OFFICE OF THE ATTORNEY GENERAL

January 4, 2001

OFFICIAL OPINION 2001-1

Timothy A. Brooks
Chairman
State Board of Tax Commissioners
Indiana Government Center North, N1058
Indianapolis, IN 46204

RE: Constitutionality of Standard of Wealth
In Proposed Assessment Manuals

Dear Chairman Brooks:

This letter responds to your request for a legal opinion under Indiana Code § 4-6-2-5. You asked for an opinion on the legality of the standard of wealth proposed by the State Board of Tax Commissioners in proposed Assessment Manual alternatives published on December 1, 2000. The State Board published three alternative Assessment Manuals, for use in the General Reassessment to be completed by March 1, 2002. Specifically, you asked:

> Does the definition of wealth set forth in the proposed Assessment Manual alternatives (24 IR 702 (Dec. 1, 2000)) meet the requirements of the Indiana Constitution as interpreted in the *Town of St. John* decisions to establish an 'objectively verifiable' standard of measuring property wealth?
>
> Furthermore, does the proposal satisfy the requirements of Indiana Code 6-1.1-31-6(c) requiring that 'true tax value does not mean fair market value'?

You note that the concept of property wealth employed by the State Board is explained not only in the three alternative proposed Assessment Manuals but also in the State Board's publication, "True Tax Value: A Definition," a State Board "White Paper" you provided to this office in draft and final forms.

We conclude that the standard of wealth contained in the State Board's three proposed Assessment Manuals, as further explained in the State Board's White Paper, generally complies with the requirements of the *Town of St. John* decisions issued by the Indiana Supreme Court and Indiana Tax Court. That is, the State Board's definition of wealth in the proposed Assessment Manuals is consistent with Indiana's courts' explication of the provisions of the Indiana Constitution governing property valuation. We further conclude that the State Board's approach is consistent with the statutory definition of "true tax value."

These legal conclusions are based on our understanding of the relevant background facts, including the contents of the proposed Assessment Rule and other information you have provided to us. Before addressing the legal analysis more specifically, we recite the relevant facts and legal standards on which we base our opinion.

Background Facts

To comply with statutory mandates and the requirements set by the Tax Court in *Town of St. John v. State Bd. of Tax Comm'rs*, 729 N.E.2d 242 (Ind. Tax 2000), the State Board has published three proposed Assessment Manuals. 24 IR 702 (Dec. 1, 2000). Each of these manuals is independent of the other. To comply with the Tax Court's mandate that the State Board publish a final rule governing the next General Reassessment by June 1, 2001, the State Board could select any one of the three proposed Assessment Manuals or some combination of the three, so long as the State Board acts in accordance with Indiana Code 4-22, which governs the development and promulgation of final rules.

Each of the three proposed Assessment Manuals begins with an introductory section, and the introductions of all three are virtually identical. Each introduction first quotes the Indiana Supreme Court's statement that Article 10, Section 1 of the Indiana Constitution requires:

> a system of assessment and taxation characterized by uniformity, equality and just valuation based on property wealth, but the Clause does not require absolute and precise exactitude as to the uniformity and equality of each individual assessment.

Town of St. John v. State Bd. of Tax Comm'rs, 702 N.E.2d 1036, 1040 (Ind. 1998). Noting that Indiana Code § 6-1.1.-31-6(c) requires the State Board to define "true tax value," which is the basis of assessment in Indiana, the State Board states the following definition:

> True tax value, therefore, is defined as: The market value in use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property, less that portion of use value representing subsistence housing for its owner (some punctuation omitted).

The introduction of each proposed Assessment Manual goes on to explain that True Tax Value in most cases will be the owner's asking price because the asking price represents the utility the owner obtains from the property. In some cases, however, True Tax Value will not equal value in exchange because the utility derived is higher than the market price (for special use properties) or because owners may be motivated by non-market factors (such as retaining land in farm use even when it would be more valuable in another use).

The introductions go on to explain that True Tax Value uses market data, but sometimes derives values that are not strictly based on market data. The introductions state that "the basis for True Tax Value outlined in this manual is value-in-use as opposed to value-in-exchange." The introductions define use value as "[t]he value a specific property has for a specific use."

The introductions in Versions A and B go on to explain that the basic approach to valuation -- typical for mass appraisal systems -- is replacement cost. Version A derives its cost information from the Marshall & Swift commercial valuation service, and Version B incorporates Marshall & Swift's values in their entirety. Version C does not prescribe a particular approach to cost, but rather permits each assessor to choose a method or combination of methods, subject to State Board approval.

The introductions then explain the two most frequent instances when value-in-use will diverge from value-in-exchange:

> Th[e] first is for residential properties where the owner cannot freely transfer 100 percent of the sale price to some other asset type but rather must keep at least a minimal amount to be used to purchase alternative shelter. In this sense, the minimal amount required to provide a basic level of shelter is not a form of property wealth but rather is a minimal amount needed for subsistence and reflects a lack of disposability. The second instance is for special-purpose industrial properties where value-in-exchange occurs only infrequently and under special circumstances.

As to the first of these exceptions, the introductions differentiate subsistence shelter from other forms of property wealth, which are totally disposable. In contrast, when a person sells a home at least some of the proceeds must be re-invested in another form of shelter. "Therefore," the introductions continue, "the value-in-use for the most basic forms of shelter does not represent property wealth and must be deducted from the True Tax Value."

As to the second exception, the introductions explain that some industrial properties are only infrequently exchanged. The owner would not sell for anything less than the utility the owner obtains from its use of the property, and the State Board intends to assess the property at the level of utility the owner obtains from it in its current use, not a lower price that a buyer might be willing to offer.

Version A is the manual most similar to the current assessment rule, 50 IAC 2.2, although it is far more elaborate and detailed. It requires valuation of land based on actual sales data. It prescribes valuation for residential dwelling units based on square footage, with many specific adjustments, to determine replacement cost. It makes specific provisions for valuing various sorts of improvements, including mobile and manufactured homes. It includes a grading process rooted firmly in cost-of-construction. It contains depreciation tables that are derived from market data. It also contains lengthy provisions describing the process for valuing and depreciating commercial and industrial properties.

Version A contains a Shelter Allowance for residential dwellings. The proposed manual states that "Property wealth is a relative concept that reflects the difference between the property owned by the taxpayer and the minimum amount necessary to sustain life. A basic level of shelter is not property wealth because such subsistence shelter cannot be substituted with other types of assets." The proposed manual explains that the Shelter Allowance is calculated starting with the lowest fair market rent for the smallest unit as determined by the U.S. Department of Housing and Urban Development (HUD), less an adjusted expense amount determined from data published by the Institute for Real Estate Management. This calculation yields the present value of net operating income, which is capitalized over a 30-year period at a risk-free rate of 5.15% (determined from Treasury bills on the date of the assessment). These calculations yield a rounded shelter allowance of $16,000, which is adjusted by county based on HUD rental rates.

The proposed manual prescribes that the shelter allowance is to be applied to all owner-occupied homes and to homes that qualify for the homestead credit. The proposed manual contains a county-by-county roster of shelter allowances adjusted for costs by county, ranging from a low of $16,000 in several counties to a high of $21,600 in two counties.

Version B is similar to Version A, but more compact and less detailed because all of the valuations of improvements -- residential, commercial, industrial, and agricultural -- are simply derived from the Marshall & Swift service without the adjustments contained in Version A. Version B requires valuation of land based on actual sales data. It contains grading concepts based on elements of construction and design. It also contains depreciation tables derived from market data. Version B contains the same discussion of Shelter Allowance as Version A.

Version C is even briefer, permitting local assessors to select their valuation method from several generally described in the manual, subject to the State Board's approval. It also contains the same Shelter Allowance provisions as Versions A and B.

The State Board further explained value-in-use concepts, including the Shelter Allowance, value-in-use for special purpose properties, and value-in-use for farmland, in its White Paper, "True Tax Value: A Definition." This publication may be described as a technical economic document explaining both the theoretical basis for the Shelter Allowance, value-in-use for special purpose properties, and value-in-use for agricultural land and explaining the technical basis for calculating these elements.

