

Opinion No. 59-147

September 21, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. Robert D. Castner State Auditor Santa Fe, New Mexico

{*223} This is in response to your inquiries contained in two recent letters asking for our opinion regarding the following questions:

1. May you refuse to approve an audit contract between a State institution governed by a Board of Regents authorized by its Enabling Act for institution to make its own rules and regulations?
2. May you or personnel from your office perform the audit of such institutions?
3. May you select an independent auditor to perform such audits without the consent of the Board of Regents of such an institution?

Our answers to your questions are:

1. Yes.
2. Yes.
3. No.

The specific fact situation giving rise to your questions involves a proposed audit contract between the New Mexico School for the Deaf, officially known as the New Mexico Asylum for the Deaf and Dumb, and an independent auditor. However, since the questions will arise regarding the auditing of other State institutions, you ask for our opinion generally.

The New Mexico School for the Deaf, confirmed as a State educational institution by Article XII, § 11, New Mexico Constitution, is governed by a Board of Regents of five members approved by the Governor with the advice and consent of the Senate -- § 73-24-3, N.M.S.A., 1953 Compilation. The board has broad powers over the management of the school, including the power to make its own rules and regulations ". . . for the government of its meetings and institution under its care." § 73-24-3, supra.

However, in our opinion, the general powers conferred upon the board do not include the power to enter into audit contracts or have audits of its financial affairs otherwise conducted, unless such audits are conducted by or with the approval of your office. Section 4-4-2.2, supra (P.S.), provides that the financial affairs of "every state agency" and "every public body" shall be thoroughly examined and audited annually. Under § 4-

4-2.3, such audits are to be conducted by you, personnel from your office designated by you, or independent auditors approved by you. A state agency subject to such audit is defined in § 4-4-2.1 as including ". . . any department, **institution**, board, bureau, commission, district or committee of the government of the State of New Mexico . . ." (Emphasis supplied). In view of the above cited constitutional provisions, in our opinion there is no question but that the New Mexico School for the Deaf is an institution included within the definition of state agencies subject to audit by your office or independent auditor approved by you.

However, in our opinion, the power vested in you to "approve" independent auditors to perform such audits, should you decide that the audit is to be performed in such a manner, does not include the power to initially select such auditors or select such auditors at any time without the prior consent of the governing body of such institution. The courts have generally held that the power vested in a public official to approve certain acts means that said official is to confirm, ratify, sanction or consent to the act of {224} another, and not to initiate action on his own behalf. See **State ex rel. City of St. Louis v. Caulfield**, 333 Mo. 270, 62 S.W. 2d 818; **Stewart v. Yellowtail**, 35 F. Supp. 798; **County Council of Baltimore County v. Egerton Realty, Inc.**, 217 Md. 234, 140 A. 2d 510.

It is further our opinion that any and every institution of the state, including those designated as State Educational Institutions by Article XII, § 11, of the New Mexico Constitution, even though governed by boards of regents with broad powers to make rules and regulations relating to the administration of such institutions, are subject to audit by your office or by independent auditors approved by you. However, if the audit is performed by an independent auditor, such auditor cannot be chosen by you without the consent of the institution, since your power to approve independent auditors does not include the power to select such auditors initially.

Philip R. Ashby

Assistant Attorney General