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February 4, 2002

**OFFICIAL OPINION 2001-13**

The Honorable Thomas K. Weatherwax  
State Senator  
3012 Woodland Drive  
Logansport, IN 46947-1357

RE: Community College System

Dear Senator Weatherwax:

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

1. What is the authority of the Commission for Higher Education in regard to the operation of the Community College System? Can the Commission for Higher Education require changes to signage at Ivy Tech sites where the Community College System is in place?
2. Does the Commission for Higher Education have the authority to require students to make payments for classes at Community College System sites to "Community College of Indiana" rather than to Ivy Tech State College?
3. What is the fiduciary role of the respective trustees of Vincennes University and Ivy Tech State College as it relates to the Community College System? Is there any basis to exempt or modify their duties under the generally accepted principle of law that trustees have an independent fiduciary duty to act in the best interest of the institution that the trustee represents?

The Commission for Higher Education (the "Commission") has virtually no authority over the *operation* of the Community College System. The Commission does not have the authority either to require changes to signage at state university sites or to require students make payments to a fictitious entity or to any entity other than one designated by the Board of Trustees of the educational institution in which the student is enrolled. The creation of the Community College

System does not alter or modify the basic fiduciary duties of the trustees of Ivy Tech and VU to their respective institutions.

### BACKGROUND AND ANALYSIS

The Indiana Community College System (the “System”) was created by the General Assembly in 1999 at IND. CODE § 20-12-75. The System was “established as a *coordinated partnership* of Vincennes University [‘VU’] and Ivy Tech State College [‘Ivy Tech’]” to, among other things, “provide an opportunity for students to earn associate degrees that are accepted by four (4) year colleges and universities.” IND. CODE § 20-12-75-4(a) (emphasis added). The authorizing legislation delineates the degrees and courses that may be offered by each of VU and Ivy Tech, IND. CODE § 20-12-75-6 through § 20-12-75-8, and further provides that

[a] framework for implementing sections 6 through 8 of this *chapter shall be mutually agreed upon by both the Vincennes University board of trustees and the Ivy Tech State College state board of trustees* and shall be approved by the community college policy committee.

IND. CODE § 20-12-75-9 (emphasis added). The Community College Policy Committee, comprised of three members of the boards of trustees of each of VU and Ivy Tech, as well as individuals appointed by the governor, was created to

- (1) oversee the implementation of the community college system, including the selection of the sites at which the community college system will be offered and the timetable for implementing these sites;
- (2) review the broad policies and principles to be used to carry out and guide the implementation; and
- (3) serve as a communication link among the two (2) boards of trustees and the commission for higher education with regard to implementing the community college system.

IND. CODE § 20-75-12(a). However, the General Assembly made it abundantly clear that the System does *not* supercede, replace, or diminish the independence of either Ivy Tech or VU:

Although the community college system is a coordinated partnership of Vincennes University and Ivy Tech State College, under the community college system:

- (1) *each institution remains an independent entity; and*
- (2) *the coordinated system shall not in any way limit the independence of each institution.*

IND. CODE § 20-12-75-5 (emphasis added). Moreover, the “community college policy committee *shall not exercise any powers that have been assigned to the Vincennes University board of trustees, the Ivy Tech State College state board of trustees, or the commission for higher education.* IND. CODE § 20-12-75-12(b) (emphasis added).

The boards of trustees of Ivy Tech and VU, each of which is a body corporate and politic that may sue and be sued, IND. CODE § 20-12-61-5 (Ivy Tech) and § 23-13-18-1 (VU), have been given broad grants of authority by the General Assembly over the operations of their respective institutions.

Ivy Tech is governed by a state board of trustees (the "State Board"), IND. CODE § 20-12-61-4, which in turn appoints a regional board with oversight authority over Ivy Tech institutes within a specific region. IND. CODE § 20-12-61-10; § 20-12-61-12. The State Board "has the responsibility for the management and policies of Ivy Tech and its regional institutes within the framework of laws enacted by the general assembly." IND. CODE § 20-12-61-5(b). Among its powers and duties are:

(2) Operating, either through committee or through subordinate corporate entities, statewide occupational and technical programs, which in its opinion should be established due to the specialized nature of the programs, the limited number of students involved, or other unique features requiring special attention.

(3) Contracting with appropriate education institutions, including local public schools or other agencies, to carry out specific programs which can best and most economically be provided through this approach.

...

(6) Making biennial studies of the budget requirements of the regional institutes and of its own programs and preparing a budget, including anticipated revenues and providing for the construction or rental of facilities requisite to carrying out the needs of Ivy Tech.

(7) Performing or contracting for the performance of an audit of the financial records of each regional institute on at least a biennial basis.

