OFFICE OF THE ATTORNEY GENERAL

March 7, 2002

OFFICIAL OPINION 2002-1

Tim McClure, Director
State Ethics Commission
402 West Washington Street, Room W189
Indianapolis, Indiana 46204

RE: Authority of State Ethics Commission to Enforce Executive Orders

Dear Mr. McClure:

This letter responds to the request of the former director, David Maidenberg, for an answer to the following question:

Does the State Ethics Commission have the authority to enforce an executive order establishing standards of conduct for the Indiana Utility Regulatory Commission?

It is our opinion that the State Ethics Commission does have the authority to enforce an executive order establishing standards of conduct for the Indiana Utility Regulatory Commission.

ANALYSIS

The Commission is established in, and granted authority by, Indiana Code Chapter 4-2-6. The Commission's authority to investigate and take action concerning ethics violations is found in Indiana Code Chapter 4-2-6-4 which provides a procedure by which the Commission may initiate investigations itself or receive complaints that ultimately can lead to action being taken. In language that is repeated elsewhere in the statute regarding the Commission's powers, Indiana Code Section 4-2-6-4(b)(2)(E) and (F) allow the Commission to take various actions when it determines that a respondent has violated "this chapter, a rule adopted under this chapter, or any other statute or rule establishing standards of official conduct of state officers, employees, or special state appointees."

In 1993 Governor Bayh issued an executive order entitled Code of Ethics for the Indiana Utility Regulatory Commission which addresses the conduct of the members of the Commission and certain employees of the Commission. Section 1 of the executive order states that:

> An independent and honorable Commission is indispensable to the proper performance of its statutory duties. Commissioners should establish, maintain, and enforce high standards of conduct so that the integrity and independence of the Commission may be preserved. **The provisions of this code should be construed and applied to further that objective without any limitation upon the State Ethics Commission in the exercise of its powers**.

(emphasis added). Therefore, it is clear that the intent was that the Code of Ethics for the Indiana Utility Regulatory Commission was intended to supplement other requirements enforced by the State Ethics Commission.

There still remains the question of whether this Code of Ethics falls within the scope of "any other statute or rule establishing standards of official conduct of state officers, employees, or special state employees" and thus falls within the State Ethics Commission jurisdiction. The question becomes whether this Code of Ethics is either a statute or a rule. Executive orders are issued by the governor and statutes are enacted by the General Assembly. An executive order is clearly not a statute.

The Indiana Court of Appeals discussed the nature of executive orders in a recent opinion stating that:

> In general an executive order is a command or direction issued by the "President of the United States or the chief executive officer of a State that has the force of law and that is promulgated in accordance with applicable law." 43 U.S.C. § 14616 (defining an executive order in the context of public health and welfare). An executive order must fall within the authority granted to the Governor by the constitution or statutory provision. 81A C.J.S. § *States* 130 (1977).... Executive power is the "power to execute the laws, to carry them into effect as distinguished from the power to make the laws and the power to judge them." *Tucker v. State*, 218 Ind. 614,670, 35 N.E. 2d 270, 291 (1941). By express legislation the Governor has the responsibility of ensuring the efficient operation of the executive branch of government. Ind. Code § 4-3-6-3 provides in part that the Governor shall re-examine from time to time the organization of all agencies of State government and determine what changes are necessary to accomplish various purposes including "to promote the better execution of laws, the more effective

management of the executive and administrative branch of the government and of its agencies and functions, and expeditious administration of the public business."

Nass v. State ex. rel. Unity Team, Local 9212 International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), 718 N.E.2d 757, 763 (Ind. App. 1999), transfer denied, *Nass v. Unity Team*, 735 N.E.2d 224 (Ind. 2000).

However, the inquiry remains whether an executive order is a rule. Rules and rulemaking are generally governed by Indiana Code Chapter 4-22-2. Several pertinent definition are found in Indiana Code Section 4-22-2-3 as follows:

(a) **"Agency" means any officer**, board, commission, department, division, bureau, committee, or other governmental entity **exercising any of the executive** (including the administrative) **powers of state government**. The term does not include the judicial or legislative departments of state government or a political subdivision as defined in IC 36-1-2-13.

(b) "Rule" means the whole or any part of an agency statement of general applicability that:

(1) has or is designed to have the effect of law; and

(2) implements, interprets, or prescribes:

(A) law or policy; or

(B) the organization, procedure, or practice requirements of an agency.

(c) "Rulemaking action" means the process of formulating or adopting a rule….

(emphasis added).

Indiana Code Section 4-22-2-13 addresses the scope of Indiana Code Chapter 4-22-2 and states the following as pertinent to the current question.

(c) **This chapter does not apply to a rulemaking action that results in any of the following rules**:

(1) A resolution or directive of any agency that relates solely to internal policy, internal agency organization, or internal procedure and does not have the effect of law

(2) A restriction or traffic control determination of a purely local nature that:

(A) is ordered by the commissioner of the Indiana department of transportation;

(B) is adopted under IC 9-20-1-3(d), IC 9-21-4-7, or IC 9-20-7; and

(C) applies only to one (1) or more particularly described intersections, highway portions, bridge causeways, or viaduct areas.

(3) A rule adopted by the secretary of state under IC 26-1-9.1-526.

(4) **An executive order or proclamation issued by the governor**.

(emphasis added).

Although rules probably are more typically thought of as provisions adopted by various state agencies after having gone through the rulemaking process under Indiana Code Chapter 4-22-2, it is clear from the above quoted provisions that the General Assembly considers an executive order a rule. With that said, it would be an "other rule establishing standards of official conduct" as contemplated by the State Ethics Commission statute and therefore within the enforcement authority of the State Ethics Commission.

CONCLUSION

For the foregoing reasons, it is our opinion that the State Ethics Commission does have the authority to enforce an executive order establishing standards of conduct for the Indiana Utility Regulatory Commission.

We hope this response has adequately answered your question. If you need more assistance concerning this matter, please call me at (317) 232-6303.

