

## **Opinion No. 67-07**

January 17, 1967

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Honorable Eugene W. Peirce, Jr. State Representative Legislative Executive Building Santa Fe, New Mexico

### **QUESTION**

#### QUESTION

May the State of New Mexico accept federal matching funds when the funds are to be matched with funds contributed by a private source and then paid to the private source by the State?

#### CONCLUSION

Yes, but see analysis.

### **OPINION**

#### **{\*9} ANALYSIS**

Congress has appropriated federal money through the Laird Amendment to the Vocational Rehabilitation Act to be used on a matching fund basis for the establishment of vocational rehabilitation facilities and workshops. Under the Laird Amendment the State may match federal funds with funds contributed by private sources to the State when the funds are designated for vocational rehabilitation facilities or workshops. We have been asked whether the State of New Mexico would be violating Article IV, Section 31 of its constitution if it accepted funds under the Laird Amendment to the Vocational Rehabilitation Act. Article IV, Section 31 of the New Mexico Constitution provides 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 legislative assembly of nineteen hundred and nine."

It is clear that any appropriation by the legislature to a private corporation, whether directly or indirectly made, would violate the above quoted constitutional provision.

Article IV, Section 30 of the New Mexico Constitution provides that no money shall be paid out of the treasury except by appropriations made by the legislature. We therefore see that money paid into our state treasury may not be paid out of the treasury unless by appropriation, and the legislature may not appropriate money for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the State.

In spite of the above cited New Mexico constitutional provisions, New Mexico may accept federal matching funds even though they are eventually to be paid to charitable, educational or other benevolent institutions not under the absolute control of the State. This is due to Section 11-2-3, N.M.S.A., 1953 Compilation, which allows the State Treasurer to create "suspense accounts" for state departments, institutions or agencies. Under Section 11-2-3, supra, money may be deposited with our State Treasurer in escrow or in good faith to secure the performance of any department, institution or agency of the State of New Mexico. The reason that the above sections of Article IV of our state constitution do not apply to these funds is the State Treasurer does not deposit the money in the treasury, but merely holds the money in separate accounts called "suspense accounts" acting merely {<sup>\*10</sup>} as an escrow holder of the money so deposited. This money never becomes money of the State.

Like any escrow agreement the depositor of the funds may prescribe that certain conditions be met prior to payment of the money by the escrow holder to the grantee of the funds. If the conditions are performed, the State Treasurer, as custodian of the money deposited in the "suspense account", pays the money according to the agreements entered into between the parties. If the conditions are not performed, the State Treasurer may refund the moneys to the depositor.

We therefore conclude that since the moneys deposited in "suspense accounts" are never deposited in our treasury, Article IV, Section 30 of the New Mexico Constitution prohibiting the payment of money out of the treasury unless by appropriation of the legislature is inapplicable. Since the money may be paid to the escrow grantee without an appropriation, Section 31 of Article IV of our constitution is also inapplicable. State agencies, departments or institutions may therefore accept federal money for purposes of matching this money with funds contributed by private sources and subsequently pay such federal money to the private source without violating our state constitution if the federal money has been deposited in a suspense account pursuant to Section 11-2-3, supra.

We do, however, have serious doubts whether state agencies, departments or institutions may provide this service without reimbursement from either the federal government or the private source, or both the federal government and the private source for the services rendered by the State as an escrow holder. Under Article IV, Section 31 of the New Mexico Constitution we feel that it is incumbent upon the State to obtain reimbursement for any actual expenses occasioned by reason of such permitted services.

By: Gary O'Dowd

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