The publication notes that economists as early as Adam Smith noted the difference between value in use and value in exchange. It goes on to examine various definitions of wealth, examining the concept in part from the vantage point of the economic concept of utility, "a monetary measurement of the usefulness of property rights for producing, distributing, or consuming goods and services." It reviews various types of value, including investment value, going-concern value, market value, use value, and insurable value.

The White Paper concludes that use value is the concept closest to economic utility. It notes that use value sometimes is less than market value, such as when farm land lies on the edge of a developing urban area. Use value may also be higher than market value, as for a special-purpose industrial facility that can be used to make only one product and which has only scrap value if the product made there were no longer valued. Market value and use value are likely to be the same for most residential properties, however, because any given residential property will have similar value as shelter to a large number of buyers and sellers.

The White Paper goes on to reason that the use value of residential property has two parts: the portion that must be used for basic shelter and the portion that could be used for any other purpose. Some portion of all residential property represents basic shelter, and when it is sold some portion of the proceeds must be re-invested in shelter, with the remainder available for other uses. It concludes that "[t]o the extent that subsistence shelter is fundamental to human life similar to the way that food and clothing are (i.e. the three basic necessities -- food, clothing, and shelter), subsistence shelter is a necessary expenditure incurred by all taxpayers and is not wealth."

The White Paper then reviews the mechanics of use value concepts in Indiana's property taxation system. It points out that the State Board is given wide discretion to define value, so long as objective and verifiable data are available to verify calculations. It also points out that the State Board could reasonably choose not to tax the subsistence value of residential property because such taxation could reduce the availability of low-cost housing. It constructs an economic model showing that a subsistence level of housing exists, then quantifies the shelter allowance in the way explained in the "Shelter Allowance" sections of the three proposed Assessment Manuals, summarized above.

The White Paper concludes that "the shelter allowance, by introducing a definition of wealth that is not based strictly on fair market value, does serve to make the property tax fairer. In particular, the shelter allowance protects those who have relatively little wealth from being taxed from the first dime of their subsistence shelter." It concludes that the shelter allowance should reduce homelessness marginally and permit some families to purchase homes for the first time. The shelter allowance also reduces the impact of court-mandated changes in the assessment system.

The White Paper also explains that use value requires different treatment of special-use properties, for which value in use does not equal value in exchange. These include specialized industrial properties, designed for a particular use, and specialized residential properties such as customized residences. For these properties, the utility to their users is greater than the properties' sales price, and they must be treated specially in the assessment process to capture their value in use. It notes that "traditional appraisal adjustments" including sales comparisons and obsolescence must be applied judiciously to these kinds of properties because their value in use is greater than their value in exchange.

Farmland is the other kind of property requiring special treatment in a value-in-use system, according to the White Paper. For farmland, value in use mandates valuation based on productivity of the land for agriculture even if the land would be more valuable if sold for another purpose, such as residential or commercial development. Use value equals net income divided by a capitalization rate, or use value can be based on net cash rent. According to the White Paper, the State Board has devised a valuation system that combines net cash rent and net income valuations over a period of years.

Applicable Law

The Indiana Supreme Court initially discussed the constitutional requirements for property valuation in *Boehm v. Town of St. John*, 675 N.E.2d at 318 (Ind. 1996). The assessment system is governed by Article 10, Section 1 of the Indiana Constitution:

> The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal.

The Court said that the framers' intent was "to specifically require uniform and equal assessment and taxation, and just valuation." 675 N.E.2d at 323. Moreover, the Constitution gives "substantial, but not unlimited" discretion in devising the system of assessment. *Id.* at 327.

The Supreme Court concluded in *Boehm* that the Constitution does not require assessment based on market value. "While a careful and accurate fair market value assessment may well be the system closest to our constitution's requirements for uniform and equal rates of assessment and taxation and for just valuation, a system based solely upon strict fair market value is not expressly required either by the text of the constitution, by the purpose and intent of its framers, or by the subsequent case law." *Id*.

The Supreme Court said more about the principles governing the assessment system in *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998). The Court analyzed Indiana Code § 6-1.1-31-6(c), which states: "[w]ith respect to the assessment of real property, true tax value does not mean fair market value." The Supreme Court determined that the statute is constitutional if properly interpreted: "we construe Indiana Code § 6-1.1-31-6(c) to mean that 'true tax value' is not exclusively or necessarily identical to fair market value. This provision does not prohibit the State Board from promulgating regulations in which 'true tax value' is based, in whole or in part, on property wealth." 702 N.E.2d at 1038.

In its 1998 opinion, the Supreme Court again emphasized that "varying methods of valuation could be used and that uniformity of assessment methods is not required [across classes of property], provided that the resulting valuations are just and the burdens are distributed with uniformity." Furthermore, "our state constitution does not require the property taxation system to be based solely on a fair market value. Collectively, these principles require that the system provide rates of assessment that are substantially uniform and equal based on property wealth." *Id*. (citation omitted).

The Supreme Court also stated that the system of assessment "must also assure that individual taxpayers have a reasonable opportunity to challenge whether the system provided by statute and regulations was properly applied to individual assessments, but the Clause does not create a personal, substantive right to uniformity and equality." *Id*. at 1040. Thus, the assessment system "must be grounded on objectively verifiable data." *Id.* at 1041. Moreover, if the State Board prescribes different assessment systems for different types of property, "the classification of the differing properties cannot be arbitrary but rather must be based upon differences naturally inhering in the property." *Id*. at 1042.

The Supreme Court also discussed the concept of value-in-use because the State Board contended that the assessment system under consideration in the Supreme Court's 1998 opinion was based on value-in-use concepts. "We find that property valuation for assessment based upon value in use is a reasonable measure of property wealth. A uniform and equal assessment of land or improvements accurately based upon value in use would not offend constitutional requirements." *Id.* The Supreme Court, however, went on to affirm the Tax Court's conclusion that the system at issue in *Town of St. John*, the State Board's 1995 rule, was not in fact a value-in-use system that met the requirements of the Indiana Constitution. Rather, the cost schedules that underlay that system lacked meaningful reference to property wealth and resulted in assessments that were not uniform or equal and not based on property wealth. *Id*. at 1043.

The Tax Court reiterated many of these principles in its discussion of limitations on the State Board's authority to define "true tax value" in *Town of St. John v. State Bd. of Tax Comm'rs*, 729 N.E.2d 242 (Ind. Tax 2000). The Tax Court stated that the State Board may use different methods to value different kinds of property, but the differences must be based upon differences naturally inhering in the property and must result in uniformity and equality across classifications of property. *Id*. at 248. The Tax Court stated that "true tax value" need not be identical to fair market value, but the State Board could require consideration of fair market value in its rule. *Id*. Moreover, the State Board's rule "must include instructions for determining the true tax value of property based on

six listed factors [in Indiana Code § 6-1.1-31-6(b)] and any other factor that the board determines by rule is just and proper." 729 N.E.2d at 248 (citation omitted). The valuations mandated by the State Board must be based on objectively verifiable data. *Id.* at 249.

Legal Analysis

We will address *seriatim* the two questions you presented in your request.

1. Does the definition of wealth set forth in the proposed Assessment Manual alternatives (24 IR 702 (Dec. 1, 2000)) meet the requirements of the Indiana Constitution as interpreted in the *Town of St. John* decisions to establish an 'objectively verifiable' standard of measuring property wealth?

A. The State Board's operative definition of property wealth.

The State Board's definition of property wealth is not stated explicitly in any of the proposed Assessment Manuals, but rather is defined by operation of the rules in the manuals themselves. We will capsulize the operation of the rules as follows:

1. The State Board's proposed Assessment Manuals seek to determine the value-in-use of real property in Indiana. "True tax value, therefore, is defined as: The market value in use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property, less that portion of use value representing subsistence housing for its owner." Version A, Introduction (unpaginated) (some punctuation omitted).

2. Generally, value-in-use is the same as value-in-exchange.

3. For owner-occupied residences, value-in-use generally equals value in exchange less a Shelter Allowance designed to represent subsistence shelter cost. Basic subsistence is not "property wealth." "To the extent that subsistence shelter is fundamental to human life similar to the way that food and clothing are (i.e. the three basic necessities -- food, clothing, and shelter), subsistence shelter is a necessary expenditure incurred by all taxpayers and is not wealth." White Paper, p. 13.