Sincerely,

Stephen Carter
Attorney General

James F. Schmidt
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

March 7, 2002

OFFICIAL OPINION 2002-02

Dr. Suellen Reed
State Superintendent of Public Instruction
Room 229 State House
Indianapolis, IN

RE: Funding for Charter Schools

Dear Dr. Reed:

During its 2001 session, the Indiana General Assembly passed the Charter School Act, now codified at Ind. Code § 20-5.5, *et. seq*. (the "Act"). The Act provides for the creation of charter schools, which are defined as "*public* elementary school[s] or secondary school[s] established under this chapter." Ind. Code § 20-5.5-1-4 (emphasis added). In the Act the Legislature provided an alternative to traditional public schools, and authorized charter schools to provide:

> innovative and autonomous programs that do the following:
>
> (1) Serve the different learning styles and needs of *public school students*.
>
> (2) Offer *public school students* appropriate and innovative choices.
>
> (3) Afford varied opportunities for professional educators.
>
> (4) Allow *public schools* freedom and flexibility in exchange for exceptional levels of accountability.
>
> (5) Provide parents, students, community members, and local entities with an expanded opportunity for involvement *in the public school system*.

Ind. Code § 20-5.5-2-1.

The Department of Education (the "Department") will be required by Ind. Code § 20-5.5-7-3 to distribute state tuition support for charter schools. An issue has arisen as to when the initial distribution of these funds[1] to charter schools must be made by the Department.

In your letter dated February 14, 2002, requesting a legal opinion, you provided us with the Department's interpretation based on its reading of the Act and the Budget Bill, P.L.291-2001 § 4. The Department believes that (i) it is prohibited by statute from making any distribution of state tuition support to charter schools earlier than January 2003, and (ii) it has no authority to reduce payments to which traditional public school corporations are entitled to receive (during the first semester of a school year) for the purpose of providing tuition support to charter schools.

Brief Answer

It is my legal opinion that the General Assembly has created dual obligations that the Department must fulfill. It cannot be assumed that the General Assembly intended to have the new public schools operate without state tuition funds absent clear language to that effect in the Charter School Act. Therefore, the Department of Education is required both to distribute tuition support and other state funding upon verification of the required information from the charter school organizer and to make full state tuition payments to public school corporations.

Analysis

The importance of the issue presented is one that is set within our Indiana Constitution, which states:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools[2], wherein tuition shall be without charge, and equally open to all.

Ind. Const. art. 8, § 1. Any analysis of charter school funding requirements must begin with the basic and irrefutable fact that charter schools are *public* schools, "wherein tuition shall be without charge."

Titles 20 and 21 of the Indiana Code are replete with statutory provisions evidencing the General Assembly's ongoing concern with the quality of education in this state and the importance of minimizing disparities of funding available to educate each student in a *public* school.

The establishment of charter schools is in direct response to public interest in providing innovation and flexibility in education. The fact that these schools may operate independently of already-established school corporations does not negate the fact that they are, nonetheless, by definition *public* schools. Each charter school student is to be counted for the purpose of state tuition support "in the same manner as a student of the school corporation in which the charter school student resides." Ind. Code § 20-5.5-7-2.

In the absence of a specific legislative directive which indicates that charter schools must operate without state tuition support during the first semester of operation, one may only conclude that charter schools, like all other public schools, are required to be funded with public funds during the first semester of a school year. Indeed, any other reading would require the inference that the General Assembly intended charter schools with inadequate private start-up monies to never open. *See, e.g., Wilson v. Stanton*, 424 N.E.2d 1042, 1045 (Ind. App. 1981) ("It is not to be presumed that the legislature intends its enactments to have no effect.")

Although the Act provides that the organizer of a charter school "*may* apply for and accept for a charter school (1) independent financial grants; or (2) funds from public or private sources other than the department," Ind. Code § 20-5.5-7-5 (emphasis added), a traditional school corporation has similar authorization. (A "school corporation... shall have... the power... [t]o make all applications, to enter into all contracts, and to sign all documents necessary for the receipt of aid, money, or property from the state government, the federal government, *or from any other source*." Ind. Code § 20-5-2-2-(15) (emphasis added).

In addition, the General Assembly has explicitly provided that charter schools are entitled to a proportionate share of the public funds available to all other public schools. S*ee generally*, Ind. Code § 20-5.5-7-3. Of equal importance is the fact that the General Assembly did *not* provide that charter schools specifically be required to operate without state tuition funding during the first semester they are in operation.

Any other statutory provisions that possibly conflict must be construed to give effect to the Act. "[T]his is particularly true where the hardships and evils of a different construction could readily affect adversely the educational opportunities of children." *Fort Wayne Public Schools v. State ex rel New Haven Public Schools*, 159 N.E.2d 708, 712 (Ind. App. 1959). The Indiana Court of Appeals provided this guidance for statutory construction:

> … when two statutes on the same subject must be construed together, the court should attempt to give effect to both; however, where the two are repugnant in any of their provisions, then the later statute will control and operate to repeal the former to the extent of the repugnancy. Similarly, where one statute deals with a subject in general terms and another statute deals with a part of the same subject in a more detailed or specific manner, then the two should be harmonized, if possible; but if they are in irreconcilable conflict, then the more detailed will prevail as to the subject matter it covers.

Indiana Alcoholic Beverage Commission v. Osco Drugs, 431 N.E.2d 823, 833 (Ind. App. 1982) (citations omitted).

In the funding formulas set forth in Ind. Code § 21-3-1.7, the General Assembly has sought to reduce the disparity in resources available to educate students residing in "property-poor" taxing districts and those in "property-rich" taxing districts. The funding formulas require each school corporation to make an Average Daily Membership ("ADM") count "within the first thirty (30) days of the school term." Ind. Code § 21-3-1.6-1.1(d). The school corporation's ADM is then used in a formula weighted to take into account, among other things, the amount of local revenues available and significant changes in both the number of students and the amount of local revenues over previous years. Ind. Code § 21-3-1.7. A school corporation's state tuition entitlement is adjusted in January to reflect changes in the September ADM.

