

January 17, 2002

Gary Stivers, Executive Director
Idaho State Board of Education
650 W. State Street
Boise, ID 83702

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Stivers:

This guideline is provided in response to the State Board of Education's ("Board") request for guidance regarding the legality of instituting a differential fees program ("Program") at Idaho's universities and colleges. The Program, as described in your letter, would enable an institution to charge a group of students a higher matriculation fee, as defined in Idaho Code § 33-3717(1)(b), than other students based upon academic major or emphasis. This guideline will analyze the Program under art. 9, sec. 10 of the Idaho Constitution, Idaho Code § 33-3717, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and art. 1, sec. 2 of the Idaho Constitution.

The question of the legality of the Program arises as a result of the University of Idaho's ("University") recent proposal to the Board to institute such a Program for students in its Integrated Business Curriculum ("IBC"). The IBC makes up the junior level common curriculum for all students in the University's College of Business and Economics. See University of Idaho's Differential Fees Proposal, Board's agenda materials, p. 12 of the Instruction, Research, and Student Affairs agenda dated November 14-15, 2001, attached hereto as Exhibit A. According to the University, the unique resources for the IBC include a five-person faculty team, a limited section enrollment cap of 60 students per IBC section, considerable faculty time as mentors for student teams, coordination of material, and providing cross-functional perspectives on the businesses presented in the IBC. The University contends, "The resource demands for this unique approach to undergraduate business education are unusually high when compared to traditional pedagogy in other business curricula." *Id.* at p. 17. The University asserts that the "combination of empirical support, outside evaluation, and personal testimonials support the University's position that the IBC is indeed a unique program that differentiates the University's undergraduate business program." *Id.* at p. 16. It is unclear whether either the activities of the IBC students or the IBC in general do in fact result in increased costs to the University in terms of maintenance and operation of the physical plant, student services or institutional support more than any other major or emphasis at the University.

While the only differential matriculation fees proposal currently before the Board

is the proposal from the University regarding the IBC, if the Board determines that the Program is appropriate, other institutions may also seek to institute a differential matriculation fees structure for their different departments. Thus, the legality of a differential matriculation fees structure in general must be analyzed.

Our conclusion is that the Program would not violate art. 9, sec. 10 of the Idaho Constitution or Idaho Code § 33-3717. However, the Program may not pass rational basis scrutiny under the Fourteenth Amendment to the United States Constitution or art. 1, sec. 2 of the Idaho Constitution if the purpose of the classification is only to reimburse the institution for increased cost of instruction.

ANALYSIS

A. Definition of “Tuition”

Art. 9, sec. 10 of the Idaho Constitution, incorporating the 1889 Territorial Act creating the University, prevents the imposition of a fee to any resident student attending the University. See Dreps v. Bd. of Regents of the Univ. of Idaho, 65 Idaho 88, 95, 139 P.2d 467, 470 (1943). The University, however, is entitled to charge resident students tuition for studies in a “professional department” and for “extra studies.” *Id.* at p. 468, n.1. Similarly, Idaho Code prohibits charging a fee for tuition to full-time, regularly enrolled resident students in any degree-granting program at Idaho’s state colleges or universities (hereinafter collectively referred to as “institutions”). Idaho Code § 33-3717(1), adopted in 1970, also provides an exception for tuition charged for studies in a professional college, school or department, or for “extra studies,” as well as for part-time enrollment. Thus, under Idaho law, tuition may only be charged to non-resident students, students in a professional department, students involved in extra studies, or part-time students.¹

Tuition is defined in Idaho Code § 33-3717(1)(a) as:

[T]he cost of instruction at the colleges and universities. The cost of instruction shall not include those costs associated with said colleges and universities, such as maintenance and operation of physical plant, student services and institutional support, which are complementary to, but not a part of the instructional program.

In accordance with the statutory definition, the Board’s Governing Policies and Procedures Manual (“Board Policies”) defines “tuition” as follows:

Tuition is defined as the fee charged for the cost of instruction at the colleges and universities. The cost of instruction shall not include those costs associated with said colleges and universities, such as maintenance

and operation of physical plant, student services, and institutional support, which are complementary to, but not part of the instructional program. Tuition may be charged only to nonresident, full-time and part-time students enrolled in any degree-granting program and to vocational students enrolled in pre-employment, preparatory programs.

