OPINION NO. 79-032

Syllabus:

The board of trustees of a state university is able to assign, without

recompense, its interest in defaulted National Direct Student Loan Notes to the Department of Health, Education and Welfare.

To: Harold L. Enarson, President, Ohio State University, Columbus, Ohio
By: William J. Brown, Attorney General, June 15, 1979

I have before me your request for an opinion in which you ask if the Ohio State University is able to assign its interests in defaulted National Direct Student Loan Notes to the United States pursuant to 20 U.S.C. §1087 cc after the university has made its best efforts to collect these debts.

I believe that a brief discussion of the circumstances surrounding this question is helpful to its proper disposition. You have indicated by letter that since 1959 the Ohio State University has participated in a federal student loan program known currently as the National Direct Student Loan (hereinafter NDSL) Program. Each student loan made under the program is comprised of ninety percent federal dollars from the Department of Health, Education and Welfare (HEW) and ten percent state dollars from the university.

As of June 30, 1978, the Ohio State University has made 40,840 loans since the inception of the NDSL program in the amount of $35,154,201. As of the same date, the University had 21,201 loans outstanding, either in repayment or deferment status. Of this total number, 2,046 loans, with a principal amount outstanding of $1,676,225, were in default with at least two years of payment past due.

You further indicate that over the past two years, HEW has expressed considerable concern in the NDSL default rate. This concern has progressed from warnings to institutions regarding their default rates to threats of discontinuing the program at schools not achieving satisfactory results from their collection efforts. HEW has realized, however, that many of the loans that universities are currently carrying in a default status were made many years ago and are truly uncollectable. Consequently, HEW's Office of Education has offered to accept an assignment of these notes and attempt to collect those loans in default with at least two years of payments past due. Although any loan thus assigned to HEW's Office of Education is removed from the school's default category, thereby effecting a reduction of the total default rate for the school, no monetary payment is given by HEW for the assignment. It is hoped that this procedure will help the Office of Education to identify institutions not making vigorous collection efforts and, perhaps, result in additional collection.

Realistically, these defaulted loans are of little or no value. Each one has gone through various collection procedures. Because these debts are uncollectable, the time and money being spent to administer these notes will not be recovered. Furthermore, if these debts remain on the books of the university, they must be included in the default calculation used by HEW to determine the minimum acceptable default rate, a rate which will, of course, be inflated if the notes are not assigned to HEW.

Your letter states that the consequences of carrying a large default rate are substantial for the Office of Education is in the process of defining minimum performance standards for all schools participating in the NDSL program. As of June 30, 1979, these standards will specify a maximum default rate acceptable to the Office of Education. Any school not meeting these performance standards will receive no further NDSL funds from the federal government.

I understand from information you have provided that in the academic year 1978-79, the Ohio State University received $2,163,198 in federal funds under the NDSL program. For 1979-80, the university has requested $1,917,046 in new federal NDSL funds. The university has been notified, however, that because of its high

default rate, the tentative award being considered by the Office of Education is only $1,145,014. The university has appealed to the Office of Education for reinstatement of the full amount requested. In addition, unless the university is able to assign the defaulted notes, thereby reducing its default rate, it is strongly suspected that the university could be declared ineligible to receive future federal funds for the NDSL program.

It is necessary, at the outset, to recognize the nature of the transaction under consideration. The university wishes to assign rights under a contract that constitute a chose of action against the debtor. These rights are of at least theoretical value. It is my opinion, therefore, that such an assignment is, from an analytical standpoint, identical to an expenditure of public funds. Admittedly, the plan does not call for an actual transfer of money. However, because the defaulted notes do have some value, the transaction is tantamount to a transfer of funds. Therefore, I shall, for purposes of this analysis, treat the assignment as an expenditure of public funds.

There is, of course, no statute that expressly prohibits or allows the assignment of the university's interest in these notes. The ability of a board of trustees to expend public funds under such circumstances, therefore, requires an analysis of the basic powers and general limitations placed upon the board of trustees of a state university in the performance of its duties.

The boards of trustees of the various universities of the state are vested with extremely broad powers. R.C. 3345.021, which is one of several statutes conferring powers upon boards of trustees, provides in part as follows:

> The board of trustees of any college or university, which receives any state funds in support thereof, shall have full power and authority on all matters relative to the administration of such college or university.

Indeed, the authority of a board of trustees is so sweeping that it has been held that a direct or specific statute is unnecessary to confer a particular power upon it. Rather, it is possessed of all powers incidental to the administration of a university unless specifically limited by statute. See, e.g., Long v. Board of Trustees, 24 Ohio App. 261 (1926).

