



January 19, 2024

The Honorable David M. Gallegos  
New Mexico State Senator  
P.O. Box 998  
Eunice, NM 88231

AG Advisory No. 2024-01

Re: Advisory Letter on Cooperative Educational Services Scholarship Authority

Dear Senator Gallegos:

You requested our advice regarding a proposal by Cooperative Educational Services (CES) to establish a scholarship program for students attending state educational institutions. In particular, you ask whether the program, if implemented, would violate the Anti-donation Clause of Article IX, Section 14 of the New Mexico Constitution. As discussed in more detail below, based on our review of the information provided to us and the applicable law, we are unable to conclude that CES has sufficient legal authority to establish a scholarship program. Because this question is resolved on statutory grounds, we decline to address constitutional issues raised by the proposed program.

#### CES's Authority to Establish a Scholarship Program

We start with the understanding that public educational institutions that charge tuition may offer scholarships in the form of tuition reductions or waivers. Attorney General Opinion 97-02 (1997). “[T]o be permissible a scholarship must be for the purpose of obtaining public education provided by a government entity, awarded in accordance with a rational and even-handed policy, and within the granting agency's constitutional or statutory authority.” *Id.* These scholarships may not include stipends, reimbursements for living expenses, or cash support. *Id.*

As explained in your request, CES was created under a cooperative procurement agreement authorized by the Procurement Code, NMSA 1978, § 13-1-135 (1999), and entered into under the Joint Powers Agreements Act (JPAA), NMSA 1978, §§ 11-1-1 to -7 (1961, as amended through 2009). The agreement was initially entered into by 89 school districts in New Mexico, and later amended to include additional parties, including state universities and other state educational institutions. *See Restated and Amended Joint Powers Agreement to Establish an Educational Cooperative* (2018) (EC Agreement).

Section 13-1-135 authorizes state agencies and local public bodies, as defined in the Procurement Code, to participate in a cooperative procurement agreement “for the procurement of any services, construction or items of tangible personal property.” Cooperative procurement agreements entered into under Section 13-1-135 must “clearly specify the purpose of the agreement and the method

by which the purpose will be accomplished” and are “limited to the procurement of items of tangible personal property, services or construction.” NMSA 1978, § 13-1-135(A). The Code defines “procurement” as “purchasing, renting, leasing, lease purchasing or otherwise acquiring items of tangible personal property, services or construction” and related “procurement functions.” NMSA 1978, § 13-1-74 (1984).

Section 13-1-135(B) provides that cooperative procurement agreements may be entered into under the JPAA, which allows public agencies to enter into agreements to “jointly exercise any power common to the contracting parties.” NMSA 1978, § 11-1-3 (1983). Similar to Section 13-1-135, the JPAA provides that a joint powers agreement must “clearly specify the purpose of the agreement or for any power which is to be exercised [and] . . . provide for the method by which the purpose will be accomplished and the manner in which any power will be exercised under such agreement.”

The JPAA requires the parties to a joint powers agreement to designate an agency to “administer or execute” the agreement. NMSA 1978, § 11-1-5(A) (1961). The designated agency may be one of the parties or, like CES, “a commission or board constituted pursuant to the agreement.” *Id.* The administering agency shall:

possess the common power specified in the agreement and may exercise it in the manner or according to the method provided in the agreement, *subject to any of the restrictions imposed upon the manner of exercising such power of one of the contracting public agencies or such restrictions of any public agency participating which may be designated or incorporated in the agreement.*

Section 11-1-5(C) (emphasis added). In effect, an entity created under a joint powers agreement authorized by the JPAA is an instrumentality of the public agencies that are parties to the agreement. *Gebler v. Valencia Reg'l Emergency Commc'ns Ctr.*, 2023-NMCA-070, ¶ 12 (holding that an entity created by local public bodies under the JPAA to provide enhanced 911 emergency communications functions was an “instrumentality” of the public bodies and granted immunity from liability under the Tort Claims Act).

The EC Agreement is a cooperative procurement agreement covered by Section 13-1-135. According to the recitals in the Agreement, its purpose is to pool the parties’ “efforts and resources in order to bring additional, necessary educational services to their respective institutions at an affordable cost.” EC Agreement, p. 1. The common power exercised by the parties to achieve the Agreement’s purpose is “the power to procure” or “purchase” services, professional services, construction and tangible personal property. *Id.*

CES was created under the EC Agreement to “conduct[] cooperative procurements” on behalf of the parties. *Id.* ¶ 1. As the administering agency, CES is charged with:

establish[ing] and maintain[ing] a system for providing cooperative purchasing services under the State Procurement Code for tangible personal property, services and construction which includes, but is not limited to, ancillary services, special education services, placement services, food procurement, needs assessments,

supplemental employee benefits, construction services, professional services and general consultant services. CES is also authorized to provide services to [the parties] and other participants ...

*Id.* ¶ 2.

The EC Agreement controls CES's authority, if any, to establish a scholarship program. As quoted above, Section 13-1-135(A) of the Procurement Code provides that a cooperative procurement agreement is "limited to the procurement of items of tangible personal property, services or construction." Consistent with this limitation, the EC Agreement authorizes CES to provide "cooperative purchasing services" and the common power specified for carrying out the Agreement's purposes is "the power to procure" tangible personal property, services, and construction.

### Conclusion

According to the request, CES proposes to establish a scholarship program for students attending state educational institutions that are parties to the EC Agreement. The scholarships "would defray costs associated with tuition, books, supplies, and materials charged by higher educational institutions." the request does not provide details regarding the structure or operation of the proposed program. However, it is clear from the request that the scholarship program would include a disbursement of funds, not a procurement of tangible personal property, services, or construction. This program also would not be considered a service provided by CES to the public agencies that are parties to the EC Agreement. Based on the limitations recognized by Section 13-1-135(A) and included in the EC Agreement, this program would exceed the scope of CES's authority.

Based on the information available to us at this time, we are unable to conclude that CES has sufficient authority to establish a scholarship program under the EC Agreement and applicable law. We do not discuss the Anti-donation Clause because we refrain from addressing constitutional issues unnecessarily. *Cf. Huey v. Lente*, 1973-NMSC-098, ¶ 5 (discussing a similar principle as a matter of judicial restraint).

If our office may be of further assistance, please let us know. Your request to us was for a formal Attorney General's opinion on the matters discussed above. Such an opinion would be a public record, available to the general public. Although we are responding to your request in the form of a letter rather than a formal opinion, we believe this letter is also a public document.

Sincerely,

*Todd S. Baran*

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Assistant Attorney General