

OPINION NO. 72-023

Syllabus:

Public funds may not be used to finance a legal aid clinic at a state university staffed by a private attorney whose duties will be, primarily, to counsel those students who seek his advice as to their legal rights either as against those outside the university, or as against the university or members of the university community.

To: Glenn A. Olds, Pres., Kent State University, Kent, Ohio
By: William J. Brown, Attorney General, April 3, 1972

Your request for my opinion reads as follows:

"The Student Government at Kent State University is desirous of continuing and expanding its Legal Aid Clinic on our campus for any student desiring to make use of the same. Enclosed and made a part of this request for a formal opinion is a copy of the proposed Student Government program.

"It should be noted that the primary purpose of the Legal Aid Clinic would be to counsel with students concerning legal problems and secondarily, to process class action suits on behalf of the student body. Further, it should be noted that the attorney will be retained on a part-time basis.

"Public money would be used to finance this Clinic in that its source of funds would come from the General Fee charged by the University, of which \$6 per student is used for student activities.

"Finally, in support of the proposition that certain forms of legal counseling are seen as a part of the educational purpose of this University, you will find enclosed a copy of a letter from the Vice President for Student Affairs to the President of the Student Body on this matter.

"Therefore, as President of Kent State University, I request your formal opinion on the following:

"1. May Student Government use public money to establish a Legal Aid program whereby the attorney will counsel the students, but not represent the student or group of students in a court of law * * *?

"2. If your answer to number 1 is yes, what guidelines should Student Government and the University follow in determining what is counseling and what is representation?

"3. If your answer to number 1 is no, is there any form of legal counseling that Student Government or the University can sponsor or establish for students? If so, what guidelines should Student Government or the University follow in establishing the same?

"4. Is the legal service of the Attorney General's Office available to Student Government and/or individual students either through your office directly or through your local Counsel? If so, to what extent, and what guidelines should Student Government and the University establish in accomplishing the same?

"5. As a part of the Legal Aid Clinic * * * may public monies be used to finance litigation or court representation for an individual student, or finance litigation or court representation for a class of students * * *?

"6. If your answer to class action suits as described in question 4 is no, would your opinion change if a member of the University administration was made a part of the advisory body on class action suits?

"7. If any form of legal counseling is proper, may the attorney who is employed to give legal advice accept private employment from a student on the matter for which he interviewed the student as the legal aid or legal counseling attorney?

"8. If Student Government may establish some form of legal counseling service, using public monies, may the attorney employed for such purpose, represent any student in his private capacity in any criminal, civil, or administrative hearing against the University?"

From the various documents submitted to me it appears that a certain percentage of the student activities fees collected by Kent State University has been allocated to the Student Government; that the Student Government retains an attorney who is available in an office in the Legal Aid Clinic on campus at stated times to give legal advice to any student who may request assistance;

that the attorney is available to assist in obtaining the release of a student who has been arrested and to advise him of his options at that time; that the attorney is to engage in research on legal problems when so directed by the Student Government; that the attorney is to serve as legal adviser to the Daily Kent Stater and to perform appropriate educational activities dealing with legal problems; and that, should it become apparent that a student is in need of private counsel, the attorney should furnish him with a list of licensed attorneys in the county.

In Opinion No. 71-051, Opinions of the Attorney General for 1971, I held that:

"State funds may not be used to finance an office of student defender at a state university [Ohio University], where such office is to be devoted primarily to providing legal representation of students in criminal and civil proceedings."

Your present request was occasioned by that Opinion.

I agree with your assumption that the proposed legal aid program, resting as it does upon the use of student activities fees by a student government organization, involves the use of public monies. This is clear from the provisions of Chapter 3345, Revised Code, which is devoted to the general powers of state universities. Section 3345.011, Revised Code, defines such an institution in the following language:

"* * * [A] public institution of higher education which is a body politic and corporate.
* * *"

The section includes Kent State University among the eleven institutions recognized by the State of Ohio as "state universities". And Section 3345.05, Revised Code, provides that all fee income received by a state university, and indeed all of its income from any source, is to be held and administered by the board of trustees of the university, and that all receipts and expenditures are subject to inspection by the Auditor of State. That Section provides in pertinent part as follows:

"All registration fees, nonresident tuition fees, academic fees for the support of off-campus instruction, laboratory and course fees when so assessed and collected, student health fees for the support of a student health service, all other fees, deposits, charges, receipts, and income from all or part of the students, all subsidy or other payments from state appropriations, and all other fees, deposits, charges, receipts, and income received by each state-supported university and college, * * * shall be held and administered by the respective boards of trustees of the state-supported universities and colleges, * * *."