Board Policy § V.R.1.a. (1).

B. Definition of “Matriculation Fees”

Idaho law allows the institutions to charge “matriculation fees” to their resident students. Matriculation fees are defined as:

[T]he fee charged to students for educational costs excluding the cost of instruction. The state board of education and board of regents for the University of Idaho may prescribe matriculation fees for resident students.

Idaho Code § 33-3717(1)(b). In accordance with this definition and the statutory definition of “tuition,” the Board defines matriculation fees in policy as follows:

Matriculation fee is defined as the fee charged for maintenance and operation of physical plant, student services, and institutional support for full-time students enrolled in academic credit courses and vocational pre-employment, preparatory programs.

Board Policy § V.R.1.a.(2). Thus, while tuition is prohibited for resident students, the institutions can charge matriculation fees, as they are the fees charged for certain educational costs that are not costs of instruction.

We have been informed that Idaho’s institutions currently charge their students for only a fraction of the actual costs of maintenance and operation of physical plant, student services, and institutional support. The remainder of the actual costs for these items is paid out of the institutions’ “general accounts,” consisting of state-generated appropriated funds. The general accounts are currently used not only to help supplement the matriculation fees for the actual costs of these items, but also for other costs involved in running the institutions, including the cost of instruction. The institutions are allowed, subject to Board approval, to increase their matriculation fees to pay for these specified costs. *See generally* Idaho Code § 33-3717(1)(b); Board Policy § V.R.4.a. If the matriculation fees were increased, the institutions would need lesser funds from their general accounts to pay for the actual costs incurred for maintenance and operation of their physical plants, student services, and institutional support. Therefore, by increasing the matriculation fees, the institutions indirectly benefit their general accounts that support the costs of instruction.

C. The Legality of Differential Matriculation Fees Under Art. 9, Sec. 10 of the Idaho Constitution and Idaho Code § 33-3717

The amount of matriculation fees charged by the institutions is within the discretion of the Board. Idaho Code § 33-3717(1)(b). As long as the matriculation fees are used for maintenance and operation of physical plant, student services, and institutional support, such fees are legal under section 33-3717(1)(b). *See generally* Letter from Steven Berenter, Deputy Attorney General, to Mr. Milton Small, Executive Director, Idaho State Board of Education, dated September 2, 1980 (regarding the imposition of student fees for institutional maintenance), attached hereto as Exhibit B; Attorney General Guideline from Kenneth Mallea, Deputy Attorney General, to Representative Joseph Walker, dated February 4, 1980 (regarding which costs of operating and maintaining Idaho's universities and colleges are properly associated with tuition) 1980 Idaho Att'y Gen. Ann. Rpt. 205, attached hereto as Exhibit C. There is nothing in Idaho Code § 33-3717 or art. 9, sec. 10 of the Idaho Constitution that explicitly requires each student to pay an equal amount of fees. However, if certain students are subject to increased matriculation fees without a related increased expense on behalf of the institution for the costs that may be reimbursed by matriculation fees, there may be significant equal protection concerns.

D. The Legality of Differential Matriculation Fees Under the Equal Protection Clause of the United States Constitution and the Idaho Constitution

Implementing the Program at Idaho's institutions may present equal protection concerns. "The principle underlying the equal protection clauses of both the Idaho and United States Constitutions is that all persons in like circumstances should receive the same benefits and burdens of the law." Bon Appetit Gourmet Foods, Inc. v. State, Dep't of Employment, 117 Idaho 1002, 1003, 793 P.2d 675, 676 (1989); State v. Breed, 111 Idaho 497, 500, 725 P.2d 202, 205 (1986). By its very nature, the Program divides students into different categories according to academic department and associated matriculation fees. Therefore, the Program is subject to an equal protection analysis.

