



December 2, 2024

OPINION  
OF  
RAÚL TORREZ  
Attorney General

Opinion No. 2024-14

To: Secretary Designate Mariana Padilla,\* Public Education Department

Re: Opinion Request – Indian Education Fund Distributions

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### **Question**

May funds appropriated by the New Mexico State Legislature to the New Mexico Public Education Department (PED) through the Indian Education Fund (Fund) be distributed by PED to tribally controlled and Bureau of Indian Education (BIE) schools within the State?

### **Answer**

Yes. Based on our examination of the relevant legal authority, PED is not precluded from distributing money from the Fund to tribal and BIE schools in New Mexico.

### **Background**

The Indian Education Act (Act), NMSA 1978, §§ 22-23A-1 to -11 (2003, as amended through 2019), establishes a framework for improving educational opportunities and outcomes for American Indian students. The Act created the Fund, which contains money appropriated by the Legislature to PED. Section 22-23A-8. Per the Legislature’s directive, PED distributes awards from the Fund. Section 22-23A-8(A). In making awards, PED must ensure that funds are “used for the purposes stated in the Indian Education Act[.]” Section 22-23A-8(B); *see also* 6.35.2.14(B) NMAC (“Awards from the [F]und shall be used to support and advance the purposes of the [A]ct.”). The Act directs PED to develop procedures and rules for awarding money from the Fund. Section 22-23A-8(C).

PED asks whether it may distribute money from the Fund to tribally controlled schools within pueblos, tribes, and nations as well as to BIE schools within the State. Tribally controlled schools are schools operated by an Indian tribe or tribal organization. BIE schools are overseen by the BIE, a federal agency responsible for executing Congress’ directives regarding American Indian education.

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\* The opinion request was initially submitted by the former PED Secretary, Arsenio Romero.

## Analysis

Because the Legislature has instructed that PED's distributions from the Fund must support the purposes of the Act, we first consider whether a money award from the Fund to tribal and BIE schools aligns with the Act's purposes. We then analyze whether the distributions are prohibited under various provisions of the New Mexico Constitution.

### Legislative Purpose

The Legislature has the "exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government." *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, ¶ 14, 120 N.M. 820 (internal quotation marks and citations omitted); *see also State ex rel. Segó v. Kirkpatrick*, 1974-NMSC-059, ¶ 23, 86 N.M. 359 (stating that "the Legislature has the power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of the funds appropriated"). Here, the Legislature has instructed that the Fund must be used in support of the Act's purposes. Section 22-23A-8(B).

The Act sets forth a varied and expansive list of statutory purposes. *See* § 22-23A-2. Some of the express purposes include ensuring "equitable and culturally relevant learning environments, educational opportunities and culturally relevant instructional materials for American Indian students enrolled in public schools"; providing "for the study, development and implementation of educational systems that positively affect the educational success of American Indian students"; providing "the means for a formal government-to-government relationship between the state and New Mexico tribes and the development of relationships with the education division of the bureau of Indian affairs and other entities that serve American Indian students"; and establishing collaborative efforts among numerous entities to "work together to find ways to improve educational opportunities for American Indian students[.]" Section 22-23A-2(A), (C), (F), (H).

Indeed, collaboration is a hallmark of the Act. The Act contemplates partnerships, collaborative efforts, and government-to-government relationships. *See, e.g.*, § 22-23A-2 (setting forth purposes); § 22-23A-4.1 (providing that PED "shall collaborate and coordinate efforts with the higher education department and institutions of higher education, including tribal colleges and teacher education institutions and tribal education departments"); § 22-23A-5(C) ("The secretary and the assistant secretary, in cooperation with the Indian education advisory council, shall collaborate with state and federal departments and agencies and tribal governments to identify ways such entities can assist the department in the implementation of the Indian Education Act."); § 22-23A-6(D) ("On a semiannual basis, representatives from all New Mexico tribes, members of the commission, the office of the governor, the Indian affairs department, the legislature, the secretary, the assistant secretary and the Indian education advisory council shall meet to assist in evaluating, consolidating and coordinating all activities relating to the education of tribal students."); § 22-23A-9(C) (requiring school districts to meet with local tribes); *see also* 6.35.2.10(A) NMAC (directing collaboration, cooperation, and government-to-government meetings). Simply stated, the objectives of the Act cannot be achieved by the State alone.