* * * * * * * *

"All receipts and expenditures are subject to the inspection of the auditor of state."

It is, of course, well settled that public funds are to be spent only for a public purpose. The following passage from Opinion No. 71-058, Opinions of the Attorney General for 1971, briefly summarizes the law on this subject:

All public moneys constitute a public trust fund, State, ex rel. Smith v. Maharry, 97 Ohio St. 272 (1918), and the expenditure of such funds is limited to a public purpose, Kohler v. Powell, 115 Ohio St. 418 (1926). Where the expenditure of funds is expressly limited by law, such funds cannot be spent for any other purpose. State ex rel. Walton v. Edmondson, 89 Ohio St. 351 (1914)."

While it is true that public funds can be granted to a private nonprofit association, the grant must be clearly for a public purpose and it must contain limitations which insure that the funds will be expended for that purpose only. State ex rel. Defenbacher, 164 Ohio St. 142 (1955). In discussing the holding of that case I recently said, in Opinion No. 71-044, Opinions of the Attorney General for 1971:

"All the judges agreed that public moneys could be used only for a public purpose. That doctrine rested on Article VIII, Section 4, Ohio Constitution, applicable to the state itself, which is as follows:

"The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever."

"State, ex rel. Leaverton v. Kerns, 104 Ohio St. 550 (1922), had held that such provision does not prevent grants being made to corporations or associations not for profit where the purpose of the grant is a public one. Neither the majority nor minority in Defenbacher, supra, entertained any doubt about the correctness of that holding. Donees of public funds therefore are not restricted as to type of organization by the above quoted provision, with the exception of private business entities. The grant itself, however, must be made for a public purpose. Both majority and minority also concurred in the view that some control must be imposed to give reasonable assurance that the funds are actually used for the granted purpose.

I will assume that the Student Government is such a nonprofit association as would be eligible to receive public funds. The questions then are, whether the proposed legal aid program involves the expenditure of funds for a public purpose, and whether the grant to the Student Government contains limitations which guarantee expenditure for that purpose only.

The answer to the first of these two questions, which I think is dispositive of all the questions raised in your request, depends upon the purpose of Kent State University and the manner of its governance as ordained by the General Assembly. Section 3341.02, Revised Code, provides in pertinent part as follows:

"(B) The government of Kent State University is vested in a board of seven trustees, who shall be appointed by the governor, with the advice and consent of the senate. * * *"

Section 3345.021, Revised Code, provides in pertinent part as follows:

"The board of trustees * * * shall have full power and authority on all matters relative to the administration of such * * * university."

And, as already noted, the trustees have full responsibility for the care and administration of all income received by the University, subject to review by the Auditor of State. Section 3345.05, *supra*. See also Section 3341.04, Revised Code. The trustees have, however, the power to delegate their administrative authority to the president and to the administrative officers of the University (Sections 3345.021, 3345.21 and 3345.24, Revised Code), and they have apparently acquiesced in a subdelegation of authority to the Student Government to expend a certain proportion of the monies specifically collected by the University as student activities fees. Such subdelegation may well be proper so long as it is accompanied by appropriate regulations and guidelines. See Opinion No. 356, Opinions of the Attorney General for 1939. I think, however, that no one would contend that the Student Government could expend public monies, collected as student activities fees, for a purpose which is foreign to the statutory purpose of Kent State University, or which could bring the Student Government into conflict with the trustees and the administrative officials of the University, to whom the accomplishment of its statutory purpose, and the expenditure of its public funds, have, by statute, been committed.

Kent State University has been established by the General Assembly as "a public institution of higher education". Section 3345.011, Revised Code. Originally incorporated in 1910 as a State Normal School (101 Ohio Laws, 320), it became a State College in 1929 when the General Assembly changed its name and granted the trustees authority to establish courses leading to the degrees of bachelor of arts and bachelor of science. 113 Ohio Laws, 34-35. In 1943 the General Assembly further authorized the trustees to create "a college of liberal arts and a college of business administration, and to include the usual technical or graduate instruction for the degree of master of arts", and the institution became the Kent State University. 120 Ohio Laws, 593-595. The public purpose for which the General Assembly established the University is, therefore, the inculcation of higher education. While the trustees have been granted considerable discretion in their choice of means to attain that end, Carrell v. State, 11 Ohio App. 281 (1919), they have no authority to permit the expenditure of the public funds which they administer for any purpose which is not reasonably incidental to the statutory end for which the University was created. Long v. Board of Trustees, 24 Ohio App. 261 (1926).

