

Opinion No. 73-43

May 7, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Office of the Attorney General of New Mexico

QUESTIONS

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1. Do the Regents of the University of New Mexico have the legal authority to establish and operate a non-profit public foundation in aid of the University of New Mexico School of Medicine?
2. Does the Legislature of New Mexico have the power to control the budgeting and expenditure by the Regents of the University of New Mexico of income generated under the control of the Regents for the benefit of the University by the clinical faculty of the School of Medicine through the New Mexico Medical Foundation?

CONCLUSION

1. Yes.
2. No, see analysis.

OPINION

{*82} PREFACTORY STATEMENT

We think it appropriate to mention at the outset that prior to undertaking an answer to your questions this office corresponded with the Attorney General of every state and territory to ascertain whether the same, or similar, issues had arisen in their jurisdictions, and, if so, how the matters were resolved. We received replies from practically every state. Many had dealt with closely allied problems. The consensus, numerically, appeared to be that the universities and the legislature had resolved the issue amicably and without the necessity for a confrontation. Perhaps the answer from the Attorney General of the State of Alabama sums it up best in this paragraph:

"Information reveals that the procedure in use here in Alabama and also there in your State of New Mexico is the generally accepted practice in most states and is due to the 'crying' need for more and more operational funds for medical schools. **The State Legislators are happy that the schools are able to get funds from any source and since the use of these funds is under the control of Boards of Trustees and**

audited by a State agency, there is no further need at this time for additional controls. " (Emphasis added)

The Attorney General of the State of Indiana phrased it this way:

"The idea is to enable a doctor to teach at the university without penalizing him for not remaining in private practice where he could earn several thousand dollars more than the university could afford to pay only for teaching."

ANALYSIS

The State Constitution established the {*83} educational institutions of New Mexico in Article XII, Section 11. Control and management of each of these enumerated state educational institutions is vested in a Board of Regents for that institution. Article XII, Section 13, New Mexico Constitution.

The power to control and manage the educational institution analytically includes taking all appropriate steps in aid of fulfillment of the educational mission of the university. Our research discloses that the constitutions of at least twelve other states vest control and management of state educational institutions in the regents of such institutions. Further, we find no cases holding that a board of regents possessing a constitutional mandate to control and manage a state educational institution lacks the authority or power to create and operate a non-profit foundation in aid of the educational functions of the institution.

Actually, in only two states, Minnesota and Michigan, has there been a challenge to the regental power of independent control and management of the type involved in establishing and operating a non-profit foundation devoted to the educational operations of the institution. In those states, in varying circumstances over a long period of years, the courts have uniformly held that independent control and management of a higher state educational institution by its board of regents includes broad incidental powers unrestricted by other branches of government. See Opinion of the Attorney General, No. 70-73, dated September 3, 1970.

Our answer to your second question is in the negative. The higher educational institutions in this state have been structured to a considerable degree to be independent bodies. This is reflected not only in the Constitution, but, insofar as the University of New Mexico is concerned, in Section 73-25-3, N.M.S.A., 1953 Comp. That section provides:

"The management and control of said university, the care and preservation of all property of which it shall become possessed, the erection and construction of all buildings necessary for its use, **and the disbursements and expenditures of all moneys, shall be vested in a board of five regents. "** (Emphasis added)

The State of Minnesota faced the problem squarely in **Fanning v. University of Minnesota**, 236 N.W. 217 (1931). In that case, a group of citizens challenged the right

of the university to expend funds received from rental of university property, and funds earned by the operation of the university press by university employees in a manner other than specifically authorized by the legislature. After holding that the Constitution of Minnesota established the university as an independent body with corresponding control over the disposition of its property, the court went on to state:

". . . [H]aving the right of disposition, the board could use campus rentals for the building of a dormitory without a legislative appropriation for such a purpose . . ."

In regard to the press earnings, it was held that they were proper university revenues also not subject to legislative control.

Michigan too has a proven history of university independence. In **Weinberg v. Regents of the University of Michigan**, 56 N.W. 605 (1893) it was held:

"Under the Constitution, the state cannot add to or take away from its property without the consent of the Regents . . . Property aggregating in value nearly or quite half a million dollars had been donated to the university by private individuals, such property is the property of the university. It is not under the control of the state when it acts through its executive or legislative departments, but of the Regents, who are directly responsible to the people for the execution of their trust."

In **State Board of Agriculture v. Fuller**, 147 N.W. 529 (Mich. 1914), the Michigan court overturned an attempt of the legislature to indirectly control the expenditure of university funds by making an appropriation contingent upon the university expending no more than \$ 35,000 from **any** source, on the School of Engineering. The court held that such a limitation on the discretion of the Board of Regents in the use of its funds was invalid. See also **State Board of Agriculture v. State Administrative Board**, 197 N.W. 160 (Mich. 1924).

{*84} It is our considered conclusion that the Legislature may not prevent the Regents of the University of New Mexico from expending funds which are generated by its medical practice plan. It is quite true that the state Legislature is the body which appropriates general revenue funds of the State of New Mexico. Article IV, Section 30, New Mexico Constitution. But even though these generated medical fees are public funds and strict accountability must be made therefor, it does not follow that they are the type funds which must be placed in the general fund and appropriated therefrom by the Legislature. For example, in the recent Colorado case of **MacManus v. Love**, 499 P.2d 609 (Colo. 1972), the Colorado Legislature had placed in an appropriation act the following language:

". . . Any federal or cash funds received by any agency in excess of the appropriation shall not be expended without additional legislative appropriation."

The Governor of Colorado vetoed that provision and a number of State Senators filed suit seeking a declaration that the Governor's vetoes were improper. The Supreme

Court of Colorado held that the legislative limitation was in violation of the constitutional doctrine of separation of powers. By analogy, it would appear foreseeable that any attempt by the Legislature to control funds generated by a medical practice plan would be in violation of the separation of powers doctrine.

At the same time, the Legislature has a legitimate interest in higher education and has the sole authority over making appropriations of state moneys for higher education. The institutions of higher education are plainly subject to accountability to the Legislature in fulfillment of their public trust, and the Regents of such institutions must adhere to all laws of general application which do not interfere materially with the relatively independent control and the management of the University by the Board of Regents.

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