

## Opinion No. 51-5334

February 19, 1951

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** The Honorable Tom L. Popejoy President, University of New Mexico Albuquerque, N. M.

{\*7} I am in receipt of your request for an opinion as to whether the University of New Mexico Regents may contract for medical training for a limited number of students to be taught at the University of Colorado.

Your inquiry raises several interesting propositions: (1) whether there are any prohibitions in the State Constitution to prevent such a plan? and (2) are there any valid laws granting such authority to the Regents of the University?

There are four constitutional provisions that must be considered in determining if there are any prohibitions to prevent the above contract plan.

Firstly, Article IV, Section 31 of the State Constitution states as follows:

"No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state, but the legislature may, in its discretion, make appropriations for the charitable institutions and hospitals, for the maintenance of which annual appropriations were made by the {\*8} legislative assembly of nineteen hundred and nine."

Only a few New Mexico cases were found which have even a remote application to the question but they contain interesting and clarifying views of the Court with regard to Article IV, Section 31 of the State Constitution.

In *Harrington v. Atteberry* 21 N.M. 50, (1915) the court was considering an act of the legislature authorizing the Board of County Commissioners of the several counties of the state to annually appropriate \$ 500.00 to a regularly organized Fair Association for the purpose of holding a county fair at the county seat of each county. In holding this act unconstitutional as in contravention of Article IV, Section 31, the court said on Page 64:

"The confusion of the appellants in the case at bar results from their failure to properly distinguish the difference in meaning between a 'public governmental function' and a 'public purpose.' The exercise of public governmental functions must always be presumed to be the exercise of the public purpose, whereas something may be done for a public purpose, or quasi-public purpose, like caring for the poor and destitute, educating the youth of the county, etc., and still not be in pursuance of the exercise of a governmental public function. It would depend upon the power and identity of the

person or corporation acting . . . citizens of the county of Santa Fe or a private corporation, might well cause a public bridge to be constructed in the county, which would serve a public purpose or benefit; but they would not be exercising any public governmental function because they are not the instrumentalities or agencies of the government endowed with the power of their principal. While the purposes here are of a public nature, culture and education, **the association was nevertheless a private corporation** and would have received a "donation" within the meaning of the constitutional provision." (Emphasis supplied.)

In the same case, on Page 61, the court held that the California case of *Dagett v. Culgan*, 92 Cal. 53, holding that an act appropriating money to be used for the construction of buildings and the maintenance of exhibits at the 1892 Chicago World's Fair was constitutional, was not in point, saying:

"That case was not at all in point. First, **there the corporation** was created for the state. **The [Fair] Commission** was a subordinate governmental department of the state . . ."

The language of this case would seem to indicate that the highest court of New Mexico, while rejecting the "public purpose doctrine" when the recipients of public funds are private corporations [i. e. not created by the legislature for state purposes] even though such private organizations intend to spend these monies for purposes beneficial to the general public, it might well look differently and perhaps favorably upon an appropriation to a corporation erected by the legislature to perform purely "public governmental functions."

See also *State Office Building Commission v. Trujillo*, 46 N.M. 29, 120 P. 2d 434; *Hutcheson v. Atherton*, 44 N.M. 144, 99 P. 2d 462.

A second provision of the Constitution which must be considered is Article XII, Section 3, which states as follows:

"The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected {\*9} for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university."

Under the above provision we must concern ourselves with two propositions: firstly, does such a plan take away from the State exclusive control of the University; and secondly, is any part of the appropriation from the State to the University being used to support any sectarian, denominational or private school, college or university?

As to the first proposition, we must examine the proposed contract between the University of New Mexico and the University of Colorado before we would be in a

position to pass judgment on the question of whether there is any relinquishment of the exclusive control of the State of New Mexico over said institution.

As to the second proposition, it is contended that, if the University of Colorado actually performs services to the University of New Mexico by providing instructors, professors, laboratories, classrooms, etc., to the students of the University of New Mexico, then, and in that event, the appropriation would not be for the support of the University of Colorado but would be for payment of actual services rendered.

Further, construction of Article XII, Section 3 would indicate that there is no prohibition because the University of Colorado is neither a sectarian, denominational or private school, college or university but is a public corporation created by the State of Colorado. The Supreme Court of the State of New Mexico has not passed on the precise question before us in interpreting the effect of Article XII, Section 3.