The collaborative nature of the Act, as well as the Act's numerous purposes, suggest that money from the Fund may permissibly be used in a variety of ways. Moreover, the Act does not expressly

specify or limit the entities that may receive awards from the Fund; rather, the primary directive is that the Fund is used to support the Act. *See generally* § 22-23A-8 (creating and describing the Fund). The Legislature has also expressly directed PED to develop rules and procedures for the awards process. Section 22-23A-8(C). These characteristics indicate that PED may exercise significant discretion in distributing money from the Fund. Further, a court would likely defer to PED's conclusions about whether PED's distributions align with the purposes of the Act. *See Nohl v. Bd. of Educ. of City of Albuquerque*, 1921-NMSC-055, ¶ 5, 27 N.M. 232 (“The expenditure of public funds raised by taxation or other methods for public purposes must necessarily be intrusted by the Legislature to public agencies, and these agencies are required to exercise discretion and judgment in determining the purpose for which such money will be spent, within the limits of the authority granted, and courts will not interfere unless there is a clear departure from the legislative authority.”); *see also Johnson v. N.M. Oil Conservation Comm’n*, 1999-NMSC-021, ¶ 16, 127 N.M. 120 (explaining that courts may afford deference to state agencies on legal questions such as the interpretation of a statute, “particularly if the question at hand implicates agency expertise”).

Based on the foregoing, we conclude that distributions from the Fund to tribal and BIE schools can reasonably be considered to support the purposes of the Act. We next consider whether such monetary distributions are otherwise prohibited by law.

#### Anti-Donation Clause

The Anti-Donation Clause prohibits the State from making “any donation to or in aid of any person, association or public or private corporation[.]” N.M. Const. art. IX, § 14. Although tribal and BIE schools are governmental entities, they are not entities of the State of New Mexico. Accordingly, we further examine the nature of the funding at issue. *Cf. City of Gallup v. State Park & Recreation Comm’n*, 1974-NMSC-084, ¶ 11, 86 N.M. 745 (holding that the anti-donation prohibition “is inapplicable . . . when the parties involved are the State and its subordinate governmental agencies”).

The Anti-Donation Clause is implicated only in cases where, “by reason of its nature and the circumstances surrounding it,” government funding or aid takes on the “character [of] a donation in substance and effect.” *Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 37, 62 N.M. 18. A “donation, for purposes of Article IX, Section 14, [i]s ‘a gift, an allocation or appropriation of something of value, without consideration.’” *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 50 (quoting *Vill. of Deming*, 1956-NMSC-111, ¶ 36); *see also* N.M. Att’y Gen., No. 12-01 (Jan. 9, 2012) (“The state may not confer something of value to a private entity or individual without receiving something of value in return.”). In assessing whether government funding is properly characterized as a donation, thus implicating the Anti-Donation Clause, the determinative factor is often whether the government has received something of value in exchange for the expenditure of public funds. Based on our review of the Act, we conclude that distributing funds from the Fund to tribal and BIE schools does not amount to an unconstitutional gift under the Anti-Donation Clause.

First, in exchange for the funds, the State receives concrete and measurable benefits. *See, e.g., Hutcheson v. Atherton*, 1940-NMSC-001, ¶ 26, 44 N.M. 144 (discussing a case where “the direct, tangible benefits accruing to the school district from the arrangement freed it from the claim of

unconstitutionality” based on the Anti-Donation Clause); *see also City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (rejecting Anti-Donation Clause challenge where municipality receives true consideration); *City of Gallup*, 1974-NMSC-084, ¶ 9 (rejecting an Anti-Donation challenge where State would “get value received” for disbursement of state funds). In particular, tribal and BIE schools that receive funds assist PED in meeting its directives and objectives under the Act. *See* § 22-23A-5(C) (“The secretary and the assistant secretary, in cooperation with the Indian education advisory council, shall collaborate with state and federal departments and agencies and tribal governments to identify ways such entities can assist the department in the implementation of the Indian Education Act.”); *cf.* NMSA 1978, § 22-2-1(B)(2) (2004) (providing that PED may “enter into contracts to carry out its duties”). These are state goals established by the Legislature as a matter of state policy for the benefit of the state.

