



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2023-08**

December 15, 2023<sup>1</sup>

#### **QUESTION PRESENTED<sup>2</sup>**

Central New Mexico Community College (“CNM”) has obtained federal grant funds. The grant agreements between CNM and the federal government permit CNM to expend the federal funds it receives for the purchase of laptops and textbooks for student use. The question posed is whether CNM’s purchase of laptops and textbooks for use by its students nonetheless violates Article IX, Section 14 of the New Mexico State Constitution, commonly known as “the Anti-Donation Clause.”

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<sup>1</sup> This is an official advisory opinion of the New Mexico State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion. NMSA 1978, § 10-16G-8(C) (2019).

<sup>2</sup> The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On October 13, 2023, the Commission received a request for an advisory letter that detailed the issues as presented herein. See 1.8.1.9(B) NMAC. While the request was not initially submitted by a “public employee” was the State Ethics Commission Act defines that term, *see* NMSA 1978, § 10-16G-2(J) & (K) (2021), Commissioner Jeff Baker made the same request for an advisory opinion. *See generally* 1.8.1.9(A)(5) NMAC.

## ANSWER

The Anti-Donation Clause does not apply to CNM. To the extent it does, it likely permits the proposed expenditures.

## ANALYSIS

The Anti-Donation Clause provides in relevant part:

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through H of this section.<sup>3</sup>

As explained below, the Anti-Donation Clause does not apply to CNM because CNM is not a “state . . . county, school district or municipality.” Furthermore, even if CNM were an entity subject to the Anti-Donation Clause, its expenditures on laptops and textbooks for student use likely would not violate the Anti-Donation Clause.

### **I. CNM is not subject to the Anti-Donation Clause.**

The Anti-Donation Clause applies only to those public bodies that are the State (or an agency or instrumentality thereof), a county, a municipality, or a school district. CNM is a community college, defined by the Community College Act, NMSA 1978, Sections 21-13-1 to 27 (1963, as amended through 2019), to mean “a public educational institution that provides not to exceed two years of training in the arts, sciences and humanities beyond the twelfth grade of the public high school curriculum, . . . [or] vocational and technical curriculum and appropriate courses of study for persons who may or may not have completed the twelfth grade of public high school[.]”<sup>4</sup>

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<sup>3</sup> N.M. Const. art. IX, § 14.

<sup>4</sup> See NMSA 1978, § 21-13-2 (1998).

Being a “public educational institution,” however, does not automatically subject CNM to the Anti-Donation Clause as an arm, instrumentality, or alter ego of the State.<sup>5</sup> CNM is subject to the control of an elected college board whose members represent particular districts, indicating that CNM is a political subdivision serving local political purposes subject to local political control, not an “alter ego” of the State.<sup>6</sup> For this reason, CNM is not subject to the Anti-Donation Clause.

This conclusion is supported by the text of the New Mexico Constitution and previous guidance issued by the New Mexico Attorney General’s Office.

Begin with the text of Anti-Donation Clause, which specifies that “the state []or any county, school district or municipality” is prohibited from making donations or pledging its credit in support of a private enterprise. As with statutes, the meaning of any given provision of the Constitution is determined by reading it *in pari materia*, i.e., in context with other provisions touching on the same subject.<sup>7</sup> And other provisions of the Constitution adopted at the same time as the Anti-Donation Clause apply more broadly, supporting a narrow interpretation of the Anti-Donation Clause. For example, as originally drafted, Article VIII, Section 6 referenced “any county, city, town, school district, or other municipal corporation *or subdivision of the state.*”<sup>8</sup> In other words, the framers of the state

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<sup>5</sup> *Cf. Leach v. New Mexico Junior College*, 2002-NMCA-039, ¶ 14, 132 N.M. 106 (concluding that a junior college was not a “state educational institution” given its “absence from the constitutional listing of state educational institutions”); *see also Santa Fe Cmty. Coll. v. Ztark Broadband, LLC*, Civ. No. 20-1151 SCY/KK, 2022 WL 298675, at \*3-\*7 (D.N.M. Feb. 1, 2022) (holding that community college established as a political subdivision of the state is not subject to the Anti-Donation Clause).