The fact that an already-existing school corporation must wait until January for funding adjustments based on September's ADM does not support the argument by correlation that a charter school must wait until January for any state tuition support.

In regard to state tuition support for charter schools, the Act provides:

> (a) Not later than the date established by the department for determining average daily membership under IC 21-3-1.6-1.1(d), the organizer shall submit to the department [of education] the following information:
>
> (1) The number of students enrolled in the charter school.
>
> (2) The name of each student and the school corporation in which the student resides.
>
> (b) After verifying the accuracy of the information reported under subsection (a), the department shall distribute the following to the organizer[3]:

> (1) Tuition support and other state funding for any purpose for students in the charter school.
> (2) A proportionate share of state and federal funds received for students with disabilities or staff services for students with disabilities or staff services for students with disabilities for the students with disabilities enrolled in the charter school.
> (3) A proportionate share of funds received under federal or state categorical aid programs for students who are eligible for the federal or state aid enrolled in the charter school.
>
> ....
>
> (d) The distribution under subsection (b) shall be made on the same schedule as the schedule on which the school corporation receives funds.

Ind. Code § 20-5.5-7-3. It is important to note that the count mentioned in subsection (a) is *not* referred to as the "ADM" count. Likewise, the Department is *not* directed by subsection (a) to use the student count number to determine the calendar year tuition support for a charter school. Rather, it is directed simply to "distribute tuition support" to the charter school.

In its interpretation of the statute, the Department does not distinguish between the difference in: (i) the requirement that public schools (including charter schools) be funded during the first semester of a school year; and (ii) the availability of such funds to make such distributions. The Department appears to interpret Ind. Code § 20-5.5-7-3(d) ("the distribution under subsection (b) shall be made on the same schedule as the schedule on which the school corporation receives funds") to preclude distribution to a charter school during the first semester based on the fact that available funds are already committed to pre-existing public school corporations.

P.L. 291-2001 § 4 makes the biennial appropriation for tuition support to public schools. It makes no specific reference to charter schools, providing simply that

> [t]he above appropriations for tuition support shall be made each calendar year under a schedule set by the budget agency and approved by the governor. However, the schedule shall provide for at least twelve (12) payments, that one (1) payment shall be made at least every forty (40) days, and the aggregate of the payments in each calendar year shall equal the amount required under the statute enacted for the purpose referred to above.

Although public schools operate on the basis of a school year (defined in Ind. Code § 21-3-1.6-1(b) as "a year beginning July 1 and ending the next succeeding June 30"), state tuition support is distributed during the following calendar year. Ind. Code § 21-3-1.6-1.1(c) defines "state distribution" to mean "the amount of state funds to be distributed to a school corporation in any *calendar* year under this chapter," with the amount of funds calculated on the basis of a school's ADM of "the school year ending in the calendar year." Ind. Code § 21-3-1.6-1.1(d).

Subject to the amount appropriated by the General Assembly, "the amount a school corporation is *entitled* to receive in tuition support for a year is the amount determined by section 8 of this chapter," Ind. Code § 21-3-1.7-9. This amount is distributed on a monthly schedule established by the Budget Agency and approved by the Governor. P.L. 291-2001 § 4.

Thus, the statutory framework established by the General Assembly has an inherent time lag of roughly one semester between the time a public school starts a school year and the time it receives a distribution of state tuition support based on September ADM.

However, during the first semester of a school year each public school corporation is assured under Ind. Code § 21-3-1.7-9 that it will receive at least the monthly distributions based on the previous September ADM count, and the school may budget accordingly. The Charter School Act in no way alters the state's obligation to the traditional public school corporations. It is therefore my legal opinion that the Department has no authority to reduce payments which traditional public school corporations are entitled to receive during the first semester for the purpose of providing tuition support to charter schools.

I am fully aware that the General Assembly has created what may be termed an "unfunded legislative mandate". It has created a new variety of public school without either (1) addressing the fiscal impact these schools may have on entitlements to existing school corporations, or (2) expressing an intent that charter schools will not receive state tuition support during the first semester of operations.

It is possible, given current budget projections, that the appropriations cap set by the General Assembly in 2001 may be inadequate. This is an issue that the General Assembly created, and one that may require its action to remedy.

The Department may find in the performance of its ministerial duties that it is impossible to satisfy the State's financial obligations to all public schools as required by the General Assembly. In such an event, the General Assembly must supply the Department with

the necessary funds to satisfy these obligations. The Department must carry out all of its ministerial duties as required by statute and may not allow the potential lack of funding to cause it to choose one duty over another.

Therefore, in answer to your request for guidance as to your statutory obligations as Superintendent of Public Instruction under the new Charter School Act, it is my legal opinion that the Charter School Act obligates the Indiana Department of Education to distribute tuition support and other state funding upon verification of the required information from the charter school organizer, and to make full state tuition payments to public school corporations.

Sincerely,
Stephen Carter
Attorney General

[1] The Act also provides that charter schools shall receive a proportionate share of "local support" (general fund property tax levy, auto excise and financial institution taxes) available to any other public school. Ind. Code § 20-5.5-7-3(c). The Department is not responsible for distribution of these funds, and any issue surrounding distribution of these funds is beyond the scope of this opinion.
[2] The phrase "Common Schools" is synonymous with "public schools" and includes high schools. *State v. O'Dell*, 118 N.E. 529, 530 (Ind. 1918).
[3] This opinion focuses exclusively on the distribution of state tuition support as that term is used in Ind. Code § 21-2-1.7. It does not address other sources of state or federal funding.

OFFICE OF THE ATTORNEY GENERAL

July 3, 2002

OFFICIAL OPINION 2002-3

Mr. Phillip H. Roush
Commissioner
Proprietary Education Committee
302 W. Washington Street, Room E201
Indianapolis, IN 46204-2767

RE: Jurisdiction of the Committee over computer software/hardware training programs.