4. For some special use properties, value-in-use is not the same as value-in-exchange because the property has special utility for its owner. Customized homes (the White Paper uses the example of Bill Gates's $53.4 million home) are worth the cost of construction to the owner, but likely could not be sold for as high a price as was required to build the homes. Similarly, special-use industrial properties have unique value to the owner, but would have a much lower value-in-exchange under many circumstances. This concept means that some traditional adjustments to replacement cost must be used sparingly for special-use properties.

5. Farmland is appropriately valued based on its productivity when that valuation is lower than value-in-exchange. Those who wish to retain their land in agricultural use, even though it could be more valuable to them if sold on the open market, are motivated by non-market factors.

B. Constitutionality of value-in-use

The State Board's definition is based on value-in-use. The Supreme Court has already approved, in theory, an assessment system based on value-in-use. "We find that property valuation for assessment based upon value in use is a reasonable measure of property wealth. A uniform and equal assessment of land or improvements accurately based upon value in use would not offend constitutional requirements." *Town of St. John*, 702 N.E.2d at 1042. At least some systems based on value-in-use would meet the requirements of the Indiana Constitution. The State Board's definition is based on fair market value with specified adjustments to determine value-in-use for three discrete types of property.

The question, then, is whether the particular system designed by the State Board meets constitutional requirements. We conclude that the State Board's value-in-use system meets the constitutional requirements because it defines property wealth in a manner that can be measured based on objective data and it permits individual taxpayers to determine whether the system has been properly applied to their properties.

First, the State Board's system is based on objective data. The basic assessed value is fair market value derived from the commercial Marshall & Swift valuation service (Versions A and B) or one or more other commercial appraisal methods (Version C) (Steps 1 and 2 above). For residences, the basic amount is adjusted by the Shelter Allowance, which also has been derived from objectively verifiable information about housing costs and interest rates (Step 3 above). For special-purpose properties, value-in-exchange concepts cannot be permitted to overwhelm objectively verifiable cost information, which is most indicative of value-in-

use to the owner (Step 4 above). Valuation of farmland is to be based on objectively verifiable productivity information, including net income and net cash rent (Step 5 above).

Second, the definition permits individual property owners to determine whether the system is being applied fairly to their properties. All of the information in the State Board's rules is objectively verifiable, including the data used to calculate the Shelter Allowance. Most of the basic information comes directly from the Marshall & Swift valuation manual, which is widely used by fee appraisers. Any taxpayer could review the State Board's rule and determine whether it had been applied properly in his or her case.

Third, the definition of property wealth leads to assessments "that are substantially uniform and equal based on property wealth." *Town of St. John*, 702 N.E.2d at 1038. The basic valuation is derived directly from market value, which the courts already have determined to meet constitutional requirements. The premise of the system is that market value is the same as value-in-use except for three situations where adjustments must be made to adequately account for value-in-use.

The three deviations from market value all permit uniformity and equality. First, the Shelter Allowance is set up to exclude from the assessment the portion of the value of the property that is not wealth, that is, the portion encompassing subsistence housing. Second, special provisions for special-use properties permit uniform and equal assessments because they clearly define the properties to which they apply and base valuation on reproduction cost, limiting the use of certain adjustments (including sales comparisons) that inaccurately measure value-in-use. Third, valuation for farmland based on net income and net cash rent provides for uniformity and equality by valuing the land as it is used. Moreover, to the extent that these three situations are treated differently from other property, the different treatment is based on differences inhering in the property.

We wish to make clear what this Official Opinion does not discuss. The foregoing answers only the question you posed, whether the "definition of wealth" meets constitutional requirements. This Official Opinion does not analyze the mechanics of the calculations underlying the rules, only the "definition of wealth." Thus, this Official Opinion does not reach any conclusion about, for example, the calculations used to compute the Shelter Allowance. Those mechanical issues require additional information and are therefore beyond the scope of this Official Opinion.

In sum, the State Board's definition of wealth meets constitutional requirements. The definition, which equates with market value except for three specific exceptions, provides an objectively measurable standard of property wealth; it permits taxpayers to determine whether their properties have been assessed properly; and it permits assessments that are substantially uniform and equal based on property wealth.

2. Does the proposal satisfy the requirements of Indiana Code 6-1.1-31-6(c) requiring that 'true tax value does not mean fair market value'?

Indiana Code § 6-1.1-31-6(c) states: "With respect to the assessment of real property, true tax value does not mean fair market value. True tax value is the value determined under the rules of the state board of tax commissioners." The Indiana Supreme Court has made the following analysis of this language: "we construe Indiana Code § 6-1.1-31-6(c) to mean that 'true tax value' is not exclusively or necessarily identical to fair market value. This provision does not prohibit the State Board from promulgating regulations in which 'true tax value' is based, in whole or in part, upon property wealth." *Town of St. John*, 702 N.E.2d at 1038.

As the Supreme Court explained, Indiana Code § 6-1.1-31-6(c) does not forbid the State Board from adopting a valuation system that is identical to, or includes as a central attribute, fair market value. The statute means only that the State Board is not mandated to use only fair market value as the means for real property valuation in Indiana.

The State Board's proposal is consistent with the statutory language. Fair market value is the basis for the valuation system but, as explained above, the system deviates from fair market value to determine value-in-use when value-in-use does not equal fair market value. The adjustments to fair market value to achieve value-in-use for three enumerated types of property are within the statutory mandate, as explained by the Supreme Court.

Conclusion

It is my opinion that the State Board's proposed definition of property wealth is consistent with constitutional requirements and the applicable statute.

Sincerely,

Karen M. Freeman-Wilson
Attorney General of Indiana

OFFICE OF THE ATTORNEY GENERAL

May 31, 2001

OFFICIAL OPINION 2001-2

Treasurer Tim Berry
State Treasury of Indiana
Indiana State House
Indianapolis, Indiana 46204

RE: North Miami School Corporation & Indiana Intercept Statute

Dear Treasurer Berry:

In a letter dated February 8, 2001, you requested that the Attorney General provide you with an opinion in regard to the application of the state's intercept statute. Specifically, you posed the questions listed below.

I. Questions Presented:

(1) Does the intercept mechanism in IC 20-5-4-10 apply to the instant case involving North Miami School Corporation, when it made lease payments to Center School Buildings, Inc. but Center Schools failed to make payments to Harris Bank, the assignee of the lease proceeds?

(2) What event must occur to trigger the treasurer to apply the intercept statute and does the statute provide for the payment of interest in the event of a default?

II. Brief Answers

(1) No, the intercept statute does not apply because the school did not default in any debt service obligation. Harris Bank failed to provide notice to North Miami School Corporation that it had been assigned the proceeds of the lease and that payment was to be made to the bank. Harris Bank is estopped from collecting from North Miami because of the legal relationship of the parties, their course of dealings, and the fact that every lease payment was made to Center Schools.

(2) The events that trigger the application of the intercept statute are (1) receipt of notice by the Treasurer of the State that a school corporation has defaulted in its payment of a debt service obligation and (2) the finding by the Treasurer that the school corporation actually defaulted on a debt service obligation. The intercept statute applies to the actual amount in default, plus any interest that accrues from the time that the amount should have been paid, in accordance with the terms of the specific agreement in question.

III. Statement of Facts

On November 26, 1979, Ray Dunn, President of Center Schools, Inc. (hereinafter "Center Schools") entered into a Lease Agreement with North Miami School Corporation (hereinafter "North Miami") to construct a school building addition. The Agreement outlined Center School's duties as landlord and North Miami's duties as tenant. The Agreement provided for semi-annual installment payments of $163,882.00 with an option to purchase the structure and the land at the end of the tenth year, provided that North Miami had not defaulted under the lease. North Miami also would receive a special warranty deed at the end of the lease term in February 2000, had it not exercised the option to purchase after the tenth year. Dunn and Fred Warner, President of North Miami at the time, signed the document. Harris Bank was not a party to the Agreement.

The Lease Agreement allowed Center Schools to assign the lease without approval from North Miami after the building was constructed. It provided that a default left uncured for 30 days would result in written notice from the landlord to correct the default. As per the terms of the lease, notice of any kind was to be delivered to the tenant, North Miami, at its Denver, Indiana office.