Even when the expenditure of public money is involved, it has been held by the courts of this and other jurisdictions that such an expenditure is proper if it is incidental to university purposes. See, Long v. Board of Trustees, supra, (establishment of school bookstore); Cincinnati v. Jones, 16 Ohio Dec. 343 (C.P. Hamilton Co. 1905) (erecting a house for the university president); Board of Directors v. City of Cincinnati, 1 Ohio N.P. (n.s.) 105 (Super. Ct. Cincinnati 1903) (expenditures for the construction of athletic fields); Davis v. Board of Regents, 66 Cal. App. 693 (1924) (maintenance of student infirmary); State ex rel. v. Whitmore, et al., 85 Nebr. 566 (1909) (maintenance of agricultural experimental stations). As I have had occasion to observe in the past, the thread running through these decisions is that the expenditures are proper if they are connected with the well-being of the communal body of the university and if they promote the purposes for which the university was founded. See, 1971 Op. Att'y Gen. No. 71-051.

In considering the power of a university board of trustees to engage in the transaction in question, therefore, one must consider whether the transaction promotes both the purpose and the communal well-being of the university.

In determining whether the plan you describe satisfies the foregoing standard, it is essential not to lose sight of its intended purpose. It is apparent from your letter that this plan is designed to ensure the future effectiveness of the student loan program at Ohio State. It is neither designed, nor will it have the incidental effect, of benefiting students who have defaulted on their loans. So viewed, there is little question that the plan you have described promotes both the purpose and the communal well-being of the university. Indeed, it would seem that there are few programs that comport more fully with the purposes for which a public university was founded. The existence of a low interest loan program, available to

all and availed upon by so many, effectively promotes one of the most fundamental purposes of a state-supported university—the ability of students to continue their education.

Further, I am of the opinion that the university's power to assign the interests in question is in any way affected by the operation of R.C. 115.17. This statute, which concerns the settlement of claims owing the state, provides as follows:

> The auditor of state shall keep an account of claims due the state reported to him by an officer or agent of the state. Such reports shall be made in the form and manner prescribed by the auditor of state. Upon receipt of such reports the auditor of state shall certify a copy to the attorney general, who shall give immediate notice by mail or otherwise to the party indebted of the nature and amount of such indebtedness. The attorney general shall collect such claim or secure judgment and execution thereon. Such claims shall bear interest at the rate of six per cent per annum from the day on which they respectively fall due. The attorney general and auditor of state may adjust any claim in such manner as is equitable. They may extend the time of the payment of the claim or judgment for such period of time as is best for the interests of the state, but not to exceed one year, and they may require and take security for its payment.

The foregoing expression of legislative intent with respect to the adjustment of claims between the state and individual debtors would mitigate against a finding of a similar, but merely implied, power on the part of the university. It is not, however, the power to adjust or settle claims owing the state that is the subject of this opinion.

The proposal under consideration calls for the assignment of the university's full interest in these defaulted notes to the Department of Health, Education and Welfare. The department, whose interests in the loans far outweigh those of the university, is presumably in a position to pursue the debtors with greater vigor. The plan herein described neither purposely nor incidentally effects a compromise or reduction in the amount owed on the notes. The situation, therefore, is quite unlike that addressed in R.C. 115.17 and the existence of that statute has no bearing on the permissibility of the plan you describe.

It is, therefore, my opinion that the board of trustees of a state university has the power to assign its interest in defaulted student loans to the Department of Health, Education and Welfare.

Although the board of trustees possesses the general power to assign its interests in defaulted student loans, such power must be exercised within the limitations set forth in the Ohio Constitution.

Since this assignment involves the gratuitous transfer of a chose in action, it is necessary to consider the operation of Ohio Const. art. VIII, §4, which prohibits the state or any instrumentality thereof from lending its aid or credit to any corporation or association. The Supreme Court has held that, while the provision forbids the giving or loaning of credit to or in aid of a private business enterprise, it does not prohibit such a gift or loan to a public organization created for a public purpose. See, Bazell v. Cincinnati, 13 Ohio St. 2d 63 (1968); State ex rel. Speeth v. Carney, 163 Ohio St. 159 (1959); State, ex rel Dickman v. Defenbacher, 164 Ohio St. 142 (1955). Since, the Department of Health, Education and Welfare, rather than the individual debtors, would be the sole beneficiary of the plan you describe, the operation of art. VIII, §4, supra, does not prohibit assignment of the university's interest.

In conclusion, it is my opinion, and you are advised, that the board of trustees of a state university is able to assign, without recompense, its interest in defaulted National Direct Student Loan Notes to the Department of Health, Education and Welfare.