Dear Mr. Roush:

This letter responds to your request for an answer to the following question:

Are organizations that offer instructional services for a fee in a variety of the popular software and mainframe operation programs exempt from the jurisdiction of the Proprietary Education Committee by virtue of offering instruction that may be used for self-motivational or avocational purposes?

BRIEF ANSWER

The types of computer software/hardware training programs your office presented to our office for review meet the statutory definition of a post-secondary proprietary educational institution. The governing statute provides that "no person shall do business as a post-secondary proprietary educational institution in the state of Indiana without accreditation." In order to gain accreditation, a person must file an application and be approved by the Proprietary Education Committee. The only exceptions to the requirement for accreditation for individuals doing business in Indiana by offering to the public instructional or educational services or training in any of the technical, professional, mechanical, business, or industrial occupations for a fee are found at Indiana Code section(s) 20-1-19-1(1)(A) through (E). The programs presented to our office for review did not fall under any of the listed exceptions.

Your office additionally, specifically asked whether any of the programs presented to our office would be exempt from jurisdiction under Indiana Code section 20-1-19-1(1)(D)(iii). This subsection provides that any organization that offers *exclusively* instruction that is self-improvement, motivational, or avocational in intent is not deemed a post-secondary proprietary educational institution for purposes of the chapter." It is our opinion that the programs presented to our office for review did not offer *exclusively*

instruction that was clearly self-improvement, motivational, or avocational in intent. Therefore, the software/hardware computer training programs presented to our office for review should fall under the jurisdiction of the Proprietary Education Committee.

ANALYSIS

Ind. Code § 20-1-19-1 provides in pertinent part:

> "Post-secondary proprietary educational institution" means any person doing business in Indiana by offering to the public for a tuition, fee or charge, instructional or educational services or training in any technical, professional, mechanical, business, or industrial occupation, either in the recipient's home, at a designated location, or by mail."

Ind. Code § 20-1-19-5 provides that "[o]n or after July 1, 1972, no person shall do business as a post-secondary proprietary educational institution in the state without having obtained accreditation." The exceptions to the requirement for accreditation from the committee are found at Ind. Code § 20-1-19-1(A) through (E). If any organizations' instructional curriculum falls under one of the listed exceptions, jurisdiction under the committee is not required. The exceptions listed include, but are not limited to educational institutions financed by public funds, institutions that are regulated by another state regulatory board, employer training for employees provided without charge, and training that is offered *exclusively* for self-improvement or avocational purposes. Because in Indiana, corporations, partnerships, limited liabilities, etc., can be defined as "persons," anyone doing business in any of those manners are contemplated by the statute, and potentially subject to jurisdiction.

Individuals may enroll in a variety of the computer software/hardware training programs exclusively for self-improvement, or avocational purposes. Because of this fact, you have asked our office if that qualified the organizations providing training or educational services from the requirement for accreditation by virtue of one of the listed statutory exceptions.

Ind. Code § 20-1-19-1(1)(D)(iii) specifically provides:

> The following are not considered to be post-secondary proprietary educational institutions under this chapter:
> (D) Any educational institution or educational training that:
> "[o]ffers *exclusively* instruction which is *clearly* "self-improvement, motivational, or avocational in intent."

The statute provides that to fall under this exception, the educational institution or training must only offer instruction that is *clearly* "self-improvement, motivational, or avocational in intent." The authors use of the words *exclusively* and *clearly* must be assumed to be intentional. "There is a presumption that words appearing in a statute were intended to have meaning, and a court will give those words their plain and ordinary meaning absent a clearly manifested purpose to do otherwise." *Indiana Dept. of Human Services v. Firth*, 590 N.E.2d 154, 157 (Ind. Ct. App. 1992) trans den. "Additionally, courts are given the authority to use the dictionary to determine the plain and ordinary meaning of a word." *State Bd. of Accounts v. Indiana University Found.*, 647 N.E.2d 342,347 (Ind. Ct. App. 1995). Merriam-Webster's Ninth New Collegiate Dictionary (1988) defines exclusively as "in an exclusive manner." Exclusive is further defined as "limiting or limited to possession, control, or use by a single individual or group."

Although the programs may provide educational training that any individual may choose to enroll in exclusively for self-improvement or avocational purposes, it is not the intended purpose of the enrollee that is contemplated by the statute. Based on the statutes' language, it is clear that it is the intention of the provider that the statute addresses. The *provider* must intend to offer only instruction that is self-improvement, motivational, or avocational in intent. Based on the provider responses received, and the information gleaned from provider brochures, it appears clear that the instruction provided by the programs given to our office for review was not offered only for self-improvement, motivational or avocational purposes, as is required to fall under the statutory exception.

A majority of the programs we reviewed were costly. Typical packages range from one-thousand five hundred ($1,500) to eleven thousand ($11,000) dollars for a complete program that included testing and certification. The courses generally certified students to be at an alphabetic or numeric level of mastery for a specific type of software program, or hardware maintenance/operation after the successful completion of an examination. The programs were generally advertised as being able to either increase the marketability of an individual or qualify them for specific types of positions by virtue of their level of certification. Some courses were offered as a part of a comprehensive program, and many of the providers are accredited vocational schools in their states of origin.

The courses are generally purchased by individuals who are already using information technology skills in their respective jobs and who are attempting to improve their skill level for promotion or employment, or to become qualified for a specific job. The majority of the courses offered are in classroom facilities with intensive instruction. Some courses may be able to be purchased over

the internet or by mail order and are self-paced for completion at home. Whether there are attendance or hour requirements to qualify to sit for testing was not made clear from the materials presented. The programs at minimum appear to offer a benefit of improved competency with a particular software package even if an individual fails to achieve a specific certification level. However, organizations that provide these training services do not appear to be regulated by any agency, and it is therefore not clear where a dissatisfied consumer would turn for a grievance. Although the extent of job placement services provided was also not made clear, many of the brochures mentioned job placement assistance. Based on those facts, it does not appear as if a majority of the providers are offering their educational services *exclusively* for self-improvement or avocational purposes.