Idaho courts have set forth a three-step equal protection analysis for consideration under the Fourteenth Amendment to the United States Constitution and art. 1, sec. 2 of the Idaho Constitution. *See Sanchez v. City of Caldwell*, 135 Idaho 465, 467, 20 P.3d 1, 3 (2001). First, we must identify the classification under attack. *Id.* Second, we must determine the standard under which the classification should be tested: strict scrutiny, means-focus/intermediate, or rational basis. *Id.* Finally, we must determine whether the appropriate standard has been satisfied. *Id.*

Applying this three-step analysis to the present matter, the classification at issue is University students in the IBC.² Because this case does not involve suspect classes or

fundamental rights, strict scrutiny does not apply to this equal protection analysis.³ State v. Mowrey, 134 Idaho 751, 754, 9 P.3d 1217, 1220 (2000). Intermediate scrutiny under the Fourteenth Amendment to the United States Constitution is not appropriate because the proposal for differential fees is not based on gender or illegitimacy. *Id.* In addition, Idaho's means-focus scrutiny is also not applicable in this matter. The Program does not distinguish the IBC students on an odious basis, or on any basis that is calculated to "excite animosity or ill will." *See State v. Hart*, 135 Idaho 827, 830, 25 P.3d 850, 853 (2001).

Rational basis scrutiny applies to all other challenges not appropriately analyzed under the strict scrutiny or intermediate/means-focus scrutiny. *See Mowrey*, 134 Idaho at 754, 9 P.3d at 1220. Applying the rational basis scrutiny to the Program reveals genuine legal concerns. Under both the United States Constitution and the Idaho Constitution, a classification will pass rational basis review "if it is rationally related to a legitimate government purpose" and, as stated in Meisner v. Potlatch Corporation, "if there is any conceivable state of facts to support it." Mowrey, 134 Idaho at 755, 9 P.3d at 1221; Meisner v. Potlatch Corp., 131 Idaho 258, 262, 954 P.2d 676, 680, *cert. denied*, 525 U.S. 818, 119 S. Ct. 56, 142 L. Ed. 2d 44 (1998). When applying the rational basis analysis, courts "do not judge the wisdom or fairness of the challenged legislation." *Id.* *See also Sanchez*, 135 Idaho at 467, 20 P.3d at 3.

Using the IBC as an example, the Program may fail rational basis scrutiny if the purpose of the classification is only to indirectly charge for increased instructional costs. Instructional costs are "tuition," prohibited by art. 9, sec. 10 of the Idaho Constitution and Idaho Code § 33-3717(1). While the institutions are able, subject to Board approval, to increase the amount of matriculation fees currently charged to their students "across the board" to pay for certain specified costs, the University must be able to demonstrate a rational relationship between the classification of students in the IBC and a legitimate purpose. Assuming this is the only purpose for the Program, there is, arguably, no legitimate government purpose to this classification.

Assuming the University can demonstrate that the classification has a legitimate government purpose, such as the IBC accounting for a higher level of costs that may be reimbursed by matriculation fees, this conclusion may be different. In other words, if the IBC generates an increased cost for maintenance and operation of physical plant, institutional support or student services, and the differential fees collected are used to pay for these increased costs, a Program based on these actual increased non-instructional costs may pass a rational basis review.

CONCLUSION

In summary, the institutions are not prohibited from charging differential matriculation fees under art. 9, sec. 10 of the Idaho Constitution or Idaho Code § 33-

3717, provided that the fees collected are used only for maintenance and operation of physical plant, institutional support or student services. An equal protection analysis, however, leads to the conclusion that the Program may not survive a rational basis review if it is merely a method to allow an institution to be reimbursed for increased costs of instruction. If the classification of the IBC students in the Program has a legitimate purpose, such as accounting for an increased cost for items that may be reimbursed by matriculation fees, it is likely to pass a rational basis review.

Very truly yours,

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¹ The IBC is not a “professional department” as defined by the Board. Board Policy § V.R.1.6.(4).

² For purposes of this specific analysis, we are reviewing the IBC only. However, this analysis is also applicable to any other Program based on a specific academic department or major.

³ The Idaho Supreme Court has determined that “education is not a fundamental right because it is not a right directly guaranteed by the Idaho Constitution.” Idaho Schools for Equal Education Opportunity v. Evans, 123 Idaho 573, 582, 850 P.2d 724, 733 (1993). Education is also not a fundamental right guaranteed by the United States Constitution. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct.1278, 36 L. Ed. 2d 16 (1973).