

## **Opinion 07-03**

July 18, 2007

### **OPINION OF: GARY K. KING** Attorney General

**BY:** Elizabeth A. Glenn, Assistant Attorney General

**TO:** The Honorable Sheryl William Stapleton, New Mexico State Representative, Box 25385, Albuquerque, NM 87108

#### **QUESTION:**

Is it appropriate to use public funding to defend public school districts, boards and employees in legal actions involving misconduct?

#### **CONCLUSION:**

As a legal matter, providing a defense for school districts, officials and employees in lawsuits alleging misconduct is a legitimate use of public funds, subject to certain limitations.

#### **FACTS:**

The question addressed in this opinion stems from House Memorial 77, adopted during the 2007 regular legislative session. House Memorial 77 directs staff from the Public Education Department and the Legislative Education Study Committee, in consultation with staff from the Legislative Finance Committee and the Legislative Council Service, to conduct a study of: the criteria local school districts now use to evaluate the merit of legal actions filed against them; amounts districts spend on legal actions; what limits districts impose on spending for litigation costs and attorneys fees; and practices of school districts and state governments in surrounding states regarding the use of state money to defend school districts, boards and employees in legal actions. This opinion focuses on the legality of using public money to provide a defense for public school districts and their officers and employees.

#### **ANALYSIS:**

New Mexico law now requires school districts to provide a legal defense for their officials and employees in some cases. The Tort Claims Act, NMSA 1978, §§ 41-1-1 to -27 (1976, as amended through 2003), applies to tort and civil rights claims against public school districts, school board members and school employees. Governmental entities, including public school districts, and their elected and appointed officials and employees generally are immune from liability for any tort, except as waived under the Tort Claims Act, while acting within the scope of duty. NMSA 1978, §§ 41-4-3(B), (C), (F), 41-4-4. Unless provided by an insurance carrier, the Act requires a governmental

entity to provide a defense, including costs and attorneys fees, for any of its employees against whom a claim is brought for:

- (1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or
- (2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

NMSA 1978, § 41-4-4(B). "Scope of duty" is defined, for purposes of the Tort Claims Act, as "performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance." NMSA 1978, § 41-4-3(G).

In the absence of a statute providing otherwise, the weight of judicial and other legal authority from New Mexico and other states permits state and local government entities to use their discretion to pay legal defense fees incurred by a public employee, under certain conditions. The applicable law was thoroughly analyzed in a 1985 Attorney General advisory letter addressed to the General Services Department, which was contemplating the provision of criminal defense insurance coverage for public employees. See N.M. Att'y Gen. Advisory Letter No. 85-23 (1985).<sup>1</sup>

Then, as now, there was no pertinent New Mexico case law. Accordingly, the 1985 advisory letter reviewed court decisions from other states and gleaned from them the following five criteria that were applied in cases upholding the use of public money for defending public employees against allegations of wrongdoing in the absence of a controlling statute:<sup>2</sup>

- (1) the charges must arise from the discharge of an official duty in which the government has an interest;
- (2) the public employee must have been acting in good faith when the alleged wrongful conduct occurred;
- (3) the employing government entity must have express or implied legal authority to pay the employee's legal expenses;
- (4) the employee must be exonerated of the charges; and
- (5) the decision to pay the fees must be made by an impartial official or official body.<sup>3</sup>

The 1985 advisory letter dealt with criminal charges, but this office has applied similar criteria when public employees have sought reimbursement for legal expenses incurred

in civil proceedings. A 1965 Attorney General opinion addressing legal expenses incurred by school board members concluded that a school board member charged in a civil suit with doing a wrongful act in the member's official capacity could be defended by spending public funds, provided the member prevailed in the lawsuit. N.M. Att'y Gen. Op. No. 65-233 (1965). See also N.M. Att'y Gen. Op. Nos. 59-209 (1959) (town could reimburse town manager for successful defense of civil suit for libel arising from manager's discharge of a former employee, where the manager acted in good faith and within the scope of his official duties); 57-128 (1957) (concluding that public funds could be used to reimburse a district judge for expenses incurred in successfully defending himself from civil liability if the suit arose from acts committed while performing his official duties).

The requirements that the allegations arise from conduct within the public employee's official capacity or scope of employment and that the employee be exonerated ensure that public funds are not improperly used to provide a defense in personal proceedings. For example, this office has concluded that a school board could not hire an attorney to defend one of its members in a quo warranto proceeding (an action to determine or test an officer's right to hold and exercise his office) because such a proceeding is purely personal. N.M. Att'y Gen. Op. No. 65-233 (1965). See also N.M. Att'y Gen. Op. 88-18 (1988) (conservancy district could not reimburse expenses incurred by two of its directors in a successful election contest). The use of public money to pay an employee's personal legal expenses is specifically prohibited by the antidonation clause of Article IX, Section 14 of the New Mexico Constitution. See N.M. Att'y Gen. Op. No. 88-61 (1988) (Legislative Finance Committee's attempt to pay attorneys fees for two legislators who filed a lawsuit challenging governor's line item vetoes violated the antidonation clause because the legislators were acting in their individual capacities and the LFC was not a party to the lawsuit). See also N.Y. Att'y Gen. Informal Op. No. 2003-16, 2003 WL 22669327 (municipality's "payment of legal fees when an employee is found guilty would constitute an unconstitutional gift of public funds because an employee acting criminally is not acting within the scope of his public employment").

If the five criteria discussed above are met, we believe that public money may legitimately be used to provide a defense for school districts, officials and employees in legal proceedings alleging misconduct. Nevertheless, the legislature has the ultimate authority to determine the appropriate use of school district funds, including a prohibition against using public money to provide a defense for school officials and employees in lawsuits not covered by the Tort Claims Act or allowing payment of legal expenses only in connection with civil or other specified cases.

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[1] The law pertaining to the authority of public bodies to provide a defense for its officials and employees in civil and criminal actions does not appear to have changed significantly since the 1985 advisory letter was issued. See Kimberly J. Winbush, J.D., Annotation, Payment of Attorney's Services in Defending Action Brought Against Officials Individually as Within Power or Obligation of Public Body, 47 A.L.R.5th 553 (1997 & Cum. Supp. 2007) (hereafter "Winbush").

[2] The 1985 advisory letter also discusses cases from other states holding that a public body has a duty, even in the absence of a law or ordinance, to pay for a public employee's defense where the challenged conduct arose from the performance of the employee's official duties and, at the opposite extreme, that a public body had no authority to reimburse public employees for expenses they incur to defend themselves against criminal charges, even if they prevail. However, as stated above, applicable case law generally allows a public body, if it so elects, to pay for its employees' legal expenses in suits brought against them for acts committed in the discharge of their official duties. See, e.g., Hart v. County of Sagadahoc, 609 A.2d 282, 283-84 (Me. 1992). See generally Winbush, supra note 1.

[3] The requirement that an impartial official or public body make the decision to pay, like the other four criteria identified in the 1985 advisory letter, applies in the absence of a governing statute expressly allowing public bodies to pay their employees' legal defense fees in specified circumstances.