IND. CODE § 20-12-61-9. In addition, the State Board may

(1) Hold, encumber, control, acquire by donation or purchase, construct, own, lease, use and sell real and personal property as is necessary for the conduct of its program of operation, on whatever terms and for whatever consideration may be appropriate.

...

(8) Prescribe rules for the effective operation of a statewide program and exercise other powers that are necessary for the efficient management of the program.

(9) Establish a schedule of fees or charges for students and provide scholarships and remission of fees in proper cases.

(10) Authorize, approve, enter into, ratify, or confirm any agreement relating to a statewide program or a regional institute with the United States

government . . . , or with any person, organization, or agency offering contracts or grants-in-aid financing the educational facilities or the operation of the facilities and programs.

IND. CODE § 20-12-61-13.

The State Board is authorized to appoint a treasurer of Ivy Tech, who may be either one of the trustees or an employee. IND. CODE § 20-12-61-7(a). The Treasurer of Ivy Tech shall:

- (1) Keep true accounts of all money received into the treasury of Ivy Tech and of the expenditure thereof.
- (2) Pay out the same on order of the state board.
- (3) Collect the tuition and fees due Ivy Tech as well as gifts, grants, bequests, and devises.
- (4) Submit a full statement of the finances of Ivy Tech and his receipts and payments, at each annual meeting of the state board.
- (5) Invest and reinvest such funds as shall come into his possession to the benefit of Ivy Tech.

IND. CODE § 20-12-61-7.5.

The power and authority of VU's Board of Trustees (the "VU Trustees") is similar to that of Ivy Tech's State Board. Established originally in 1807 by the territorial legislature, the VU Trustees are "authorized and required" to:

- (1) erect, purchase or hire, as they may deem most expedient, for carrying the said university into effect, suitable buildings for the said university;
  - (2) make ordinances for the government and discipline thereof;
  - (3) establish plans of education . . . ;
  - (4) regulate the admission of students and pupils into same.
- . . .
- (9) generally to do all lawful matters and things whatsoever, necessary for the maintaining and supporting the institution and for the more extensive communication of useful knowledge.

IND. CODE § 23-13-18-8. The VU Trustees are further authorized and empowered to:

- (a) (1) erect, construct, and complete buildings, structures and otherwise improve property owned by the university;
- (2) equip, furnish, operate, control and manage said properties for the purposes of the or for the benefit of the university; and
- (3) acquire by purchase, lease, gift or otherwise, such property both real or personal as in the judgment of said trustees shall be necessary for such purposes. . . .

(b) Title to all property so acquired including the improvements thereon shall be taken and held by and in the name of said trustees in the corporate capacities for the purposes of this chapter.

IND. CODE § 23-13-18-14.

The Commission for Higher Education, on the other hand, is fundamentally an oversight body created for the purposes of planning, coordinating, reviewing and making recommendations on issues related to postsecondary education. IND. CODE § 20-12-0.5-3. For example, the Commission is, among other things, tasked with developing and implementing a long range plan for post-secondary education, IND. CODE § 20-12-0.5-8(1), including vocational and technical education, IND. CODE § 20-12-0.5-8(2), and is responsible for reviewing budget requests of all state educational institutions, IND. CODE § 20-12-0.5-8(4).

The Commission is specifically authorized to “approve or disapprove the establishment of any new branches, regional or other campuses, or extension centers or of any new college or school, or the offering on any campus of any additional associate, baccalaureate, or graduate degree, or of any additional program of two (2) semesters, or their equivalent in duration, leading to a certificate or other indication of accomplishment.” IND. CODE § 20-12-0.5-8(7). In fact, no state educational institution “shall establish any new branch, regional campus, or extension center or . . . offer any new degree or certificate . . . without the approval of the commission or without specific authorization by the general assembly.” *Id.* Beyond this approval power, the Commission

shall have *no* powers or authority relating to the management, operation or financing of . . . Vincennes University, Ivy Tech State College . . . or any other state educational institution except as expressly set forth in this chapter. *All of the particulars, management, operations, and financing of all state educational institutions shall remain exclusively vested in the trustees or other governing boards or bodies of these institutions.*

IND. CODE § 20-12-0.5-11 (emphasis added). The Commission’s only responsibility to the System is to make an annual report on the System to the budget committee and the legislative council, assisted by VU and Ivy Tech. IND. CODE § 20-12-75-11.

The foregoing statutes, when read together, make it quite clear that the general assembly has taken great pains to maintain the legal independence of both Ivy Tech and VU. The System provides the mechanism for the ongoing development of these two institutions as separate entities with the goal of minimizing overlapping and duplicative programs and facilities. It does not, however, confer authority on the day-to-day operations to any entity other than the respective boards of trustees.