The lease was recorded on August 13, 1980 and again on June 15, 1981 when it was amended to state that the building had been completed. Ray Dunn and Maurice Musselman, President of North Miami at the time, signed the addendum. The addendum stated that the new lease term began March 1, 1981 and ended on February 28, 2000.

On March 1, 1981, Dunn, representing Center Schools, then entered into an agreement for a loan with Harris Bank to mortgage the North Miami project. Only Dunn and Harris Bank signed the Loan Agreement. North Miami was not a party to the Loan Agreement.

The Loan Agreement outlines the relationship between Center Schools as the borrower and Harris Bank as the lender. It also states that North Miami is a lessee of the property and that to simplify collection of lease payments, Harris Bank should act as a collecting agent for Borrower with respect to unassigned portions of the lease rental payments.

The document also refers to the Assignment of the Lease. North Miami, however, was not a party to the Loan Agreement. The document further provides that if North Miami and the borrower made all payments that a warranty deed would be transferred from Harris Bank to North Miami.

Counsel for the bank provided this office with one letter from Center Schools dated September 1, 1981, which directs North Miami to "make all payments to our favor at Harris Bank, 111 West Monroe Street, Chicago, Illinois 60603." Counsel argues that this letter constituted notice to North Miami of the assignment of the lease proceeds.

Center Schools continued to send semi-annual letters to North Miami to remind the school corporation to remit payments to Center Schools at the Gary address.

The Assignment, dated February 17, 1982 and recorded on the same date, states that in cases of default of which the lender has knowledge, the banker/lender shall endeavor to notify the borrower within 30 days. One instance of default is defined as failure of the borrower or lessee to make payments.

In addition to the Loan Agreement, the mortgage note, signed by Dunn for Center Schools, and Harris Bank, provides that on or before September 2000, Center Schools promises to pay to Harris Bank $3,330,035.96 plus interest. Payments of $163,882.00 were due twice per year beginning March 1, 1981. The lease between North Miami and Center Schools secured the note.

From the beginning of the lease, North Miami made every semi-annual payment to Center Schools at the address for Center Schools in Gary, Indiana. North Miami never made a payment to Harris Bank. North Miami provides supporting documentation to this effect, with records beginning in 1981.

Harris Bank did not notify North Miami that it had been assigned the rights as holder of the lease. Harris Bank also did not request that North Miami make payments to the bank. Instead, North Miami made payments to Center Schools, and Center Schools continued to make semi-annual payments amount to the bank.

Dunn allegedly took the last two payments made by North Miami. Harris Bank states that it never received the payments. North Miami, however, made the last two payments, as documented by North Miami, in the manner in which it had made all of the other payments from 1981 until the last payment. North Miami made the semi-annual payments to Center Schools at the Gary office.

When it did not receive the first of the last two payments in March and September of 2000, Harris Bank notified Center Schools and Dunn that it had not received the payment. Dunn, in turn, wrote the bank a letter stating that he would send the payments. Harris Bank did not, however, notify North Miami that the first of the last two payments had not been received. Only after Harris Bank did not receive the last two payments did North Miami become aware that the bank had not received the payments.

Counsel for Harris Bank states that under the documents, Harris Bank was not permitted to formally declare a default until 180 days had passed from the date that the last check was due. Counsel states that its earliest opportunity to do so was September 2000. It then notified Dunn and other parties, counsel stated in a letter to this office. Counsel does not state that it notified North Miami, nor has Counsel for Harris Bank produced any document showing notice to North Miami.

Harris Bank now requests that the State Treasury apply the state intercept statute and make both of the last two payments to the bank that were allegedly taken by Dunn. Counsel states that the facts of the case are identical to a case in which the intercept statute was applied involving Jay County School Corporation (hereinafter "Jay County").

The Attorney General notes that in the Jay County case, the mortgagee, Allstate, gave Jay County written notice of the assignment of the lease and that it required that lease payments to be made directly to Allstate. In addition, Jay County made the lease payments to Allstate for approximately 15 years. None of these facts are present in the instant case.

The State Treasurer requests the opinion of the office of the Attorney General on the questions presented in Section I.

IV. The Indiana Intercept Statute

Key to the discussion is the Indiana intercept statute. To answer the questions posed by State Treasurer Berry, the Attorney General must interpret Indiana Code 20-5-4-10.

The intercept statute under Indiana Code 20-5-4-10 states in its entirety:

(1) Prior to the end of each calendar year the state board of tax commissioners shall review the bond and lease rental levies, or any levies which replace such levies, of each school corporation, payable in the next succeeding year, and the appropriations from such levies from which the school corporation is to pay the amount, if any, of principal and interest on its general obligation bonds and of its lease rentals under IC 21-5-11 through IC 21-5-12, during such succeeding year (such amounts being referred to in this section as its "debt service obligations") In the event that such levies and appropriations of the school corporation are not sufficient to pay the debt service obligations, the state board shall establish for each school corporation bond and lease, rental levies, or any levies which replace such levies and appropriations which are sufficient to pay such debt service obligations.

(2) Upon the failure of any school corporation to pay any of its debt service obligations during any calendar year when due, the treasurer of state upon being notified of such failure by any claimant shall make such payment from the funds of the state to the extent, but not in excess, of any amounts appropriated by the general assembly for the calendar year for distribution to such school corporation from state funds, deducting such payment from such amounts thus appropriated. Such deducting being made, first from property tax relief funds to the extent thereof, second from all other funds except tuition support and third from tuition support.

(3) This section shall be interpreted liberally so that the state of Indiana shall to the extent legally valid ensure that the debt service obligations for each school corporation shall be paid, but nothing contained in this section shall be construed to create a debt of the state of Indiana.

V. Discussion & Application of Law

Question 1: Does the intercept statute apply to this case?

As stated in the statute, the intercept statute must be applied liberally to the extent legally valid to all instances in which a school corporation defaults on its debt service obligations. Per the Indiana Code, the statute must be given its plain meaning, put into context and not given an outlandish meaning. *See IC 1-1-4-1, & U.S. vs. Hodgekins, U.S. Court of Appeals, 7th Circuit, 28 F.3d 610, 613 (1994), State vs. Laporte Superior Ct #1 & Honorable Norman H. Sallwasser, Ind. Supreme Court, 291 NE2d. 355 (1973), Cox & McCall vs. Workers' Compensation Board of Ind., Ind. Supreme Court, 675 NE 2d 1053 (1996), Sullivan vs. Day, Ind. Supreme Court, 681 NE2d 713 (1997), 3551 Lafayette Road Corp., vs. Ind. Dept. of Revenue, Ind. Tax Court, 644 NE 2d 199 (1994).*

The key to the application of this statute is to determine if and when a school corporation is in default. Default is determined by examining the terms of the contractual documents and the actions of the parties. The only default claimed in this case is a failure to make a lease payment to the correct party. There is no dispute that North Miami made all of the required lease payments to Center Schools. Center Schools assigned the lease proceeds with North Miami to Harris Bank as part of the security given to the bank in its financing of the property. Therefore, the question is whether North Miami paid the appropriate party, or as in the Jay County case, paid the wrong party.

Legal Relationships
(A) Lease & Secured Transaction

Based upon the documentary evidence presented, it is clear that Harris Bank and Center Schools had a mortgagor/mortgagee relationship, while Center Schools and North Miami had a lessor/lessee relationship. Harris Bank did *not* notify North Miami, however, that it had been assigned the lease proceeds and that North Miami should pay Harris Bank directly.

