

The Honorable Jean Hough McGrath
Arizona House of Representatives

May 11, 1999
No. I99-011 (R99-009)

Question Presented

You have requested a formal legal opinion regarding implementation of the Arizona constitutional provision that university instruction be furnished "as nearly free as possible" to Arizona residents. Ariz. Const. art. XI, § 6. In particular, you have asked (i) whether the Arizona Constitution imposes any practical limits on the Arizona Board of Regents' (the "ABOR") decision to raise tuition revenue, (ii) how one can determine when tuition is not "as nearly free as possible," (iii) whether justification is necessary for the ABOR to fix resident tuition, and (iv) whether the ABOR may raise tuition rates simply to stay in line with other public universities?

Summary Answer

In interpreting the Arizona constitutional requirement that instruction be furnished "as nearly free as possible," the Arizona Supreme Court has held that a State university does not violate the constitutional requirement when it imposes fees that are neither excessive nor unreasonable. Whether tuition is unreasonable or excessive cannot be determined as a matter of law, but is an issue of fact to be evaluated in light of all relevant circumstances. The ABOR has statutory responsibility to fix resident tuition and fees taking into account the universities' programs, the legislatively approved budget, and other sources of revenue. One of the circumstances that the ABOR may consider when determining whether tuition is unreasonable are the tuition and fees at other public universities, although this factor may not be the sole basis for raising tuition.

Background

As a condition to Arizona's admission to the Union, Congress required that Arizona establish and maintain a public school system. Enabling Act, §§ 20, 37 Stat. 570 (1910). Accordingly, since statehood, the Arizona Constitution has provided that "the University and all other State educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible." Ariz. Const. art. XI, § 6.

The Legislature delegated to the ABOR the task of setting university tuition rates. Arizona Revised Statutes Annotated ("A.R.S.") § 15-1626(A)(5). The ABOR must make a budget request to the Legislature and prepare an annual operating budget for each university based on appropriated general fund monies and available tuition, fees, and other revenues. A.R.S. § 15-1626(A)(6) and (12).

In establishing tuition and fees, the ABOR makes a yearly review of many factors including: the availability, ratios, and types of student financial aid; student demographics (including status profiles); and the cost of education per student at Arizona's universities. Arizona Board of Regents Report of the Commission on Student Costs and Financial Assistance 15 (December 1994). According to ABOR policy, one of the factors the ABOR evaluates prior to setting tuition and fees is the State Expenditure Authority Per Student ("SEAPS"). Arizona Board of Regents' Executive Summary 8 (November 19-20, 1998). The SEAPS represents the average State operating expenditure (excluding capital outlay) for a full-time equivalent student for a fiscal year. *Id.* For 1998-99, the SEAPS for Arizona's three universities was \$9,330.00. *Id.* In 1998-99 resident students paid 23.1% of the SEAPS for tuition and fees, a reduction of roughly two percentage points since 1993-1994. *Id.* at attachment J.

To assist the tuition setting process, the ABOR established a Commission on Student Costs and Financial Assistance in 1994 and in 1996 assembled the Study Group on Tuition Setting Process. Arizona Board of Regents, Summary Report on the Commission on Student Costs and Financial Assistance (Campbell Commission) and the Study Group on the Tuition Setting Process (Amos Study Group) at 20 (September 24-25, 1998). These entities assisted the ABOR in examining policy issues associated with student costs and financial aid. *Id.* The Summary submitted to the ABOR provided as follows:

The Commission and the Study Group reaffirmed the Board's policy on maintaining a position within the lower 1/3 of resident tuition among the other 49 states' senior public institutions, thus keeping with the Arizona Constitution that "instruction be as nearly free as possible." The Study Group recommended a process in which the state operating budget request process and revenues generated from tuition increases are viewed within the framework of achieving objectives from the universities' strategic plans. This recommendation of tying university priorities as outlined in the strategic plans to tuition revenue increases justifies tuition increases to students, parents, and the Legislature. This recommendation was incorporated into the universities' budget request process.

Id. at 21.

In 1998-99, the ABOR-Central Office compiled statistics on the annual tuition and fees of the fifty state senior public universities. The Arizona university system (including the University of Arizona, Arizona State University, and Northern Arizona University) is ranked forty-eighth lowest in resident tuition and required fees within the fifty states. Arizona Board of Regents Executive Survey, item 2, 15 (November 19-20, 1998).