Second, the Legislature has implemented metrics for assessing whether the State is receiving value in exchange for PED’s disbursement of funds. *See, e.g.*, 6.35.2.14(C) NMAC (explaining that PED will require information describing the effectiveness of the funded programs); § 22-23A-8 (requiring PED to “ensure that funds appropriated from the Indian education fund shall be used for the purposes stated in the Indian Education Act”). Such evaluation is not indicative of an outright gift, but rather suggests the State is “actuated by a spirit of self-interest in the matter” and that it intends to assess whether “it will get value received” in exchange for the distribution of State funds. *See White v. Bd. of Educ. of Silver City*, 1938-NMSC-009, ¶ 31, 42 N.M. 94.

Third, in addition to the tangible benefits the State receives in exchange for providing funds, funding recipients are required to use the awards for specific purposes and must agree to provide the State with information they would not otherwise be obligated to provide. *Cf. Luginbuhl v. City of Gallup*, 2013-NMCA-053, ¶ 15 (“Consideration consists of a promise to do something that a party is under no legal obligation to do or to forbear from doing something he has a legal right to do.” (internal quotation marks and citation omitted)). Funding recipients must create and share with PED “periodic expenditure reports . . . including a final expenditure report,” as well as “reports measuring the effectiveness of the programs” that are supported by the funds. 6.35.2.14(F) NMAC; *see also* 6.35.2.14(C) NMAC (requiring funding applications to identify goals to be achieved that are relevant to the Act and “describe how the effectiveness of the programs supported by the grant will be measured and reported” to PED). On balance, the nature of the funding at issue is not characteristic of a gift.

#### Article IV, Section 31

Article IV, Section 31 of the New Mexico Constitution prohibits appropriations “for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state.” We do not believe this constitutional provision poses a barrier to PED’s distribution of funds to tribal and BIE schools. Importantly, the Legislature appropriated funds directly and solely to PED, “an executive agency established by the New Mexico Constitution [that] is under the absolute control of the state.” *Moses*, 2019-NMSC-003, ¶ 48 (finding no violation of Article IV, Section 31, where appropriations were made directly to PED); *see also* N.M. Att’y Gen., No. 71-74 (Jun. 9, 1971) (concluding that an appropriation to a state executive body is not unconstitutional). In addition, although PED distributes awards from the Fund, it maintains control over the appropriated funds by first

determining how to best allocate funds to fulfill the purposes of the Act, and by thereafter ensuring that the funds are being used as intended. *See* § 22-23A-8; 6.35.2.14 NMAC.

### Article XII, Section 3

Article XII, Section 3 of the New Mexico Constitution instructs that “funds appropriated, levied or collected for educational purposes” may not “be used for the support of any sectarian, denominational or private school, college or university.” PED’s distribution of funds to tribal and BIE schools would not violate this provision because such schools are not considered sectarian, denominational, or private schools. Rather, they are operated by governmental entities. *See, e.g.*, N.M. Att’y Gen. (Aug. 14, 2012) (advisory letter to Representative Ray Begaye) (concluding “that a tribal college is not a private college when it is administratively managed and controlled by governmental or tribal entities”). Further, the purpose of this section of the Constitution—ensuring “exclusive control by the state over our public educational system, and . . . that none of the state’s public schools ever become sectarian or denominational[.]” *Prince v. Bd. of Ed. of Cent. Consol. Indep. Sch. Dist. No. 22*, 1975-NMSC-068, ¶ 20, 88 N.M. 548—is not implicated by distributions from the Fund to tribal and BIE schools when the funds must be used for specific statutory purposes.

### Conclusion

It is the opinion of the New Mexico Department of Justice that the law does not prevent PED from distributing money from the Fund to tribal and BIE schools in New Mexico.

Please note that this opinion is a public document and is not protected by the attorney-client privilege. It will be published on our website and made available to the general public.

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