As also evidenced by the documents, Harris Bank has a security interest in the building and property leased to North Miami Schools. The property is collateral for the loan, although the lease takes priority over the loan because it was recorded first. Additionally, the lease was recorded prior to the mortgage, and was never subordinated to the mortgage. *See IC 26-1-9-312 & IC 26-1-9-316 & A-W-D Inc, vs. Salkeld, Indiana App. Ct. 3rd District, 372 N.E. 2d 486-489 (1978), In re Dupont Feed Mill & Rushville National Bank vs. Wells Fargo Bank, 121 B.R. 555, 559, U. S. District Court, Southern District of Indiana (1990), & In re Our Own Hardward Co, Provident Bank & Tom's Home Center Inc., 194 B.R. 199, UD District Ct, SD Ind, (1996).*

The lease also appears to be a secured transaction and is governed by Article 26 of the Indiana Code. An agreement may be called a "lease" when characteristics of the lease are actually those of a secured transaction. *See Barwell, Inc. vs. First of American Bank, United States District Court, N.D. Indiana, 768 F. Supp. 1312 (1991), McEntire vs. Indiana National Bank, Ind. App. Ct. 4th District, 471 NE 2d 1216 (1984), Morris vs. Lyons Capitol Resources, Inc., Indiana App. Ct 4th District, 510 NE 2d 221 (1987).*

(B) Course of Dealings & Performance

In addition to the legal documents, one must look to the course of dealings of the parties as well to determine the nature of the contractual relationships. Course of dealings is pertinent to supplementing terms of the contract. *See IC 26-1-1-205 & 26-1-2.1-207, & Gibson County Farm Bureau Cooperative Association vs. Greer, Supreme Court of Indiana, 643 N.E. 2d 313, 320 (1994).*

The U.S. Court of Appeals for the 7th Circuit Court, in *Luedtke Engineering Co, Inc. vs. Indiana Limestone Co., Inc., 740 F.2d 598, 600 (1984)* upheld the district court's finding that evidence of prior dealings was admissible to help supplement the terms of a contract. In the *Luedtke* case, Luedtke Engineering Company argued that Indiana Limestone was required to supply cement for a specific price. The court found, however, that in accordance with Indiana Code 26-1-1-205, a different price had been established over the companies' course of dealing over the years. *For further discussion of course of dealings see also Insurance Co. vs. Eggeston, US Supreme Ct, 96 U.S. 572 (1877).*

Course of dealings is also an established doctrine that applies to leases. "If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement." (*IC 26-1-2.1-202)*

In applying the course of dealings doctrine to this case, it is clear that the system established for receiving rental payments under the lease consisted of North Miami sending the payment twice per year to Center Schools, which then sent the payment to Harris Bank. The documentary evidence demonstrates a relationship only between Harris Bank and Center Schools and then Center Schools and North Miami. North Miami was never a signatory to the documents that created the relationship between Center Schools and Harris Bank, and the conduct of the parties indicates further that the bank's relationship was only with Center Schools. Harris Bank did not give notice to North Miami that lease payments were to be made to Harris Bank. All parties relied upon this course of dealings. North Miami never deviated from this practice, and only Center Schools deviated from the practice when the last two payments were allegedly taken by Dunn. After the unilateral deviation of Center Schools, Harris Bank now attempts to use the intercept statute to obtain payment. Harris Bank now demands payment from North Miami contrary to the fact that the course of dealings dictated that payment was to be made by Center Schools and had always been accepted from Center Schools.

Duty of Harris Bank to Provide Notice to North Miami School Corporation

When it was assigned the lease proceeds in the Assignment of Lease in 1982, Harris Bank had a duty to exercise due diligence in notifying the lessee, North Miami, that Harris Bank had been assigned the lease. It also had a duty to notify North Miami that payments were to be made to Harris Bank by North Miami, if it wished to change the manner in which the bank received the payments. Indiana Code 26-1-1-201 requires that secured parties exercise "due diligence" in providing notifications to debtor parties. Harris Bank did not, however, exercise due diligence in notifying North Miami in any manner.

The Indiana Code provides certain rights to assignees and debtors liable under an assignment contract alike. An account debtor, under the code, is authorized to pay the assignor until the account debtor receives notification that the amount due has been assigned and payment is to be made to assignee. (*IC 26-1-9-502)* In addition, Indiana Code 26-1-9-318 states that notification which does not reasonably identify the rights assigned is ineffective. *(See Hall Brothers Construction, Inc., vs. Mercantile National Bank of Indiana, Court of Appeals, 5th District, 642 NE 2d 285 (1994).*

The Indiana Supreme Court discussed the notice requirement of IC 26-1-9-318 and IC 26-1-1-201 in *Ertel vs. Radio Corp. of America*. In that case the court found that notice delivered to an account debtor's employee was sufficient notice of the assignment. The employee failed to forward the notice to the accounting department. *Ertel vs. Radio Corp. of America, Ind. Supreme Court, 307 NE 2d 471 (1974).*

The facts of that case are different from the case at bar. In that case, the assignee took the affirmative step of sending a notification to the debtor. It also included with the notification of assignment a demand letter that the debtor make payments from that point forward to the assignee. In this case, Harris Bank did not notify North Miami of the assignment, nor did it make a demand that payment be made to Harris Bank.

Indiana Code 26-1-1-201 (26) & (27) define "notice" and notification for purposes of the Uniform Commercial Code on secured transactions as follows.

IC 26-1-1-201 (26)

"A person 'notifies' or 'gives' notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person 'receives' a notice or notification when:

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

IC 26-1-1-201 (27)

(27) Notice, knowledge, or a notice of notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information."

Notice may be actual or constructive. In this case, North Miami received neither. Constructive notice is a legal inference from established facts. Actual notice "is extended to embrace all degrees and grades of evidence from the most directive and positive proof to the slightest circumstance from which a court or jury would be justified in inferring notice." *Willard v. Bringolf, 5 NE 2d 315, 321, Indiana Appeals Court, (1936).*

The rights of an assignee are subject to the terms of the contract, as are its duties. *(IC 26-1-9-318).* Although Harris Bank had the right to demand direct payment from North Miami, it also had a duty to exercise due diligence in notifying North Miami of a change in the party to which payments were to be made. *See IC 32-8-11-7, IC 26-1-9-318, IC 26-1-9-502, and for interpretation of identical Illinois provision in regard to duty of assignee to notify debtor see Kent Meters vs. Emco of Illinois, US District Ct, ND Ill., Eastern Division, 768 F. Supp. 242 (1991), First Trust & Savings Bank of Glenview vs. Skokie Federal Savings & Loan, Ill. App. Ct. 1st District, 466 NE 2d 1048 (1984).* Harris Bank attempts to assert that it was assigned the rights that previously belonged to Center Schools. It must, however, exercise those rights with due diligence.

Counsel for Harris Bank provided this office with one letter from Dunn to Larry Polk, superintendent of North Miami at the time, dated September 1, 1981. Counsel argues that the letter provides notice to North Miami that Harris Bank had been assigned the lease and that payments were to made to the order of Harris Bank. The letter states the following:

Dear Mr. Polk:

The undersigned corporation is the Owner & Landlord of that certain school building which you have leased from Center, Schools Buildings, Inc., which Lease is dated November 26, 1979. From this point on, make all lease rental payments to our favor at the Harris Trust and Savings Bank, 111 West Monroe Street, Chicago, Illinois, 60690.

Yours Very Truly,
Center School Buildings, Inc.
Ray E. Dunn

This argument is not persuasive. The letter from Ray Dunn merely directs North Miami to make payments to the credit of Center Schools at the Harris Bank location. While North Miami states that it does not believe it ever received the letter, the letter does not indicate that Harris Bank has been assigned the lease proceeds, nor does it indicate that payments are to be made for the benefit of Harris Bank. This letter, if received, does not constitute either actual or constructive notice of assignment of the lease to Harris Bank. It also does not require that North Miami pay Harris Bank instead of Center Schools.

In addition to the fact that the letter does not provide North Miami with notice that the lease proceeds had been assigned, Center Schools sent North Miami a letter twice per year, in advance of the semi-annual payment date, to remind the school corporation to remit its payment to Center Schools.

Per IC 26-19-502 states that in an event of default, a secured party is entitled to notify an account debtor or obligor to make payment to the secured party. North Miami did not default, however, because Harris Bank did not notify North Miami of the assignment, nor did Harris Bank notify North Miami that payment should be made to the bank.

Counsel also attempts to place emphasis in its letter to this office dated April 6, 2001, on the fact that Harris Bank could not formally declare default until 180 days had passed since the missed payment. The notification of default, however, is a different issue from notification of the assignment of the lease proceeds and actual default under the Lease Agreement. Moreover, Harris Bank never sent notice to North Miami regarding the first missed payment when the second payment was not due for 180 days. Harris Bank could have alerted North Miami of the missed payment prior to the date of the second payment, but chose not to do so.

