THE ATTORNEY GENERAL OF TEXAS

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This Opinion Overrules Opinion
M-1162
Wrong conflict

April 12, 1973

Senator Oscar Mauzy, Chairman
Senate Education Committee
State Capitol Building
Austin, Texas 78711

Letter Advisory No. 6

Re: Are public interest research activities considered as falling within the scope of carrying out the educational functions of a university, § 54.503 Texas Education Code?

Dear Senator Mauzy:

You have requested our opinion as to whether public interest research activities properly fall within the activities authorized by § 54.503 of the Texas Education Code or whether that section should be amended as proposed in Senate Bill 192. Information furnished with the request indicates that the contemplated activities would be funded by voluntary fees and we limit our consideration to activities so financed.

The Texas Education Code provides, in § 54.503(b):

> "The governing board of an institution of higher education may charge and collect from students registered at the institution fees to cover the cost of student services which the board deems necessary or desirable in carrying out the educational functions of the institution. The fee or fees may be voluntary or compulsory as determined by the governing board. The total of all compulsory student service fees collected from a student for one semester or summer session shall not exceed $30.00. No fee for parking services or facilities may be levied on a student unless the student desires to use the parking facilities provided." [Emphasis added]

Subsection (a) of the Section provides:

> "For the purposes of this section, 'student services' means textbook rentals, recreational activities, health and hospital services, automobile parking privileges, intramural and intercollegiate athletics, artists and lectures series, cultural entertainment series, debating and oratorical activities, student publications, student government, and any other student activities and services specifically authorized and approved by the appropriate governing board." [Emphasis added]

The powers of the governing boards of the numerous institutions of higher education are set out throughout the Code. The provisions are not uniform. However, in most instances, they give governing boards general power to adopt rules and regulations necessary for the management of the institutions.

Your question to us is: "Are public interest research activities considered as falling within the scope of carrying out the educational functions of a university?"

The governing board of an institution of higher education, in adopting rules and regulations for its operation, exercises delegated legislative powers, and in the absence of a clear showing that it has acted arbitrarily or has abused the authority vested in it, the courts will not interfere.

In Foley v. Benedict, 55 S. W. 2d 805 (Tex. 1932) a student attacked the power of the Board of Regents of the University of Texas to set a policy by its rules and regulations which operated to exclude him from the School of Medicine. In refusing the Writ of Mandamus sought, the Court said:

> "Since the board of regents exercises delegated powers, its rules are of the same force as would be a like enactment of the Legislature, and its official interpretation placed upon the rule so enacted becomes a part of the rule." [at p. 808]

. . .

> "The Legislature of this state having lodged the power with the board of regents to enact rules and regulations as may be necessary for the successful management and government of the University, they shall have the power to adopt such rules . . . The courts will not interfere therewith in the absence of a clear showing that they have acted arbitrarily of have abused the authority vested in them." [at p. 810]

We are of the opinion, therefore, that the governing board of an educational institution of higher learning may now authorize a public interest research activity as a student service "necessary or desirable in carrying out the educational functions of the institution", and may provide for the collection from students of voluntary fees to cover the cost of such service, provided authorization is pursuant to regulations comporting with equal protection and due process constitutional requirements. We cannot say, in advance, nor do we think the courts could say that such authorization would be arbitrary or contrary to law without first examining the facts of each individual case.

The Board is required to exercise a measure of control over the activity. Subsection(e) of § 54. 503 provides:

> "All money collected as student services fees shall be reserved and accounted for in an account or accounts kept separate and apart from educational and general funds of the institution and shall be used only for the support of student services. All the money shall be placed in a depository bank or banks designated by the governing board and shall be secured as required by law. Each year the governing board shall approve for the institution a separate budget for student activities and services financed by fees authorized in this section. The budget shall show the fees to be assessed, the purpose or functions to be financed, the estimated income to be derived, and the proposed expenditures to be made. Copies of the budgets shall be filed annually with the coordinating board, the governor, the legislative budget board, the state auditor, and the state library." [Emphasis added]

Submission of such budgets to the governing body each year, for approval, is required whether the governing body chooses public or private instrumentalities for the implementation of its policy. Prima facie, at least, the expenditures would be for a public purpose, established by the determination of the governing body that the service was necessary or desirable in carrying out the educational functions of the institution, though the question would be ultimately a judicial one. Expenditures for a true public purpose do not violate Article 3, § 51 of the Constitution [prohibiting grants of public money to corporations or individuals], even when a private agency is used to achieve the purpose.

Voluntary fees collected for such a purpose would not constitute "revenue". Ordinarily, such funds would be regarded as restricted trust funds rather than public moneys. The safekeeping and disbursement of such fees are governed by § § 51.001 - 51.008 and 54.503 of the Texas Education Code. No violation of Article 8, § 6 of the Constitution [requiring specific appropriations for money drawn from the Treasury] should result.

We believe the following authorities support our conclusions: Foley v. Benedict, 55 S. W. 2d 805 (Tex. 1932); Davis v. City of Lubbock, 326 S. W. 2d 699 (Tex. 1959); Texas National Guard Armory v. McCraw, 126 S. W. 2d 627 (Tex. 1939); Bullock v. Calvert, 480 S. W. 2d 367 (Tex. 1972); Conley v. Daughters of the Republic, 156 S. W. 197 (Tex. 1913); Conley v. Texas Division of United Daughters of the Confederacy, 164 S. W. 24 (Tex. Civ. App., 1913, writ ref.); State v. City of Austin, 331 S. W. 2d 737 (Tex. 1960); Barrington v. Cokinos, 338 S. W. 2d 133 (Tex. 1960); Jefferson County v. Board of County and District Road Indebtedness, 182 S. W. 2d 908 (Tex. 1944); S. L. & W. Ry. Co. v. State, 173 S. W. 641 (Tex. 1914); Friedman v. American Surety Company of New York, 151 S. W. 2d 570 (Tex. 1941); Daniel v. Richcreek, 146 S. W. 2d 206 (Tex. Civ. App., Austin, 1940, no writ); Cornette v. Aldredge, 408 S. W. 2d 935 (Tex. Civ. App., Amarillo, 1966, mandamus overruled); Rainey v. Malone, 141 S. W. 2d 713 (Tex. Civ. App., Austin, 1940, no writ). Attorney General Opinions M-782 (1971), M-613 (1970), C-474 (1965), and V-54 (1947).

In 1972, this office issued Attorney General Opinion M-1162 which considered a similar question but arrived at a different conclusion, relying principally upon Texas Pharmaceutical Ass'n. v. Dooley, 90 S. W. 2d 328 (Tex. Civ. App., Austin, 1936, no writ). Our re-examination of the matter leads us to conclude that the Dooley case, when read in the light of the foregoing authorities, does not support the view expressed in M-1162(1972), and insofar as that Attorney General Opinion conflicts with this Advisory Letter, it is overruled.

In short, it is our opinion that under existing statutes, the governing bodies of one or more of our various institutions of higher education might validly determine, in the reasonable exercise of their delegated legislative discretion, that public interest research activities constitute student services "necessary or desirable in carrying out the educational functions of the institution", and collect voluntary student fees to cover the cost thereof.

Very truly yours,

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APPROVED:

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