"Vocational education," is defined at Ind. Code § 20-10.1-1-11(a) as "any education the major purpose of which is to prepare a person for profitable employment." The Indiana Court of Appeals has addressed the question of what constitutes a vocational education. In the case of *Sweet v. Art Pape Transfer, Inc.*, 721 N.E.2d 311 (Ind. Ct. App. 1999) transfer dismissed by *Sweet v. Art Pape Transfer, Inc.*, 735 N.E.2d 232 (Ind. 2000), the court found that a nontraditional school of natural health, in which a 21-year-old decedent was enrolled in at the time of her death, was a vocational school for purposes of a wrongful death statute. That statute permitted parents to bring an action for the death of a child under twenty-three (23), if that child was enrolled in vocational school or program at the time of death. The court looked to the statutory definition of vocational education for assistance in basing their decision. Because the wrongful death statute did not offer it's own definition of a vocational school or program, the court looked to definitions applicable to public schools and non-public schools which have voluntarily become accredited at Ind. Code § 20-10.1-1-11(a).

That statute defines vocational education as "any education the major purpose of which is to prepare a person for profitable employment." The court went on to look at the rules in place at the time at 511 IAC 6-1-1 that established the curricular requirements for commissioned schools, and their definition of vocational education program areas. These areas included among other areas "the recognized occupational fields of …consumer and homemaking;…home economics;… [and] …health… "for which organized educational programs are developed that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree." See Id at 314.

The court found the statute and the rules instructive. The court noted that the natural health program was not accredited or financially supported by the state of Indiana and that credits earned from the program could not be transferred to an accredited school. The court noted that the coursework was self-study with no required deadlines. The court noted that the program was preparing students for opportunities that did not require licensure or diplomas, nor did the program maintain a job placement bureau. The court still found the natural health program in which the decedent was enrolled in at the time of her death a vocational school. The court considered the language of the law defining vocational education and held that the facts of the decedent's case met the statutory definition of vocational education. The court found Trinity, a non-traditional school of natural health a vocational school. The court found this way because the instruction provided by Trinity was offered to prepare students to advise clients about natural health in jobs with chiropractors and medical doctors, in health food stores, and etc., and that students from that particular school were employed in such jobs. Because the student was enrolled in a program that was preparation for profitable employment, the Court of Appeals found the program to be vocational.

If there were a challenge to a decision to have these programs fall under the jurisdiction of your committee, the same type of analysis should be applied. The organization of the information technology software/hardware training programs given to our office for review is similar to the natural health program's organization discussed in the *Sweet* decision. A majority of the programs appear to be training to work in the field of information technology, either in the area of software applications, or hardware configuration or maintenance. Just as in *Sweet*, although the majority of the schools are not accredited, and a diploma or licensure is not required for many of these jobs, enrollees are receiving training in a field that will prepare them for a specific type of profitable employment. Some of the brochures provided did contain testimonials from satisfied customers who had found employment in these fields.

Because of these facts, the education offered by the providers sent to our office for review should be found to be vocational, as opposed to avocational. Additionally, although some may argue that the programs can be offered for avocational purposes, it is highly unlikely that the provided training will be found to be offered *exclusively* or only for self-improvement, motivational, or avocational purposes, as is required by the statute. The key to the analysis is not the intention of the enrollee, but that of the provider. And because the programs do not appear to be offered *exclusively* for such purposes, they do not meet that particular statutory exception for jurisdiction.

CONCLUSION

Therefore, because the programs meet the statutory definition for post-secondary proprietary educational institution, because by law to operate one of these institutions a person must be accredited by the committee, and because the information technology

training programs reviewed by our office do not meet any of the statutory exceptions to jurisdiction, these training programs should fall under the jurisdiction of the Committee.

Sincerely,

Stephen Carter
Attorney General

Tracy L. Richardson
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

July 29, 2002

OFFICIAL OPINION 2002-4

The Honorable Bernard A. Carter
Prosecuting Attorney
31st Judicial Circuit, Lake County, Indiana
2293 North Main Street
Crown Point, Indiana 46307

RE: Validity of County Ordinance Conferring Merit Status on Deputy Prosecutors

Dear Mr. Carter:

This letter responds to your request for an answer to the following questions:
1) May a county council confer merit status on a deputy prosecuting attorney by adopting an ordinance to that effect under the authority of the Home Rule Statute?
2) What is the legal effect of such an ordinance?
3) May a county ever have the legal power to exercise control over the independent judgment of a prosecuting attorney in any of the prosecutor's employment decisions?

It is our opinion that a county council may not confer merit status on a deputy prosecuting attorney, and a county ordinance attempting to do so is invalid. The county government's legal powers as they relate to the prosecuting attorney's hiring decisions are set out in statute. The councils have direct involvement in the hiring of an investigator but in other matters have only indirect involvement stemming from the county's duty to appropriate necessary funds for the office.

BACKGROUND

Along with your letter you included a copy of an ordinance that the Lake County Council adopted in 1983. Lake County, Indiana, Code of Ordinances, Volume I, Chapter 35: County Policy, §§35.30-35.38, Merit Status. The ordinance provides that "[a]ll full-time deputy prosecuting attorneys, including any deputy prosecuting attorney in a supervisory position, who accrue three years continuous service in the Prosecuting Attorney's Office, shall be designated as having attained *merit status* for the purposes herein set forth." (emphasis in original) As stated in your letter, "merit status created by the ordinance provides for a vesting of inalienable rights which, once attached, cannot be divested by the Prosecuting Attorney..." The ordinance also provides that if a deputy prosecuting attorney is disciplined, he or she may appeal to a grievance board made up of the circuit judge, the presiding judge of the superior court, and a third person selected by the prosecuting attorney, whose decision is binding on the prosecuting attorney. § 35.35(N). The "Statement of Intent" for the ordinance sets out that the county council adopted the ordinance under the authority of Ind. Code § 36-1-3-2, the Home Rule Act.