Estoppel

Based upon the relationship established by the documents and the course of dealings of the parties, Harris Bank is estopped from successfully claiming that North Miami failed to make a debt service payment. Under the doctrine of equitable estoppel, Harris Bank is estopped from collecting the last two payments from North Miami. Harris Bank had a duty to give notice of the assignment and direction to pay Harris Bank and it did not, therefore, it is estopped from asserting a claim thereunder. The principle of estoppel supplements the provisions of secured transactions in IC 26-1. *(IC 26-1-1-103). For discussion of estoppel see Phar-Crest Land Corporation vs. Therber, Indiana Supreme Court, 244 NE 2d 644 (1969) & AAA Wrecking Co., Inc. vs. Barton, Curle & McLaren, Inc., Court of Appeals, 4th District (1979).*

There are various types of estoppel under the law, all of which are defensive mechanisms with purposes of preserving the rights of a party who relied upon the actions of another party, resulting in detriment to the relying party. There are two types of equitable estoppel. The first involves the use of fraud or misrepresentation against a party who relies upon the misrepresentation. The second type, which applies as far as Harris Bank is concerned in this case, is created when one party with a duty to act fails to do so. *See Bowes vs. Lambert, 51 NE 2d 83, Indiana Appeals Court, (1943).* This latter type of estoppel arises when the party with the duty to act remains silent when it has a duty to act. Negligence can be the basis of estoppel. *Associates Investment Co. v. Shelton, 105 NE 2d 354, Indiana Appeals Court, (1952.)*

The Indiana Supreme Court discussed estoppel in *Brand vs. Monumental Life Insurance,* when the course of dealing leads an individual or entity to rely upon the course conduct of another person or entity. *Brand vs. Monumental Life Insurance, Indiana Supreme Court, 417 NE 2d 297 (1981).* In that case, an insurance company endeavored to foreclose on an Oddfellows organization due to the receipt of late payments due on an insurance policy. The insurance company stated to the Oddfellows organization that it would accept late payments up to 10 days after the due date. In fact, however, the company routinely accepted payments as late as 60 days after the receipt of notice that the payment was due and did not cancel the agreement or attempt to declare a forfeiture. This course of conduct continued for two years. The Court held that the insurance company was estopped from taking any action against the defendant when the company led the plaintiff to believe that premiums would be accepted after the day designated in the contract. *See also Painter vs. Industrial Life Association, Indiana Supreme Court, 30 NE 876 (1892).*

In *Brand,* the plaintiff engaged in the course of conduct for two years. In the case at bar, however, the course of conduct continued from the date that the lease was assigned—nearly 20 years. Harris Bank is estopped in this case from claiming that the defaulted on a debt service obligation by failing to make payments directly to the bank.

As a result, Harris Bank is also unable to demand payment through the intercept statute. The state is only liable under the intercept statute if a school corporation is in default under its legal obligations. The state, in effect, stands in for the school corporation when it can not or does not make a debt service payment. Thus, the state is not liable for a debt that is not owed by a school corporation.

Jay County School Corporation Case

While this office may have correctly interpreted the intercept statute in the Jay County case, the facts of that situation are different from the instant case. In that case, Southern, School Buildings Inc. (hereinafter "Southern Schools"), another corporation for which Ray Dunn served as the president, contracted with Jay County to build a new high school. The construction was completed and the property was leased back to Jay County in 1975. Southern assigned its rights and duties as landlord at that time to the Guardian Life Insurance Company, which in turn sold its interest to Allstate in 1980. Allstate notified Jay County that it had been assigned the lease and to make payments to Allstate. Jay County made its lease payments directly to Allstate from 1980 until 1995. After consistently making lease payments to the same party for 15 years, it suddenly and mistakenly began to make them to Southern Schools instead of Allstate. Southern Schools passed the payments along until 1998. In January of 2000, Allstate notified the State Treasury that it had not received payments from Jay County or Southern Schools in 1998 or 1999.

The difference between the Jay case, then, and North Miami is clear. Jay County officials made a critical error in mistakenly sending the payments to Southern Schools. Jay County officials had been given notice that Jay County was liable under the lease directly to Allstate and accordingly made payments to Allstate for 15 years. This office found that Jay County failed to pay the correct party and advised that the intercept statute should apply.

Liberal Interpretation of Intercept Statute

The Indiana Intercept Statute must be interpreted liberally. Liberal interpretation requires that any entity interpreting its language must give the statute a broad reading. *See Dept. of Treasury vs. Dietzer's Est., 21 NE 2d 137 (1939, Tennant vs. Tennant, 15 BR 502, US Bankruptcy Court, N.D. Indiana, Hammond Division, (1981).*

When a school corporation actually defaults on a debt service payment, the statute must be applied. The intercept statute is designed to insure that holders of debt service obligations are paid by the state when a school corporation fails to make debt service payments after proper notice of its payment obligation.

The statute is not designed to protect holders of school debt service obligations from their own negligence or the fraud of third parties. To interpret the statute otherwise would open the door to using the state treasury, our citizen's own tax dollars, as an insurance policy against the negligence of the debt holder or against any type of fraudulent situation such as embezzlement by a bank employee receiving the debt service payment. The intercept statute does not protect parties against their own negligence or lack of due diligence in executing contractual obligations.

The statute should be applied liberally, but only when a school corporation is in actual default on a debt service payment.

What triggering event must occur for the Treasury to apply the intercept statute?

When the Treasurer has actual notice that a default has in fact occurred, the intercept statute should be applied to the amount of default plus any interest that accrued under the specific contract obligation. The triggering event is notice and investigation of actual default under the law. Because the state substitutes itself for the school corporation in making debt service payments, the state is liable only when a school corporation is liable. The intercept statute is triggered upon the receipt by the Treasurer of notice of a valid default. The application of the statute must involve a process to determine whether a default has occurred.

Conclusion

The intercept statute does not apply to this case because North Miami was not in default on a debt service obligation. North Miami properly made the lease payment to the party named on the lease agreement. Center Schools had the right per the terms of the lease to assign the lease and the receipt of lease proceeds after the building was complete. Harris Bank had the right as assignee to receive the lease proceeds. Harris Bank, however, also had the duty to inform North Miami if it wished to change a course of dealing that had been established and followed from the inception of the lease until the last payment was made in 2000. It had the duty to notify North Miami of its intention to require that all lease payments be made directly to Harris Bank. It failed to do so.

To apply the intercept statute in a blanket fashion, regardless of whether the school corporation was actually in default of an obligation, would be inconsistent with the purpose of the statute. The purpose of the statute is to insure holders of school debt service obligations that the state will intercept and make payments when a school corporation is in actual default on these obligations.

Sincerely,

Stephen Carter
Indiana Attorney General

OFFICE OF THE ATTORNEY GENERAL

June 12, 2001

OFFICIAL OPINION 2001-3

The Honorable Richard D. Bray
State Senator
210 East Morgan Street
Martinsville, Indiana 46151-6814

Re: Accessing 911 Database.

Dear Senator Bray:

On March 12, 2001, you requested, a legal opinion on the following issues:

1. Can a police department or similar agency which has access to 911 database access the information in the database if no incoming 911 call is made or no emergency exists at a location?
2. Can such information be used by police agencies for criminal investigations or locating persons who may be wanted for criminal investigation or for arrest on criminal charges?
3. Who can access this information and under what circumstances other than administrative updates of optional information can this information be used?

BRIEF ANSWER

Absent an emergency or an incoming 911 call, the police or a similar agency may not access the 911 database or use the information in that database for criminal investigations or for arrests on criminal charges. Conversely, if there *is* an emergency, a 911 call is often the first indication that a crime has taken place. Under those circumstances police authorities may obviously access that information. In addition, the only persons who should have access to the database are those who maintain it and those who need the information to respond to emergencies. Anyone who releases customer data, other than telephone location or service user (customer), through the 911 system without a court order in a non-emergency situation may be found guilty of a class A misdemeanor.