Accordingly, the Commission does not have the authority to require changes in signage for either Ivy Tech or VU. In fact, pursuant to IND. CODE § 20-12-0.5-11, it is statutorily

prohibited from exercising any authority in the “the management, operation or financing of” these institutions.

For the same reasons, the Commission has no authority to require students to make payments for classes to “Community College of Indiana” rather than to Ivy Tech or VU inasmuch as such action goes to the very heart of the management, operation and financing of each institution.

There are additional reasons why the Commission’s requirement that payments be made to the “Community College of Indiana” is not authorized. First, the general assembly has not established such an institution, and no legal entity known as “Community College of Indiana” is registered with the Indiana Secretary of State (although the Commission reserved the name in 1999). Quite simply, at this point in time, there appears to be no “Community College of Indiana” capable of receiving checks or making disbursements<sup>1</sup>.

Second, even if an entity known as Community College of Indiana existed, it would require legislation from the general assembly to mandate that entity to collect the student tuition and fees and make disbursements for those attending Ivy Tech or VU. At present, the collection of tuition and fees are the legal responsibility of the each of the State Board and the VU Trustees, respectively. The boards of trustees of Ivy Tech and VU have the power to enter into a *voluntary* written agreement between themselves for the common, cooperative processing, disbursement and record keeping of tuition and fees under IND. CODE § 20-12-65-3 (“Joint Financing Agreement”), which provides:

(a) if:

(1) one (1) qualified institution [defined at IND. CODE § 20-12-65-1 to include both Ivy Tech and VU] wants to exercise a power or powers conferred to it under an enabling statute or statute; and

(2) one (1) or more other qualified institutions want to exercise a power or powers conferred to it or them under an enabling statute or statutes;  
then both or all of those qualified institutions may exercise those powers jointly as provided in subsection (b).

(b) Qualified institutions that want to exercise a power or powers as provided in subsection (a) must by written resolution enter into a written agreement under section 4 of this chapter.

(c) This chapter does not authorize a qualified institution to exercise a power under an agreement under this chapter that it could not otherwise separately exercise under an enabling statute.

The contents of the written agreement are detailed in IND. CODE § 20-12-65-4:

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<sup>1</sup> It is clear that Ivy Tech and VU may, *by written agreement* authorized under IND. CODE § 20-12-65-4, establish a separate legal entity for the purpose of a joint undertaking. Depending on its form, such an entity would not necessarily be registered with the Secretary of State.

- (a) An agreement under this section must provide for the following:
- (1) Its duration.
  - (2) Its purpose.
  - (3) The manner of financing, staffing, and supplying the joint undertaking and of establishing and maintaining a budget for the joint undertaking.
  - (4) The methods that may be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon partial or complete termination.
  - (5) Administration through a separate legal entity, the nature, organization, composition, and power of which must be provided.
- In addition, such an agreement may provide for any other appropriate matters.
- (b) A separate legal entity established by an agreement under this section has only the powers delegated to it by the agreement.

The Joint Financing Agreement statute further provides that a copy of the agreement must be filed not only with the respective institutions that are party to it, IND. CODE § 20-12-65-5, but also with the state board of accounts and the state budget agency. IND. CODE § 20-12-65-6.

In summary, nothing in the Joint Financing Agreement statute, the Community College System statute, or the Commission's enabling statute authorize the unilateral, non-voluntary imposition of a third-party payment requirement on Ivy Tech or VU. Any arrangement the two institutions may make must follow the requirements of IND. CODE § 20-12-65, *et. seq.*

You have also asked about the fiduciary role of the respective trustees of Vincennes University and Ivy Tech State College as it relates to the Community College System. As discussed above, the System envisions cooperation and mutual agreement between the two institutions; it does *not* require that they reach an agreement, and no penalties are provided if agreement cannot be reached on an issue.

While each of the boards has an implied fiduciary duty to the other to exercise good faith and fair dealing in any partnership transaction, *see, e.g., Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435 (Ind. App. 1990), System's enabling statute does not shift their underlying duties of loyalty and good faith away from the respective individual educational institutions to the System. *See, Massey v. St. Joseph Bank & Trust Co.*, 411 N.E.2d 751, 754 (Ind. App. 1981) ("One of the most fundamental duties of the trustee is that he must display ... complete loyalty to the interests of the beneficiary, and must exclude all selfish interest and all consideration of the interests of third persons.")

#### CONCLUSION

The Commission for Higher Education (the "Commission") has virtually no authority over the operation of the Community College System. The Commission does not have the authority either to require changes to signage at state university sites or to require students to make payments

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to a fictitious entity or to any entity other than one designated by the Board of Trustees of the educational institution in which the student is enrolled. The creation of the Community College System does not alter or modify the basic fiduciary duties of the trustees of Ivy Tech and VU to their respective institutions.

Sincerely,

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