . .*" (emphasis added) MCLA 500.2505(1); MSA 25.12505(1)

In OAG 1955-1956, No. 2942, p 737, 738 (December 7, 1956) the attorney general examined the status of the Michigan State Apple Commission and concluded that it was a state agency:

> "The Michigan State Apple Commission is created by the legislature and controlled by it with delegated powers. Its funds which it uses for purposes of the act, including pay for its members, come from an assessment levied upon the production of apples at a rate per bushel established by the act. The duties and purposes are set forth and are generally declared to be '. . . in the exercise of the police power of the state to protect public health, to promote the welfare of the state and to stabilize and protect and promote the apple industry of the state.'
>
> "The Commission consists of seven members appointed by the Governor, with the advice and consent of the Senate for definite terms of office, plus two ex officio members whose capacity is advisory only, without any vote. Its jurisdiction is co-extensive with the state boundaries. No profit is contemplated and funds derived from the taxation are to be expended to carry out the purposes of the act, including the statutory salary of members of the Commission. Such a body, created by the legislature, meets the requirements of a state agency whose members are state officers performing a governmental function in the interest of public health and welfare as declared by the law."

Similarly the Brown-McNeely Insurance Fund is created by the legislature and controlled by it with delegated powers. Its funds come from

---

the servicing insurer, MCLA 500.2510(6); MSA 24.12510(6); the commissioner and state treasurer may invest fund monies in securities specified by law for investment by casualty insurance companies, MCLA 500.2513(1); MSA 24.12513(1); the commissioner "may visit the fund at any time and examine any and all of its affairs.", MCLA 500.2513(3); MSA 24.12513(3); the commissioner may promulgate rules to implement Chapter 25, MCLA 500.2515(1); MSA 24.12515(1); the commissioner may after reasonable notice and hearing suspend or revoke the certificate of authority of any insurer which fails to comply with a provision of or rule promulgated under this chapter, MCLA 500.2515(1); MSA 24.12515(1); the commissioner hears appeals by eligible providers from decisions of the fund, MCLA 500.2515(2); MSA 24.12515(2); If Chapter 25 is repealed or expires and the fund is not sufficient to make payment of all claims and losses incurred the commissioner acting as the receiver for the fund shall be empowered to make assessments; if the moneys are more than sufficient the commissioner distributes the moneys which are not needed to eligible providers; MCLA 500.2516(2); MSA 24.12516(2).

premiums charged for the provision of insurance coverage and from assessments levied as are necessary to cover any deficit from the operation of the fund. The statute provides in effect that the fund is necessary to protect the health care delivery system of the state as "an essential part of the general health, safety and welfare of the people of this state." MCLA 500.2500; MSA 24.12500.

The board which manages the fund consists of members appointed by the Governor, with the advice and consent of the Senate for definite terms of office, plus two ex officio members whose capacity on the board is advisory and without vote. The jurisdiction of the fund is co-extensive with state boundaries. The funds derived from premiums and assessments are to be expended to carry out the purposes of the act: The provision of malpractice insurance to eligible providers. Thus the Brown-McNeely Insurance Fund as examined has those characteristics of a state agency as set forth in the opinion I have cited.

The board of the Brown-McNeely Insurance Fund was created by the legislature; delegated a sovereign power of government in granting it authority to make assessments; conferred with certain powers, duties and discretion to be exercised under the supervision of the insurance commissioner and possesses permanency and continuity under the statute. Thus the board members meet the tests of a public office consistently followed by the courts of this state.

Two facts have been brought to my attention which it is argued militate against holding the Brown-McNeely Insurance Fund a state agency. First, it is pointed out that under Section 2513(2) of the Insurance Code, MCLA 500.2513(2); MSA 24.12513(2)"

> "The fund shall be taxed on the same basis as a foreign insurer."

Secondly, the act discusses the establishment of:

> ". . . fair and reasonable procedures for the sharing among the eligible providers of *profit* or loss on risks insured in the fund and other costs . . ." (emphasis added) MCLA 500.2502(1)(b); MSA 24.21502(1)(b)

With respect to the first problem I note that, generally, property of the state is exempt from taxation even where such exemption is not expressly granted. However, ". . . All such property is taxable if the state shall see fit to tax it . . ." 2 Cooley, The Law of Taxation (4th ed) § 621 p 1313. Moreover, the moneys of the fund derived from premiums charged are not state moneys:

> "Moneys of the State housing development authority are not moneys of the State. The funds to be established under the act are trust funds to be administered by the State housing development authority. The State has no beneficial interest in such funds, and when such funds are used to finance the construction of housing, the State cannot be said to be financially interested in such construction. The State government can neither gain nor lose by reason of such construction. We conclude, therefore, that while the construction of private housing is not a public work of internal improvement, the act does not make the State party to, financially interested in, or engaged in carrying on such

work, and the act does not therefore offend against Constitution 1963, art 3, § 6." *In re Constitutionality PA 1966, No 346, supra*, 583; 158 NW 2d 416

Such a holding is consistent with the provision in the act allowing for the investment ". . . in securities specified by law for investment by casualty insurance companies." MCLA 500.2513(1); MSA 24.12513(1). State money on the other hand may not be invested except as authorized by the Michigan Constitution, art 9, §§ 18, 19, 20. This construction is also consistent with the provision that ". . . The state, the commissioner, or the department of treasury shall not be liable or responsible for the payment of claims made against this fund . . ." MCLA 500.2502(1); MSA 24.12502(1). Thus construed the state is not taxing state moneys but a trust fund which the state administers.

The Brown-McNeely Insurance Fund was not created as a profit making venture but rather ". . . to provide malpractice insurance to eligible providers . . ." MCLA 500.2502(1); MSA 24.12502(1). The generation of moneys in the fund more than sufficient to pay all losses and expenses is a possibility inherent in insuring a risk; consequently the legislature wisely provided for distribution of such moneys.

Such factors consequently do not militate against holding the Brown-McNeely Insurance Fund a state agency.

Before concluding that the Brown-McNeely Insurance Fund is a state agency I note that the Michigan Court of Appeals has recently characterized the State Accident Fund, MCLA 418.70 *et seq;* MSA 17.237(701) *et seq* as a "quasi state agency", *Devlin* v *Kaplanis*, 43 Mich App 519; 204 NW 2d 543 (1972). The State Accident Fund under the supervision of the insurance commissioner provides workmen's compensation insurance in accordance with law.

After reviewing the above authorities I am accordingly of the opinion that the Brown-McNeely Insurance Fund is a state agency.

FRANK J. KELLEY,
Attorney General.

760507.8

FISH AND GAME: Hunting on township property

TOWNSHIPS: Hunting on township property

WATERS AND WATERCOURSES: Rights of hunting on inland lakes or streams

Where a township is the owner in fee of all of the subaqueous lands of a navigable inland lake and is also the owner of uplands abutting the lake, the township may prohibit the public from hunting on the lake without adoption of an ordinance regulating hunting in the township.