OPINION 9

OFFICIAL OPINION NO. 9

July 4, 1975

Honorable Otis R. Bowen, M.D.
Governor of Indiana
Room 206 State House
Indianapolis, Indiana 46204

Dear Governor Bowen:

This is in response to your request for an official opinion in answer to the following questions:

"1. Does the Indiana State Scholarship Commission possess the statutory authority to authorize it to set a level of financial award under the provisions of Freedom of Choice Grant Program that is *less* than the difference between the amount of scholarship or grant previously awarded and the total financial need of the student in situations when the level of legislative appropriation would not otherwise be sufficient to enroll new students into the program?

"2. If it is your official opinion that this discretionary authority does exist for the State Scholarship Commission, must that authority be exercised by duly promulgated regulation, or may it be taken by simple motion of the Commission?

"3. If it is your official opinion that such statutory discretionary authority does exist within the State Scholarship Commission, can this action be undertaken without incurring potential financial risk to the State of Indiana, or to the individual members of the Commission which might arise from students who have had their awards reduced?"

ANALYSIS

The State Scholarship Commission was created by the Indiana General Assembly by the Acts of 1965, Ch. 157, the

Indiana Scholarship Act, which, as amended, is found in the Indiana Code of 1971 at Sections 20-12-21-1 to 20-12-21-18. The Commission is granted broad powers under Section 20-12-21-5, including the power to "determine the respective amounts of, and award, the appropriate scholarships" and "determine eligibility for, and award, annual renewals of scholarships."

The Freedom of Choice Grant Program, which is the subject of your inquiry, was established by the Acts of 1973, Public Law Number 229, and is found in the Indiana Code of 1971 at Sections 20-12-21-15 to 20-12-21-18. As provided in Section 20-12-21-15(c), this program was enacted to benefit students who attend private colleges within Indiana, where tuition costs are greater than at State-operated colleges, by providing such a student with a separate grant in addition to the grant he receives under the regular scholarship (Section 20-12-21-7) or educational grant (Section 20-12-21-13) programs. The amount of a Freedom of Choice Grant is prescribed by the Indiana Code of 1971, Section 20-12-21-17, to be:

> ". . . the difference between the amount of the scholarship award or educational grant and the total financial need of the student as determined pursuant to the commission's rules and regulations, but not to exceed the sum necessary to pay tuition and regularly assessed fees at the institution."

Thus, the 1973 Indiana General Assembly appears to have intended that any student who receives a regular scholarship or educational grant award and who wishes to attend a private college will receive in addition (but still subject to the Commission's determination of his or her need) a grant to cover the additional expense of the private school tuition and fees.

The facts giving rise to your request are that the Commission, apparently pursuant to its powers noted above, initially made Freedom of Choice Grants only to freshmen and then, in 1974 and 1975, to freshmen and sophomores, and that these two classes, now sophomores and juniors, are eli-

gible for renewal for the 1975-1976 school year, pursuant to the Indiana Code of 1971, Section 20-12-21-16, which provides the following:

> "Such grants shall be renewed annually, under the same conditions as are set forth in IC 1971, 20-12-21-7(b), and without further competitive examinations, for a total of three (3) consecutive academic years following the academic year of the first award or until such earlier time as the student receives a degree normally obtained in four (4) academic years."

The 1975 Indiana General Assembly, however, did not appropriate sufficient funds to provide grants to incoming freshmen in addition to renewal grants for the existing sophomore and junior participants. Apparently the real issue thus is what effect does the appropriation bill, the Acts of 1975, Public Law Number 343 (House Enrolled Act Number 1101, p. 61) have upon the prior statutory scheme which authorizes the Commission to determine the amounts of scholarships (Indiana Code of 1971, Section 20-12-21-5); which provides that Freedom of Choice Grants, once made, shall be renewed annually (Section 20-12-21-16); and which states that the amount of a Freedom of Choice Grant shall be the difference between the basic grant and the added cost of a private school.

When the 1975 Indiana General Assembly considered appropriations for state scholarship programs, the practice of the Scholarship Commission with respect to Freedom of Choice Grants was clear. The Commission had begun the program with one class and had added a second class in the second year of operation. Under its broad statutory authority and in view of its already established practice, the Commission fairly could be expected to add a third class in the third year of the program's operation. Yet, the Indiana General Assembly provided an appropriation insufficient to carry out the program as it initially was enacted in 1973. Under the practice already established by the Commission, the insufficient appropriation plainly would not permit the amount of awards indicated by the Indiana Code of 1971, Section 20-

12-21-17. Thus, to the extent that the 1975 appropriation act and Section 20-12-21-17 are repugnant, the earlier law is repealed by implication for the time period of the appropriation act. *Payne v. Buchanan* (1958), 238 Ind. 231, 148 N.E. 2d 537. In other words, the mandatory "shall" of Section 20-12-21-17, requiring a 100 per cent grant, necessarily must be stricken, or read in a permissive sense, to authorize awards subject to the limits of funds available.

Accordingly, the State Scholarship Commission may make grants at a level which is less than the difference between the amount of the basic award and the total financial need of the student where the legislative appropriation does not permit full grants. Of course, the Scholarship Commission, as the agency which administers the various scholarship programs, may change its practices and may determine not to include freshmen in the program. But that is the Commission's decision. And its construction and application of the scholarship laws should be given great weight. 1958 O.A.G. No. 4, p. 14 at 18. See also *Udall v. Tallman* (1965), 380 U.S. 1.

You also ask whether the Commission may exercise its discretionary authority by resolution or motion rather than by promulgated regulation. Clearly, the better practice is to promulgate rules pursuant to the Indiana Code of 1971, Section 4-22-2-1, *et seq.*

Finally, your question as to whether the Commission members individually or the State may be liable if renewal grants are reduced asks in essence for a prediction as to the ruling a particular judge or panel of judges may make concerning the basic questions you have raised here in some hypothetical lawsuit. I am able only to point out what appears to me to be a correct legal interpretation. I cannot predict what a court might do.

CONCLUSION

It is my Official Opinion, therefore, that the State Scholarship Commission presently has the statutory authority, in the

instances already noted, to adjust the level of the Freedom of Choice Grants. Whatever our personal views, the law makes this entirely a policy matter for the State Scholarship Commission itself to decide.