The third constitutional provision to be considered is Article IX, Section 14 of the State Constitution which provides as follows:

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

It is contended herein, in view of the facts, a fair interpretation would indicate that there is neither a lending nor the pledging of the credit of the State, nor the making of any donation. As stated above, the University of New Mexico, which has been created by the State of New Mexico, has the right to contract, to sue, and be sued and, therefore, the State itself would not be pledging its credit. Further, the above plan could not be considered a donation to the University of Colorado for it would be extending services to the University of New Mexico for which the University of New Mexico would pay as contracted.

The fourth Constitutional provision to be considered is Article XII, Section 13 as amended, which provides:

"The Legislature shall provide for the control and management of each of the said institutions by a board of regents for each institution. . .".

Said provision indicates that the Constitution has given to the Legislature the authority for enacting laws providing for the control and management of educational institutions by a board of regents and that under such authority the board of regents would be in a position to enter into a contract as indicated above, providing, however, it does not contravene other provisions of the Constitution.

{\*10} The second phase of your inquiry is if there are any valid laws granting authority to the board of regents to contract as planned. Section 55-2408, N. Mex. 1941 Compilation, provides that the University is given the authority to have departments which shall be opened, at such times as the board shall deem best, for instruction in science, literature, and the arts, law, medicine, engineering and such other departments and studies as the Board of Regents may from time to time decide upon, including military training and tactics. And further, in Section 55-2404, N. Mex. 1941 Compilation, "the Regents of the University and their successors in office shall constitute a body corporate under the name and style of the University of New Mexico, with a right, as such, of suing and being sued, or contracting and being contracted with, of making and using a common seal and altering the same at pleasure." Thus we have statutory provisions giving the Board of Regents the right to give instruction in medicine; the right to enter into contracts; and the right to be sued as a body corporate.

It is evident from the above that the Legislature has granted to the Board of Regents sufficient legislation to enter into such a contract if that contract is not prohibited by the above referred to constitutional provisions. Further, legislation giving the specific duty and power to enter into such a contract would be advisable but not mandatory.

It might be well to point out at this time that there are certain facts which we should take judicial notice of, that may be pertinent to the issues. As stated above, the University has been given authority to give instructions in medicine. It is a well-known fact that the State of New Mexico does not have a sufficient number of doctors to properly protect the health of the citizens of this State. The record shows that New Mexico has the lowest rates of all the Western States at 60.1 per 100,000 while national average is 100.5 per 100,000. Colorado has 122.4 per 100,000. We also are aware that doctors are volunteering into the Armed Forces and also may be subject to being drafted into the Armed Forces during this present world emergency, which situation would create even a greater shortage and danger to the health of the citizens of this state. Further, the record shows that New Mexico students in United States Medical Schools average 6.6 per 100,000 while the national average is 16.7 per 100,000 and Colorado, which offers medical studies, has an average of 23.0 per 100,000. Also in view of the world situation, which has created restrictions on building and has tremendously increased the cost of constructing buildings, the establishment of a department of medicine on the campus at this time is almost prohibitive.

Other factors that we should take notice of is that the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming and the Territories of Alaska and Hawaii have already proposed a compact for Western Regional Cooperation in Higher Education, because many of the Western States individually do not have sufficient numbers of potential students to warrant the establishment and maintenance within their borders of adequate facilities in all of the essential fields of technical, professional and graduate training, nor do all of the States have the financial ability to furnish within their borders institutions capable of providing acceptable standards of training in all fields mentioned above.

Whether the above proposed compact goes into effect or not depends upon approval by the legislatures of the above states and further, a more serious question as to its constitutionality faces us than this proposed contract between the University of New Mexico and the University of Colorado, which need not be answered herein.

{\*11} I have given considerable thought to the constitutional provisions referred to in this opinion; to the wording of the decision in the case of Harrington v. Atteberry, supra; and to all of the factors pertaining to the issues. It is, therefore, my opinion that such a contract entered into by the State of New Mexico with the State of Colorado would be valid and would not contravene the constitution or the laws of the State of New Mexico, if said contract would be so drawn to withhold in the State of New Mexico, and the University of New Mexico, such control as would not contravene Article XII, Section 3 of the State Constitution.

This opinion is given with the reservation that the proposed contract be submitted to the Attorney General of the State of New Mexico for his approval, in writing, before submitted to the two State educational institutions for their signatures.

Hoping that this satisfactorily answers your questions, I am,