LEGAL ANALYSIS

Indiana law has very clear proscriptions on how 911 data may be used. Indiana Code § 36-8-16-16(a) states:

> Service suppliers shall provide upon request the necessary customer data to implement an enhanced emergency telephone system. **Customer data** provided to a county or municipality for the purpose of implementing or updating an enhanced emergency telephone system **may be used only to identify the telephone location or service user, or both, and may not be used or disclosed by the county or municipality, or its agents or employees, for any other purpose unless the data is used or disclosed under a court order**. A person who violates this subsection commits a Class A misdemeanor.

(Emphasis added.) Indiana Code § 36-8-16-16(b) states that this customer data includes the address of service, the class of service, and a designation of listed, unlisted, or nonpublished.

Indiana Code § 36-8-16-16 prohibits the disclosure of customer data for purposes other than identification of the service location (address) or the service user (customer). This means that dispatchers can use this customer data to locate the address or customer. Disclosure for any other purpose may result in a Class A misdemeanor.

Indiana Code § 36-8-16-17(a) details to whom a telephone number may be released and under what circumstances:

> A [dispatch] unit may not release a telephone number required to be provided under this section to any person for a purpose other than including the number in the enhanced emergency telephone system data base or providing the number to permit a response to a police, fire, medical, or other emergency situation.

This section prohibits disclosure of telephone numbers of customers for any reason other than an emergency situation or for inclusion in an enhanced telephone system database. This means that no one may disclose the phone numbers unless it is an emergency.

CONCLUSION

Under the Indiana Code, no one may use 911 data for purposes other than determining a telephone location or service user in an emergency, unless a court order is in place. In addition, no one may disclose phone numbers for purposes other than inclusion in an emergency 911 data base or in the case of an emergency situation. Disclosure under other circumstances may constitute a Class A misdemeanor.

Sincerely,

Stephen Carter
Indiana Attorney General

OFFICE OF THE ATTORNEY GENERAL

June 15, 2001

OFFICIAL OPINION 2001-4

The Honorable Jim Buck
State of Indiana, House of Representatives
4407 McKibben Drive
Kokomo, IN 46902

Re: Constitutionality of school health service fees.

Dear Representative Buck:

On March 13, 2001, you requested a legal opinion on the following question which has been rephrased in this opinion: By charging a "Health Service Fee" to help offset the cost of a school nurse's salary, does a school corporation violate the "tuition without charge" clause of the Indiana Constitution?

BRIEF ANSWER

Yes. A school corporation violates the "tuition without charge" clause of the Indiana Constitution when it imposes a Health Service Fee. The imposition of such fees, for the purposes of offsetting the cost of the salary for the school nurse, as it pertains to 511 IAC 4-1.5-6, violates Article 8 § 1 of the Indiana Constitution "wherein tuition shall be without charge."

BACKGROUND

In 1995 the Eagle-Union Community School Corporation Board of School Trustees adopted a "Health Service Fee" in order to fund the various nursing positions within the school corporation.[1] In September, 1999, Nancy Neel, a resident within the school corporation, inquired into the validity of imposing a health service fee.[2]

The State Board of Accounts then conducted an audit of the Eagle-Union Community School Corporation for the timeframe of July 1, 1997, through June 30, 1999.[3] After the audit, the State Board of Accounts indicated to Eagle-Union Schools that the imposition of the health service fee was questionable by stating: "our audit position [is] that the Health Service Fee may not be in compliance with Constitutional provisions."[4]

In a formal response to the State Board of Accounts position, Dr. Howard J. Hull, Superintendent of Eagle-Union Community School Corporation and Jack G. Hittle, attorney for the School Corporation, both wrote letters to the State Board of accounts. Dr. Hull's opinion stated that the audit comment concerning the Health Service Fee did not comport with the rules, that a previous audit after the Health Service Fee had been instituted had not questioned the Fee and that the Health Service Fee was properly authorized and collected by the School Board.[5] Mr. Hittle's letter specifically states that "there is nothing improper, illegal, or unconstitutional in the School's Health Service Fee."[6] Mr. Hittle compared the imposition of a Health Service Fee to fees imposed for textbooks, band uniforms and athletic uniforms.[7] He further stated that it was his opinion that the Eagle-Union School Corporation had acted under the authority of Indiana Code § 20-5-1.5-2, the "Home Rule Act."[8]

In a letter dated March 31, 2000, the Indiana School Board Association (hereinafter "ISBA"), by Lisa Tanselle, gave an opinion regarding the Health Service Fee.[9] The ISBA also compared the Health Service Fee to textbook rental fees.[10] Ms. Tanselle also stated that "tuition" refers to "the act of teaching," "the services or guidance of a teacher," or "the price or payment for instruction."[11] Ms. Tanselle concludes that "because health services do not include the act of teaching or the payment for instruction from a teacher," the Eagle-Union Community School Corporation had authority to impose the Health Service Fee.[12]

On April 3, 2000, Dr. Hull sent a letter to the Indiana Department of Education requesting that the Department of Education respect the process in which the Eagle-Union Community School Corporation had implemented the Health Service Fee.[13] On April 11, 2000, Dana Long, Legal Counsel for the Indiana Department of Education, issued a response to Dr. Hull.[14] In the Indiana Department of Education's opinion, Ms. Long found that the Eagle-Union Community School Corporation violated the Indiana Constitution by implementing the Health Service Fee.[15] Ms. Long concluded that the imposition of a Health Service Fee was not like imposing textbook rental; that the ISBA's interpretation of "tuition" as being "the payment for instruction from a teacher" was too narrow;

and that a Health Service Fee "that pays for salaries and services provided for by the General Assembly and funded through tax levies violates Indiana's Constitution."[16]

On June 19, 2000, the Indiana Board of Education filed several rules with the Secretary of State implementing definitions of and mandates for "Student Services Personnel," "Educational and Career Services," "Student Assistance Services," and "Health Services."[17] It is this office's official opinion that a school board may not constitutionally impose a Health Service Fee for the purposes of paying health service providers' salaries.

LEGAL ANALYSIS

A school corporation may not impose a Health Service Fee to pay the salaries of Health Service Employees.

A school corporation may not impose a Health Services Fee in order to offset the cost of a school nurse's salary. Indiana Constitution Article 8 § 1 states in pertinent part:

> …[I]t 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, wherein tuition shall be without charge, and equally open to all.

The issue here is whether a school nurse's salary is "tuition" within the meaning of the Indiana Constitution. Neither the Indiana Constitution nor the Indiana Code define "tuition." Additionally, the only case in Indiana which discusses "tuition" in regard to the Indiana Constitution is *Chandler v. South Bend Community School Corporation*, 312 N.E.2d 915 (Ind.App. 1974). *Chandler* discussed the constitutionality of a statute that permitted charging rental fees for textbooks. The Indiana Court of Appeals held in *Chandler* that charging fees for textbooks did not violate the Indiana Constitution because there was "no basis for interpreting the word 'tuition' to include textbooks used in public schools of the state."[18]

The court then discussed definitions of "tuition":

> "Black's Law Dictionary defines tuition as 'The act or business of teaching the various branches of learning.' Websters Third New International Dictionary adds '… the act of teaching; the services or guidance of a teacher: … the price of or payment for instruction.' Neither definition state or implies that the word entails textbooks.[19]

The Eagle-Union Community School Corporation, both through Superintendent Hull and its attorney Mr. Hittle, as well as the ISBA, argue that Health Service Fees are like "textbooks" and are not "tuition" and that the school corporation was empowered to charge the Health Service Fee. Admittedly, the General Assembly has granted to school corporations a great deal of power with the "School Corporation Home Rule" found in Indiana Code § 50-5-1.5. Specifically, "… the state is to grant school corporations all the powers that they need for effective operation of each school corporation."[20] In addition, a school corporation has "all powers granted it by statute or through rules adopted by the state board of education; and all powers necessary or desirable in the conduct of its affairs, even though not granted by statute or rule."[21]

However, there are limits to a school corporation's power. "A school corporation may exercise any power it has to the extent that the power … is not expressly denied by the Constitution of the State of Indiana, by statute, or by rule of the state board of education…."[22] Although the Indiana State Board of Education had not defined "tuition," it had defined "Health Services."

