

OPINION NO. 74-011**Syllabus:**

The Board of Regents and Controlling Board are not required to penalize a state university for excess enrollment under R.C. 3345.19, by reduction of the discretionary appropriation to the university.

To: James A. Norton, Chancellor, Board of Regents, Columbus, Ohio; Hollis A Moore, President, Bowling Green State University, Bowling Green, Ohio
By: William J. Brown, Attorney General, February 14, 1974

I have before me your requests for my opinion, concerning the same subject, which can most appropriately be answered together.

The statutory background of your questions may be explained as follows. The Appropriations Act for the current biennium (Am. Sub. H.B. No. 86) contains a series of specific dollar amounts designated as the "state support allowance per student." Different figures appear in the list for the various types of university programs. The Act also contains lump-sum appropriations for the respective state-supported institutions of higher education. The Board of Regents is vested with discretion to reconcile differences between the amount appropriated and the amount which would be due, based on actual enrollment multiplied by the appropriate state support allowance. In this regard, the Act provides in part as follows:

"If the product of the actual number of full-time equivalent students by program multiplied by the appropriate state support allowance is greater than a particular state-assisted institution's appropriation, the institution shall be paid at least the amount of said appropriation, and the controlling board, upon recommendation of the board of regents, may direct that all or part of the difference between said product and said appropriation be received by the institution, so long as the total appropriation contained herein for instructional subsidies is not thereby exceeded."

The Act also provides that "[i]n defining the number of full-time equivalent students for state subsidy purposes, the Ohio board of regents shall exclude all undergraduate students who are not residents of Ohio."

R.C. 3345.19 provides in part as follows:

"In the exercise of their respective powers of government conferred by Chapter 3345. of the Revised Code and other pertinent provisions of law, the board of trustees of Bowling Green State university, Kent state university, Miami university, Ohio university, and the Ohio state university shall observe the following enrollment limitations insofar as the autumn quarter enrollment on a full-time equivalent basis as defined by the Ohio board of regents is concerned:

Bowling Green central campus	15,000
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" * * * * * " * * * * "

Bowling Green State University has exceeded this number of students by 412, because an unexpectedly high number of students who were accepted have chosen to attend that University. The Board of Regents, then, asks whether the above-cited statutes should be read together to authorize, or require, the Board to withhold that portion of the appropriation which would be based on the 412 students by which the maximum enrollment is exceeded. It will be recalled that under the Appropriations Act, the Board has discretion to award a subsidy greater than the lump-sum appropriation, based upon the number of full-time students who are Ohio residents, multiplied by a certain dollar figure. Actually, this authority is shared with the Controlling Board, which makes the final decision based on the Board of Regents' recommendation.

The President of the University, however, contends that the maximum enrollment figure has not been exceeded, because non-resident students should not be counted for such purpose. This contention is based upon the fact that the Board has not promulgated a formal rule defining "enrollment on a full-time equivalent basis", pursuant to R.C. 3345.19. It has, however, formally defined "full-time equivalent students" for purposes of calculating the appropriation or subsidy. Such definition excludes non-resident students, as it must under the terms of the statute. The President feels that this definition should also be applied to calculations under R.C. 3345.19, and furthermore, that it has been in the past.

Whatever definition has been applied, I must conclude that both resident and non-resident students are counted for purposes of the enrollment limitation. The evident purpose of that limitation is to restrict the total number of students at each of the various state universities. A distinction between resident and non-resident students is irrelevant to that purpose. Therefore, the Board has no authority to exclude non-resident students from the definition of "enrollment on a full-time equivalent basis." Even if they had attempted to do so, their action would not have committed the state to such a definition. The state is not bound by the unauthorized actions of its officials. See Ohio ex rel. Laskey v. Board of Education, 35 Ohio St. 519 (1880).

The above conclusion does not dispose of the central question, the Board's authority or duty to penalize the University through a deduction from its subsidy. It may be recalled that each state university is entitled to a lump-sum appropriation, and, at the Board's discretion, a greater amount based upon the number of students who are residents of Ohio. The Board has discretion to pay "all or part" of the additional subsidy. Therefore, the Board does have authority to recommend that additional subsidy funds be withheld. So long as it does not abuse its discretion, it may recommend the granting or withholding of the additional funds, or any part thereof, for any reasons it thinks proper.

However, I can see no implication in the statutes of a duty to impose a penalty in the instant situation. Nothing in the terms of either statute requires such a construction. In fact, it can easily be demonstrated that the Legislature did not intend any mandatory penalty. Had it done so, it would have provided a method of calculating the amount of such penalty. Under the existing statutes, such a calculation is difficult to make, and must be arbitrary to some extent. The reason is that total enrollment, for purposes of R.C. 3345.19, is calculated on the basis of total full-time equivalent students, both resident and non-resident, while the additional subsidy is calculated only on the basis of Ohio resident students. Therefore, the subsidy based on the excess 412 students should be withheld only insofar as they are residents of Ohio. If it is assumed that all 412 excess students are nonresidents, no penalty at all would be required. If it is assumed that all are residents, the penalty would have to be based on the full 412. The statutory language gives no hint as to whether one of these extremes, or some point in between them, would be the correct number. A certain rough justice could be achieved by assuming that the percentage of nonresident students in those 412 is the same as that in the student body as a whole; but there is no indication that the

General Assembly intended such a method of calculation, or any other. I can only conclude that no mandatory penalty was intended, for if one had been, a method of calculating it would also have been provided.

Evidently, the Legislature chose not to require the Board to reduce a university's subsidy as a penalty for excess enrollment, based upon a rigid formula. It left the matter to the sound discretion of the Board, to be determined on a case-by-case basis. In exercising its discretion the Board may consider a wide range of factors including, but not limited to, the fact of excess enrollment. The decision of whether to impose a penalty, and for what amount, rests with the Board of Regents and the Controlling Board, to be taken in the exercise of their sound discretion.

In specific answer to your questions, it is my opinion and you are so advised that the Board of Regents and Controlling Board are not required to penalize a state university for excess enrollment under R.C. 3345.19, by reduction of the discretionary appropriation to the university.