Analysis

The Constitution, case law, and Arizona statutes provide limited guidance on the standards the ABOR must follow to comply with the constitutional directive that university instruction in Arizona be furnished "as nearly free as possible."⁽¹⁾ Ariz. Const. art. XI, § 6. Constitutional provisions are interpreted liberally to carry out the purposes for which they were adopted. *Laos v.*

Arnold, 141 Ariz. 46, 47, 685 P.2d 111, 112 (1984). Although article XI evinces the framers' desire to establish a public education system from common schools through the university, the record of discussions on the standard in article XI that instruction be furnished "as nearly free as possible" generated no comment on the convention floor. John D. Lesly, *The Arizona State Constitution* at 16 (1993). Thus, the framers of our Constitution provided little direct guidance of how they intended article XI to be interpreted. From the language of article XI, one can infer that the framers supported an educated citizenry and wished to insure that public education at the university level be available and financially accessible to Arizona residents. In 1935, the Arizona Supreme Court considered the constitutional language that instruction be "as nearly free as possible," and held that a State university does not violate the constitutional requirement when it imposes fees that are neither excessive nor unreasonable. *Board of Regents v. Sullivan*, 45 Ariz. 245, 263, 42 P.2d 619, 625 (1935); accord *Board of Regents v. Harper*, 108 Ariz. 223, 225, 495 P.2d 453, 456 (1972) (the Supreme Court determined that *Sullivan* settled the contention of when university tuition was as nearly free as possible in rejecting the argument that the one-year residence requirement for resident tuition violated the Constitution); see also Lesly at 251.

Whether tuition is unreasonable or excessive is a factual inquiry and cannot be determined as a matter of law. Cf. *Gusick v. Boies*, 72 Ariz. 233, 237, 233 P.2d 446, 448 (1951) (in deciding when bail is excessive the Court should consider the circumstances of each case). In evaluating when university charges are unreasonable or excessive, reference is made to the ordinary meaning of those terms. Cf. A.R.S. § 1-213, (provides that words and phrases "shall be construed according to the common and approved use of the language"); *Sierra Tucson, Inc. v. Pima County*, 178 Ariz. 215, 219, 871 P.2d 762, 766 (App. 1994) (when a word is left undefined in a statute it is to be given its ordinary meaning unless the context requires otherwise). The ordinary meaning of "excessive" is "exceeding the usual, proper, or normal." Webster's third new international dictionary 792 (1993). "Unreasonable" is defined as "evidencing indifference to reality or appropriate conduct." *Id.* at 2507. Such standards are necessarily subjective.

The Legislature has the power and responsibility to enact laws to establish and maintain the public school system. Ariz. Const. art. XI, § 6. The Legislature also has the authority to determine the particulars of all aspects of the public school system, including funding. See *Board of Regents v. Sullivan*, 45 Ariz. at 256, 42 P.2d at 623-24; *Roosevelt Elem. Sch. Dist. v. Bishop*, 179 Ariz. 233, 240, 877 P.2d 806, 813 (1994); cf. ("The Enabling Act imposed upon the state the responsibility to create and exclusively control a public school system."). The ABOR's administrative powers, established in A.R.S. § 15-1626, are very broad and include fixing tuition and fees and graduating them in the categories of resident, nonresident, and students from foreign countries. A.R.S. § 15-1626(A)(5). The ABOR's enabling legislation also contains broad authority to adopt annual operating budgets for Arizona's three universities which are comprised of appropriated general fund monies, tuition, registration fees, and other revenue approved by the ABOR. A.R.S. § 15-1626(A)(12). These legislative standards neither structure nor limit the ABOR's application of sound judgment in establishing the educational mission for Arizona's

universities, approving the cost of the programs, and setting tuition based on these considerations, as long as the tuition is not unreasonable or excessive.

Your final question is whether the ABOR may raise tuition rates simply to stay in line with other public universities. The ABOR has neither statutory nor constitutional authority to raise tuition solely in an attempt to be competitive with other public universities. Comparison with other public universities, however, may offer insight into the reasonableness of Arizona's resident tuition.

Conclusion

The Arizona Constitution does not specify how to determine whether tuition is "as nearly as free as possible." The Arizona Supreme Court has interpreted "as nearly free as possible" to mean that the ABOR may not set fees that are excessive or unreasonable. Whether tuition is unreasonable or excessive cannot be determined as a matter of law but is an issue of fact to be evaluated in light of all relevant circumstances. The Legislature has provided the ABOR with discretion to set university tuition rates taking into account existing programs, the legislatively approved budget, and sources of revenue. Without more specific legislative guidance, the ABOR has broad responsibility to establish the educational mission for Arizona's universities, approve the costs of the programs, and set tuition based on these considerations, as long as the tuition is not unreasonable or excessive.

¹ Although the Constitution prohibits charging tuition in the common schools, it permits tuition at the university level. The Arizona Supreme Court has interpreted "common schools" to include those grades between kindergarten and high school. *Carpio v. Tucson High Sch. Dist. No. 1*, 111 Ariz. 127, 128, 524 P.2d 948, 949 (1974).

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