DISCUSSION

1. The Home Rule Act

In 1980 the General Assembly adopted Indiana's current Home Rule Act ("Act"). Under the Act, a local unit of government is granted broad authority, with few exceptions, to adopt any local law needed "for the effective operation of government as to local

affairs." Ind. Code § 36-1-3-2. But certain powers are withheld from local control and, additionally, a local unit may not exercise power that is expressly denied by the Indiana Constitution or by statute. Ind. Code § 36-1-3-8; 36-1-3-5(a)(1).

Local laws may be invalid because they are preempted by state law. A local unit of government may not exercise power that is expressly denied by statute or expressly granted to another governmental entity. Ind. Code § 36-1-3-5. In addition, local units of government are prohibited from regulating conduct that is already regulated by a state agency, except as expressly granted by statute. Ind. Code § 36-1-3-8(7). If state law preemptively governs an area, a local unit of government may legislate the area only when given specific authority to do so in the enacting statute. *City of Hammond v. N.I.D. Corp.*, 435 N.E.2d 42, 48 (Ind. Ct. App. 1982).

Thus, "where the legislature properly enacts a general law which occupies the area, then a municipality may not by local ordinance impose restrictions which conflict with rights granted or reserved by the General Assembly." *Suburban Homes Corp. v. City of Hobart*, 411 N.E.2d 169, 171 (Ind. Ct. App. 1980). *See also Koppin v. Strode*, 761 N.E.2d 455, 461 (Ind. Ct. App. 2002) (citing *City of Indianapolis v. Fields*, 506 N.E.2d 1128, 1131 (Ind. Ct. App. 1987)).

2. Office of the prosecuting attorney

> The office of prosecuting attorney in its present form was created by the judicial article of the Indiana Constitution in 1851. There shall be elected in each judicial circuit by the voters thereof a prosecuting attorney, who shall have been admitted to the practice of law in this State before his election, who shall hold his office for four years, and whose term of office shall begin on the first day of January next succeeding his election....

Ind. Const. Art. 7, § 16. The office is a "constitutional office, carved out of the office of the attorney general as it existed at common law." *State ex rel. Neeriemer v. Daviess Circuit Court*, 236 Ind. 624, 629, 142 N.E.2d 626, 628 (1957) (footnotes omitted), citing *State ex rel. Williams v. Ellis*, 184 Ind. 307, 312, 112 N.E. 98, 100 (1916). Prosecuting attorneys were originally appointed by the governor, later chosen by joint ballot of the state legislature, and finally elected by the people beginning in 1843. *State ex rel Bingham v. Home Brewing Co.*, 182 Ind. 75, 87, 105 N.E. 909, 913 (1914).

The prosecuting attorney is elected not for each county, but in "each judicial circuit" of the state. For this reason, the Indiana Supreme Court has remarked that judges of the circuit courts and prosecuting attorneys are not state, county, or township officers, but rather are officers of the circuit. *State ex rel. Pitman v. Tucker*, 46 Ind. 355, 359 (1874); *State v. Patterson*, 181 Ind. 660, 663, 105 N.E. 228, 229 (1914).

Officers of circuits are simply officers of the State of Indiana whose jurisdiction extends to territorial divisions of the state but nonetheless are not independent of the state. *See Woods v. City of Michigan City*, 940 F.2d 275, 279 (7th Cir. 1991) (Indiana circuit and superior court judges are judicial officers of the state, "they are not county officials"), quoting *Pruitt v. Kimbrough*, 536 F.Supp. 764, 766 (N.D. Ind. 1982), *aff'd*, 705 F.2d 462 (7th Cir. 1983).

The prosecutor, in everything the prosecutor does, enforces state law. The prosecutor is not answerable to county authorities, nor does the prosecutor exercise county power. The prosecutor's only connection with the counties in the prosecutor's circuit is that the counties fund the operation of the office. Ind. Code § 33-14-7-2(g). But counties exercise no discretion or control beyond determining what level of funding is "necessary." *See State ex rel. Schuerman v. Ripley County Council*, 182 Ind. App. 616, 395 N.E.2d 867 (1979); *Brown v. State ex rel. Brune*, 172 Ind. App. 31, 359 N.E.2d 608 (1977). This level of independence is necessary for circumstances may arise where the prosecutor may be compelled to bring criminal charges against a member of the county commissioners. *Willner v. State*, 602 N.E.2d 507 (Ind. 1992).

"The prosecuting attorney is not only specifically provided for in the Constitution, but... is necessary to the administration of justice contemplated by the Constitution." 1965 OAG No.36, pp. 177-78. A council cannot defeat the performance by an officer of a duty imposed upon the officer by the law. *Gruber v. State ex rel. Welliver*, 196 Ind. 436, 148 N.E. 481 (1925). If the county council fails to make appropriations for the salary of the prosecutor and the prosecutor's deputies, it may be mandated to do so. *Howard County Council v. State, ex rel. Osborn*, 247 Ind. 279, 280, 215 N.E.2d 191, 192 (1966). But the mere fact that the county appropriates funds for the prosecutor does not make the prosecutor a county officer. *Bibbs v. Newman*, 997 F.Supp. 1174, 1180 (S.D. Ind. 1998). No statute or case holds that this duty of appropriation brings with it the right to control the terms of employment of deputy prosecuting attorneys.

3. Employment status of deputy prosecuting attorneys

As noted above, if the prosecuting attorney is acting as a state officer, it follows that deputy prosecuting attorneys are also acting as state officers. A prosecutor's authority to appoint deputies and the number of deputies who may be appointed is a matter

of statute. Ind. Code § 33-14-7-2. Under Indiana law, a deputy is fully authorized to act for the principal officeholder. Ind. Code § 1-1-4-1(5). Deputy prosecuting attorneys legally can perform any act pertaining to the office. *Hamer v. State*, 200 Ind. 403, 163 N.E. 91 (1928); *State ex rel. Williams v. Ellis*, 184 Ind. 307, 313, 112 N.E. 98 (1916); *Stout v. State*, 93 Ind. 150 (1884).