In the summer of 2000,[23] the Indiana State Board of Education implemented rule 511 IAC 4-1.5-6 requiring schools to employ a nurse who, as part of his/her employment, "shall coordinate health services." "Health services" are further defined in pertinent part:

> (A) creating a safe and healthful school environment through a continuous health program for all students;
> (B) employing principles of learning and appropriate teaching in the delivery of health education; and
> (C) acting as a resource to students, families, staff, and the community regarding
> (i) health services;
> (ii) health education; and
> (iii) a healthy environment.

The rule clearly intends that the "school nurse" also act in the capacity as a educator and as a coordinator of health service education. Thus, with this rule, the Board of Education has defined a school nurse's role such that the role falls within the definition of tuition.

Conversely, the ISBA is of the opinion that health services do not include "the act of teaching or the payment for instruction from a teacher…." The ISBA's argument fails for two reasons: first, the Health Service rule did not exist at the time the ISBA rendered its opinion; and second, the authority the ISBA cited for this statement was *Chandler* and that case does not include the phrase "from a teacher." As the Department of Education points out in its letter, the ISBA narrowly defined "tuition" without citing any authority for the more narrow definition. Indeed, there does not appear to be any authority for this narrow interpretation.

Furthermore, other states have adopted legislation that specifically includes health services and nurses as part of tuition. In New Hampshire, the Supreme Court issued an advisory opinion regarding legislation that not only would implement nurses in public school at the public's expense, but also providing nurses in private schools at the public's expense.[24] Although the question at issue was separation of church and state, the court found that because there was an interest for the well-being of students, not only could New Hampshire enact a law to provide for and fund nurses in public schools, but also private schools.[25]

Moreover, payment for school nurses or health services is further distinguishable from textbooks in that health services and nurses' salaries are fixed expenses not unlike the fixed expenses for school building maintenance or teachers' salaries. Health services, pursuant to the Board of Education's rule, are a necessary element of any school's activity, and as such, would fall within the meaning of tuition.[26]

Additionally, the General Assembly has provided for methods of calculating tuition and for funding the tuition.[27] Because tuition is paid for through the legislative process and health services are tuition, it follows that health services are paid for by the legislature and to charge a separate fee would be in violation of the Indiana Constitution.

CONCLUSION

Indiana Constitution Article 8 § 1 and the Indiana General Assembly provide for "Common school systems wherein tuition shall be without charge." Also, the General Assembly has provided for funding of schools and a method for calculating tuition. Health services, because they include instruction and education are tuition. Therefore, a school corporation may not charge a separate fee for health services.

Sincerely,

Stephen Carter
Indiana Attorney General

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[1] Eagle-Union School Board Minutes, April 24, 1995.
[2] Letter dated September 16, 1999, to Mr. Chuck Nemeth, State Board of Accounts.
[3] State Board of Accounts, ""Audit Report of Eagle-Union Community School Corporation,"" filed with the State Examiner on January 25, 2000.
[4] Id. at 31.
[5] Id. at 41-42.
[6] Id. at 43-45.
[7] Id. at 44.
[8] Id.
[9] Indiana School Boards Association, Letter to Dr. Hull dated March 31, 2000.
[10] Id.
[11] Id.
[12] Id.
[13] Letter dated April 3, 2000, to Patty Bond, Director of Finance with the Indiana Department of Education from Dr. Hull.
[14] Letter dated April 11, 2000, to Dr. Hull from Dana Long, Legal Counsel for the Indiana Department of Education.
[15] Id.
[16] Id.
[17] See 511 IAC 4-1.5 et seq.
[18] Id. at 920.
[19] Id.
[20] IC 20-5-1.5-1.
[21] IC 20-5-1.5-3(b)(1) and (2).
[22] IC 20-5-1.5-4(1).

[23] All of the correspondences, other than the request for this opinion, occurred before the implementation of 511 IAC 4-1.5-6.
[24] Opinion of The Justices 258 A.2d 343, 344 (N.H. 1969).
[25] Id.
[26] See Granger v. Cascade County School District No. 1, 499 P.2d 780 (Mont. 1972) (All those items that are necessary for free public education); Paulson v. Minidoka County School District, 463 P.2d 935 (Idaho, 1970) (The school district could not withhold student''s transcript for non-payment of a fee charged for extracurricular activities and textbooks); Arcadia Unified School District v. State Department of Education, 852 P.2d 438 (Cal. 1992) (Free School guarantee in California Constitution extends to all activities which constitute integral fundamental part of elementary and secondary education or which amount to necessary elements of any school's activity).
[27] See IC 21-2-4; IC 21-2-11; IC 21-2-11.5; IC 21-2-15; IC 21-2-17; and IC 21-2-18.

OFFICE OF THE ATTORNEY GENERAL

July 10, 2001

OFFICIAL OPINION 2001-5

The Honorable Bruce Munson
State Representative
7009 West Santa Fe Drive
Muncie, Indiana 47304

RE: Political affiliation of appointees to county health board

Dear Mr. Munson:

This letter responds to your request for an advisory opinion on the following question:
The Commissioners in Delaware County filled a vacancy on the county health board. By statute, the vacancy should have been filled by a Republican appointee. The person selected by the commissioners has a record of voting as a Democrat in primary elections. Does the appointment violate the law?

It is our opinion that if the appointment results in more than four (4) members of the board being from the same political party, the appointment is contrary to Indiana law.

ANALYSIS

The statute is unambiguous on the required political affiliation of members of a local health board chosen by the county executive pursuant to IND. CODE § 16-20-2-2:

Members of local board of health. -- A local board of health is composed of seven (7) members, *not more than four (4) of whom may be from the same political party.*

IND. CODE § 16-20-2-4 (emphasis added). In addition to the limitation on political affiliation, the members are to be chosen from specified categories, including no less than two (2) licensed physicians, at least two others "knowledgeable in public health" chosen from designated health-related professions, and at least two (2) "representatives of the general public." IND. CODE § 16-20-5.

The Legislature has defined "political affiliation of board appointees":

(a) As used in this section, "board" means an administration, agency, authority, board, bureau, commission, committee, council, department, division, institution, office, service, or other similarly designated body of a political subdivision.

(b) Whenever a law or political subdivision's resolution requires that an appointment to a board be conditioned upon the political affiliation of the appointee, or that the membership of a board not exceed a stated number of members from the same political party, at the time of an appointment **either of the following must apply to** the appointee: ~~must~~

(1) ~~have voted in~~ The most recent primary election **in which the appointee voted was a primary election** held by the party with which the appointee claims affiliation. ~~or~~

(2) ~~if~~ The appointee ~~did not vote in the most recent primary election held by the party with which the appointee~~

~~claims affiliation,~~ ~~be~~ **is** certified as a member of that party by the party's county chairman for the county in which the appointee resides.

(c) Notwithstanding any other law, if the term of an appointed member of a board expires and the appointing authority does not make an appointment to fill the vacancy, the member may continue to serve on the board for only sixty (60) days after the expiration date of the member's term.

IND. CODE § 36-1-8-10 (emphasis added).[1]

Over fifty years ago, the Indiana Supreme Court upheld the constitutionality of statutes requiring selection or appointment of public officers or agents from members of a political party. Faced with a challenge to a statute requiring the judge of the circuit court to appoint to the Board of Registration members from "the two (2) political parties which cast the highest and next highest number of votes for secretary of state in such county at the last preceding election," the court held that

> [i]f we were to hold that the statute lays down a political test, it will be noted that our state Constitution nowhere prohibits a political test for public office. The only test for office which our Constitution proscribes is a religious test.
>
> ...
>
> It is our opinion that when the legislature conferred upon the county chairman the right to make this nomination it was exercising a reasonable police regulation to promote the public welfare.

State ex rel. Buttz v. Marion Circuit Court, 225 Ind. 7, 14, 19, 72 N.E.2d 225, 229, 231 (1947).

CONCLUSION

Assuming the appointment that you are questioning results in more than four (4) members of the board being from the same political party, the appointment did not comply with Indiana law.

Sincerely,

Stephen Carter
Attorney General

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[1] The statute was amended by S.E.A. 395, 112th Gen. Assem., first Reg. Sess. 2001. Changes shown in **bold** became effective July 1, 2001. Deleted language, which was in effect until July 1, 2001, is shown with the ~~strikethrough~~.