<sup>6</sup> *Cf. Sturdevant v. Paulsen*, 218 F.3d 1160, 1170 (10th Cir. 2000) (noting that a “fundamental characteristic of a political subdivision” is “political control by some community other than the state as a whole”); NMSA 1978, § 21-13-8 (2018) (setting out governance structure for community colleges).

<sup>7</sup> *City of Albuquerque v. New Mexico State Corp. Comm’n*, 1979-NMSC-095, ¶ 5, 93 N.M. 719.

<sup>8</sup> N.M. Const. art. VIII, § 6 (1912), *reprinted in* Charles Kettleborough, *State Constitutions and the Federal Constitution and Organic Laws of the Territories and Other Colonial Dependencies of the United States of America* (1918) (emphasis added). The full provision states: “The legislature shall have no power to release or discharge any county, city, town, school district or

constitution knew how to draft a constitutional clause that applied to the State and all its subdivisions. That they did not do so when they drafted the Anti-Donation Clause supports an interpretation that excludes unlisted political subdivisions, like community colleges, from its scope.

The Attorney General’s Office has issued written opinions tending to support the view that a community college is not an entity subject to the Anti-Donation Clause. In 2008, the Attorney General noted a Court of Appeals case holding that an educational institution not expressly set forth in Article XII, Section 11 of the New Mexico Constitution is not an “arm of the state” for purposes of Eleventh Amendment sovereign immunity, and is instead considered a “local governing body” subject to suit.<sup>9</sup> The Attorney General’s Office reasoned that if a community college is not “the state” for one purpose (sovereign immunity under the Eleventh Amendment), it is also not “the state” for purposes of the Anti-Donation Clause.<sup>10</sup> Although the opinions of the Attorney General’s Office are not binding on the State Ethics Commission, this opinion supports the view, ultimately grounded in the text of the State Constitution itself, that community colleges fall outside the scope of the Anti-Donation Clause.<sup>11</sup>

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other municipal corporation or subdivision of the state, from its proportionate share of taxes levied for any purpose.”

<sup>9</sup> N.M. Att’y Gen. Adv. Ltr., 2008 WL 660267 (Feb. 29, 2008) (discussing *Leach v. New Mexico Junior College*, 2002-NMCA-039, 132 N.M. 106).

<sup>10</sup> This line of reasoning (at least as far as the Anti-Donation Clause is concerned) stems from a statement by the Court of Appeals that “[w]hen the constitution either grants or prohibits certain powers, the affected subdivisions are specifically enumerated.” *State ex rel. Stratton v. Roswell Indep. Schools*, 1991-NMCA-013, ¶ 23, 111 N.M. 495; *see also* N.M. Att’y Gen. (Feb. 4, 1993) (citing *Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne*, 74 N.M. 487, 394 P.2d 998 (1964), *State ex rel Gomez v. Campbell*, 75 N.M. 86, 400 P.2d 956 (1965), and *State ex rel. Stratton v. Roswell Indep. Schools* for the same proposition).

<sup>11</sup> With respect to case law, the United States District Court for the District of New Mexico has held that the Santa Fe Community College (which, like CNM, is a community college under the Community College Act) is not subject to the Anti-Donation Clause: because the Legislature “provided *separate* definitions for school districts and community college districts,” the court concluded that the latter is distinguishable from the former for purposes of determining the Anti-Donation Clause’s applicability. *Santa Fe Cmty. Coll. v. Ztark Broadband, LLC*, No. 20-CV-1151 SCY/KK, 2022 WL 298675 (D.N.M. Feb. 1, 2022).

For these reasons, CNM is not the state, a county, a municipality, or a school district subject to the Anti-Donation Clause. Accordingly, CNM’s proposed expenditures do not implicate the Anti-Donation Clause.