For this reason, the Seventh Circuit has held that a deputy prosecutor has a confidential relationship with the prosecuting attorney, with the ability to directly implement policy by acting for the prosecutor. *Livas v. Petka*, 711 F.2d 798, 800 (7th Cir. 1983); *see also Americanos v. Carter*, 74 F.3d 138 (7th Cir.), *cert. denied*, 116 S.Ct. 1853 (1996) (deputy attorneys general). When a prosecuting attorney selects deputies, therefore, he or she is acting as a state officer. The decision to appoint or discharge a deputy is not some administrative detail of running the office, but rather is the selection of the lawyers through whom the prosecuting attorney will execute the function of the office. "Since the officer who appoints a deputy is responsible for all official acts of the deputy and the deputy may perform all the official duties of the officer who appointed him and is subject to the same regulations and penalties as the officer who appointed him, it is obvious that the Indiana general assembly intended deputies appointed under the chapter to be officers-at-will of the appointing constitutional officer." 1988 OAG No.11, p. 193. "Under Indiana law the relationship is presumed to be an appointment at the will of the appointing authority, and there is no evidence here tending to show that the prosecutor's power to terminate the appointment at any time and for any reason has been limited by law." *Bibbs*, 997 F.Supp. at 1180.

4. Prosecuting attorney's other employment decisions

Deputy prosecuting attorneys have a special relationship with the appointing authority and, like the prosecutor, act as state officers. In addition, the prosecutor may find it necessary to employ other individuals to assist with his duties. The appointment of an investigator must be done "with the approval of the county council or councils" and that person's salary "shall be set by the county council or councils." Ind. Code § 33-14-6-1. That same statute, however, prevents the council from terminating the investigator position or reducing the compensation of the position by the council "without approval of the prosecuting attorney." *State ex rel. Schuerman*, at 395 N.E.2d 869, 182 Ind. App. 618 (1979). In terms of other employment decisions that the prosecutor may make, "[t]here shall also be appropriated annually by the various county councils for other deputy prosecuting attorneys, investigators, clerical assistance... an amount as may be necessary for the proper discharge of the duties imposed by law upon the office of the prosecuting attorney of each judicial circuit." Ind. Code § 33-14-7-2(g). Although the county council is obliged to support the prosecutor's office,

> It is self evident that two very different sums could be arrived at as the necessary salaries for a prosecutor's staff. While these figures may be varied they may both be reasonable and thus not an abuse of discretion by the county council.

Brown at 359 N.E.2d 610, 172 Ind. App. 35. Aside from setting the level of funding, however, there is no direct involvement by the county councils in filling positions other than that of investigator.

CONCLUSION

1. Conferring merit status

"[D]eputies of elected Indiana constitutional officers [e.g. prosecuting attorneys]... are not, *by constitution or specific statute*, merit... Such deputies are officers-at-will" 1988 OAG No.11, p**.** 200 (emphasis in original)**.** Under Indiana law the prosecutor is a state officer elected by the citizens of the circuit. "The prosecuting attorney is the employer of the prosecutor's deputies, and retains the right to control the terms of their employment." 2001 OAG No. 11. Conferring merit status on a deputy prosecutor is simply outside the realm of county regulation.

2. Validity of ordinance conferring merit status

Ordinances are presumed valid and the burden of proving invalidity is upon any party challenging an ordinance. *Hobble v. Basham*, 575 N.E.2d 693, 697 (Ind. Ct. App. 1991). But an ordinance is invalid if it conflicts with "rights granted or reserved by the General Assembly." *Suburban Homes Corp.*,411 N.E.2d at 171. The prosecutor is a state officer and the General Assembly has enacted legislation concerning the appointment of deputies and their salaries. Ind. Code § 33-14-7-2. Because the General Assembly has enacted a general law that "occupies the area" an ordinance that interferes with the prosecutor's statutory authority to select deputies is invalid.

3. Other employment decisions

The nature of a county council's involvement in a prosecutor's employment decisions is set out in statute. The council may be directly involved in the decision to hire an investigator. The councils are indirectly involved in other decisions to expend funds

by setting the level of appropriations deemed necessary, "but this obligation does not carry with it the right to dictate the terms and conditions of employment in that office." 2001 OAG No. 11.

Sincerely,

Stephen Carter
Attorney General

OFFICE OF THE ATTORNEY GENERAL

October 11, 2002

OFFICIAL OPINION 2002-5

Mr. Charles Johnson, III, CPA
State Examiner
State Board of Accounts
302 West Washington Street
4th Floor, Room E418
Indianapolis, Indiana 46204-2765

RE: Payment by Public Employers of Group Health Insurance Premiums

Dear Mr. Johnson:

This letter responds to your request for an advisory letter on the following questions:

May a public employer pay the full amount of group health insurance premiums for its employees under Ind. Code § 5-10-8-2.6 and Ind. Code § 5-10-8-3.1?

What is the application of these statutes in situations where a collective bargaining agreement exists?

It is our opinion that public employers may not pay the full amount of group health insurance premiums for their employees. Ind. Code § 5-10-8-2.6(c) clearly states that employers may pay "a part" of the cost of group insurance and this language has been interpreted by past Attorneys General to exclude the possibility of allowing employers to pay the full amount. Because it is not permissible to bargain for a term that is contrary to statute or public policy, the existence of a collective bargaining agreement allowing full payment by employers would not alter this conclusion. *See Ahuja v. Lynco Ltd. Medical Research,* 675 N.E.2d 704 (Ind. Ct. App. 1997); *Gary Teachers Union, Local No. 4 v. School City of Gary,* 165 Ind. App. 314, 332 N.E.2d 256 (1975).