I am unable to see how the proposed legal aid clinic program can be said to be reasonably incidental to the University's program of higher education. One of my predecessors, when asked his opinion as to the legality of a state university's lease of its airfield facilities to a corporation for the purpose of conducting private air transportation service in conjunction with the university's student flight training program, had the following to say (Opinion No. 593, Opinions of the Attorney General for 1949):

"* * * In short, the proposed agreement amounts to the granting of a license on the part of the university, in consideration of a fee, to permit the use of university facilities by the airline company. Nothing in the proposed agreement pertains to the advancement of education, * * *."

And in my prior Opinion on the subject of a student defender office (Opinion No. 71-051, supra), I said:

"It is difficult to conceive a manner in which the office of student defender could be realistically justified as advancing the well-being of the communal body or promoting the purpose of education. The student defender office would render aid in both civil and criminal matters. This legal representation is so enmeshed in the private rights of the individual and so remotely connected with the communal side as not to be connected with the university. The beneficiary of such aid is the student in his private capacity as a citizen. His rights in such an action inhere in him as a citizen, and not as a result of his status as a member of the university community."

If the attorney's counsel is sought by a student or a group of students for a purely private purpose, this would, to paraphrase my predecessor's language in the passage just quoted above, have nothing to do with the advancement of higher education. The same would be true if, as I gather from your reference to contemplated class actions, a group of students were to band together for the advancement of some public purpose which has no connection with the purpose of the University. Finally, if the purpose for which the students seek counsel is related to the purpose of the University, the result would again be the same. If, for example, the result sought by the students is in conflict with the aims of the trustees and the administration, public funds cannot be used by the students in such a case since the administration of the funds of the University is specifically committed to the trustees. If, on the other hand, the trustees, the administration and the students are all united on any question which comes within the purpose of the University, only the Attorney General can formally counsel the University or represent it in court proceedings. Section 109.02, Revised Code, provides in pertinent part as follows:

"The attorney general is the chief law officer for the state and all its departments * * *. No state officer, board, or the head

of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. * * *

There may well be many circumstances under which the University might seek advice or representation by the Attorney General on behalf of student organizations, activities or publications sanctioned by the trustees. The rendering of legal services to individuals, however, for strictly private purposes, cannot be sanctioned.

While we need not presently pass upon, or even discuss the propriety of many of the functions which have been assumed by the state-supported universities and which, arguably, might also be outside the sphere of activities which are clearly "educational functions", let it suffice to say that legal services are distinctly different. Legal services, even when rendered at the counseling stage, are most often designed to advance either the economic or legal position of one person in opposition to that of someone else, be it the position of a tenant versus a landlord, a debtor versus a creditor, etc. The logical extension of a counseling program available to all students might well even include the counseling of well-to-do students in the creation and operation of business enterprises in real estate investments, etc. In these respects, the expenditure of public funds for a legal services program would, unlike similar expenditures on other university activities, operate to the economic benefit of an already privileged class, university students, and quite possibly to the economic and legal detriment of other members of the public with whom they deal. This type of private interest clearly may not be supported by public funds.

I might add that legal counseling, as I have used it here, has to do with that type of advice and counsel that falls within the practice of law. See In re Unauthorized Practice of Law, 175 Ohio St. 149. I do not mean by the foregoing that the administration and the faculty may not advise students on whether or not they should see an attorney respecting private rights they may believe they have. To some extent, a university owes a duty of assistance and guidance in these respects to its students who may be strangers in the community and, consequently, dependent on the university itself for aid and guidance. Of course, the University cannot provide a mechanism whereby individuals are referred to, or put in contact with, persons engaged in the private practice of law. See Code of Professional Responsibility, D.R. 2-103, 23 Ohio St. 2d 16-17 (1970).

Before concluding, it is necessary to repeat the observation I made in Opinion No. 71-051, supra, that legal services, as part of the teaching program of a law school, are not discussed, considered or affected by that Opinion or this. My reading of your questions is that the counseling service you contemplate is not part of the teaching program but is to be a service to the students. My answers are couched on that basis.

In specific answer to your questions it is my opinion, and you are so advised, that public funds may not be used to finance a legal aid clinic at a state university staffed by a private attorney whose duties will be, primarily, to counsel those students who seek his advice as to their legal rights either as against those outside the university, or as against the university or members of the university community.