**II. Even if CNM were subject to the Anti-Donation Clause, the proposed expenditures on laptops and textbooks likely do not violate the Anti-Donation Clause.**

Even if CNM were subject to the Anti-Donation Clause, its expenditures on laptops and textbooks for student use likely would not violate the Anti-Donation Clause’s prohibition against donations to private enterprise. An expenditure only violates the Anti-Donation Clause if the expenditure (1) is a transfer, pledge of credit, or a donation to or in aid of a private person; and (2) an exception to the Anti-Donation Clause does not apply. Here, the expenditures by CNM for textbooks and laptops for use by its students likely would not be prohibited donations that violate the Anti-Donation Clause because they do not constitute a donation or a pledge of credit to a private person.

When a government entity receives something of value in exchange for money, there is no “donation” because the government’s property is exchanged for something of value.<sup>12</sup> Put differently, the Anti-Donation Clause is not implicated when the government procures items of tangible personal property for itself. It follows that the Anti-Donation Clause does not prohibit an educational institution from making expenditures (whether of its own or federal grant funds) to purchase laptops or textbooks, even if those expenditures incidentally provide some private benefit to the students who use that government property during their education.<sup>13</sup> So long as CNM receives something of value in exchange for its proposed expenditures (i.e., it receives laptops or schoolbooks), its provision of what it

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<sup>12</sup> Cf. *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (Browning, J.) (“The Court does not believe that the Anti-Donation Clause is implicated when there is true consideration—money exchanged for real product. . . . The Court does not believe it should evaluate whether the agreement was a good or bad deal under the Anti-Donation Clause, but merely check for adequate consideration.”).

<sup>13</sup> See N.M. Const. art. XII, § 1 (requiring the state to establish and maintain a free public school system); see also NMSA 1978, § 21-16-2(A) (1999) (defining a “technical and vocational institute” as “a public educational institution . . . that provides not to exceed two years of vocational and technical curricula and, in addition, some appropriate courses and programs in the arts and sciences”).

receives to students to satisfy its educational mission does not violate the Anti-Donation Clause.

To the extent the question presented asks whether the Anti-Donation Clause permits CNM to lend the laptops and textbooks it has purchased to students for their use, the answer is that CNM may do so. First, as noted above, the Anti-Donation Clause likely does not apply to CNM at all. But even assuming the Clause does apply, there is no prohibition against CNM allowing students to borrow laptops and textbooks in furtherance of CNM’s statutory mandate to provide “training in the arts, sciences and humanities beyond the twelfth grade of the public high school curriculum . . . .”<sup>14</sup> So long as CNM retains ownership of the textbooks or laptops purchased, the Anti-Donation Clause is not violated if CNM pursues its statutory goals under the Community College Act by lending students textbooks and laptops.<sup>15</sup>

## CONCLUSION

For the foregoing reasons, CNM is not subject to the Anti-Donation Clause, and, even if it were, its purchases of textbooks and laptops for students likely do not violate the Clause.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**

**JEFFREY L. BAKER, Commissioner**

**STUART M. BLUESTONE, Commissioner**

**HON. CELIA CASTILLO, Commissioner**

**HON. DR. TERRY MCMILLAN, Commissioner**

**RONALD SOLIMON, Commissioner**

**DR. JUDY VILLANUEVA, Commissioner**

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<sup>14</sup> NMSA 1978, § 21-13-2(A) (1998).

<sup>15</sup> *See Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 51 (“In this case, the textbook loan program does not involve any donation or gift . . . . The Department merely loans textbooks to students for use while attending school. The Department retains ownership and control over the textbooks and the fund used to purchase them. We hold that loaning textbooks to students . . . does not involve a donation to any person or entity as prohibited by [the Anti-Donation Clause].”) (citations omitted); *see also* N.M. Att’y Gen. Op. 97-02 (Jan. 7, 1997) (opining that expenditures by the Albuquerque Technical-Vocational Institute (n/k/a CNM) would only violate the Anti-Donation Clause if the expenditures amounted to “the assumption of students’ private obligations”).