ANALYSIS

I. Public Employers May Not Pay the Full Amount of Their Employees' Group Health Insurance Premiums

Ind. Code § 5-10-8-2.6 states that public employers may provide programs of group insurance for their employees and retired employees. The statute provides in pertinent part: "A public employer may pay *a part* of the cost of group insurance..." Ind. Code § 5-10-8-2.6(c) (emphasis added).

In interpreting the meaning of a statute, the primary goal is to discern the legislative intent behind it. *Woods v. State,* 703 N.E.2d 1115, 1117 (Ind. Ct. App. 1998). To determine the legislature's intent, courts will look to the plain language of the statute. *N. Miami Educ. Ass'n v. N. Miami Cmty. Schools,* 746 N.E.2d 380, 381 (Ind. Ct. App. 2001). If a statute has not been previously construed, its interpretation is controlled by the express language of the statute and by application of the general rules of statutory construction. *Woods,* 703 N.E.2d at 1117. One of the fundamental rules of statutory construction is that we look to the plain language of the statute and attribute the common, ordinary meaning to terms found in everyday speech. *Id.*

Ind. Code § 5-10-8-2.6 has not been previously construed by a court; therefore, we must look to its plain language. The fact that the legislature has expressly stated that public employers may pay "a part" of the cost of group insurance is controlling here. It would in no way be possible to construe the word "part" to mean "whole." It is helpful here to bear in mind the Latin phrase "expressio unius est exclusio alterius" which represents a canon of construction holding that the enumeration of certain things in a statute necessarily implies the exclusion of all others. *T.W. Thom Const., Inc. v. City of Jeffersonville,* 721 N.E.2d 319, 325 (Ind. Ct. App. 1999). Therefore, because the statute specifically states that employers may pay only a part of the cost of group insurance, it excludes the possibility of allowing them to pay the full amount. Presumably, if the legislature had intended to permit employers to pay the full amount, the statute would not have included the words "a part." It may be reasonably inferred by the deliberate use of those words that the legislature did not intend for employers to pay the full amount.

However, there is no limitation in the statute upon the proportionate share which the employers may pay. Therefore, past Attorney General opinions have stated that the employer may pay any amount *less* than the total cost of the insurance. 1978 Ind. Op. Att'y Gen. No. 20 (citing 1957 Ind. Op. Att'y Gen. No. 21). The determination as to what share of the cost the employer will pay is left to the local unit. 1957 Ind. Op. Att'y Gen. No. 21. Thus, a public employer "may participate financially to any degree it desires, short of full payment for the cost of the insurance plan selected, so long as the employer has sufficient funds available for the payment of wages and salaries from which it can appropriate the money for the payment." *Id.*

Additionally, Ind. Code § 5-10-8-3.1 provides that a public employer who contracts for group insurance "may withhold or cause to be withheld from participating employees' salaries or wages whatever part of the cost of the plan the employees are required to pay." If this option is exercised, the employer withholds from the employee's wages that portion which the employee is required to pay. The employer must then contribute the additional funds necessary to comprise the entire cost of the premium. 1978 Ind. Op. Att'y Gen. No. 20.

II. Collective Bargaining Agreements

"Collective bargaining" normally refers to the negotiation process between an employer and a properly accredited agent of its employees concerning the wages, hours and working conditions of those employees. *City of Michigan City v. Fraternal Order of Police*, 505 N.E.2d 159, 160 (Ind. Ct. App. 1987). A collective bargaining agreement is the contract[1] resulting from those negotiations. *Id.* While there is a strong presumption of the validity of contracts, courts have refused to enforce contracts that contravene a statute or are otherwise contrary to the declared public policy of the state. *Ahuja v. Lynco Ltd. Medical Research*, 675 N.E.2d 704, 708 (Ind. Ct. App. 1997).

In *Gary Teachers Union, Local No. 4 v. School City of Gary*, the Indiana Court of Appeals held that a provision in a collective bargaining agreement entered into between the teachers union and the school was void as contrary to law. 165 Ind. App. 314, 316, 332 N.E.2d 256, 258 (1975). The provision granted tenure to any teacher who had served under contract as a teacher in the School City of Gary for three (3) or more successive years and who at any time thereafter entered into a contract with the school for further service. *Id.* This conflicted with the Teacher Tenure Act passed by the General Assembly which provides that teachers who have served under contract as a teacher in a school city or school town corporation for five (5) or more successive years and then enter into a contract for further service with such corporation shall become "permanent" teachers with indefinite contracts to remain in force until the teacher reaches 66 years of age. *Id.* The court ruled that the Teacher Tenure Act controls and prohibits according tenure status to teachers before the statutory requirements are met. *Id.* at 320, 332 N.E.2d at 260.

The courts will not, therefore, uphold a term reached through collective bargaining that is contrary to statute or public policy. Ind. Code § 5-10-8-2.6(c) clearly states that public employers may only pay a part of the cost of group insurance; therefore, any term of a collective bargaining agreement providing for the payment of the entire cost by the employer would be void as contrary to statute.

CONCLUSION

The language of Ind. Code § 5-10-8-2.6 unambiguously states that public employers may pay *a part* of the cost of group health insurance premiums for their employees. Rules of statutory construction hold that an unambiguous statute must be held to mean what it plainly expresses. *N. Miami Educ. Ass'n*, 746 N.E.2d at 382. Therefore, because the statute provides that employers may only pay a part of the cost, this language cannot be expanded or construed to allow employers to pay the full amount. The existence of a collective bargaining agreement allowing employers to pay the full amount would not alter this conclusion, as courts will not enforce contract terms that run contrary to statute or public policy. *Ahuja*, 675 N.E.2d at 707.

Sincerely,

Stephen Carter
Attorney General

James F. Schmidt
Deputy Attorney General

[1] Although collective bargaining agreements are considered contracts relating to employment, "they do not necessarily create a 'contract of employment' within the strict meaning of the term." *Ritter v. Stanton*, 745 N.E.2d 828, 841 (Ind. Ct. App. 2001).