



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2023-03**

April 14, 2023<sup>1</sup>

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

A District Court provides alcohol-and-drug-treatment services and supplies—including life skills training, alternative therapeutic training, exercise classes, fitness memberships, personal hygiene supplies, cleaning supplies, gardening supplies, and gift cards—to individuals participating in treatment court. Does the District Court’s provision of these services and supplies violate Article 9, Section 14 of the New Mexico Constitution?

---

<sup>1</sup> This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the 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 February 22, 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” as 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.

## ANSWER

No.

## ANALYSIS

### I.

Treatment courts—also known as drug courts—have been a part of the adjudication and resolution of criminal offenses in New Mexico since 1995. *See* New Mexico Treatment Courts Report: FY2022, at 11, *available at* <https://www.nmlegis.gov/handouts/CCJ%20082222%20Item%203%20FY2022%20DTJ-Treatment%20Court%20Report.pdf>. While each District Court and Magistrate Court has the authority to create and operate a treatment court, they must do so in compliance with the New Mexico Treatment Court Standards issued by the New Mexico Supreme Court. *See In the Matter of the Approval of the N.M. Treatment Court Standards*, No. 21-85000-002 (N.M. Jan. 22, 2021) (“N.M. Treatment Court Standards”), at Appendix K-1(b); *see generally* N.M. Const., art. VI, § 3 (providing the Supreme Court with “a superintending control over all inferior courts”). As of April 2022, twelve of New Mexico’s thirteen judicial districts conduct at least one drug court. *See* New Mexico Treatment Courts Report: FY2022, at 39.

To fund the treatment courts, the Legislature created both a “drug court fund” and a “magistrate drug court fund,” which are non-reverting funds in the state treasury. *See* NMSA 1978, § 34-9-14.1 (2003) (magistrate drug court fund); NMSA 1978, § 34-9-14.2 (2018) (drug court fund). While the treatment courts were originally funded by grants, the Legislature now appropriates funds to the Administrative Office of the Courts (“AOC”) for the operation of the drug courts. *See, e.g.*, Laws 2022, Ch. 54, § 4 (appropriating \$4,357,200 to AOC for the operation of the drug courts). In addition to legislative appropriations, the treatment courts also continue to be partially funded by grants, including crime reduction grants provided by state agencies under the Crime Reduction Grant Act, NMSA 1978, §§ 31-28-1 to -6 (2019, as amended through 2022). All monies received in the drug court fund and the magistrate drug court fund are expended on warrants of the Secretary of the Department of Finance and Administration, upon vouchers signed by court administrators or the AOC director. *See id.*

Treatment court participants, ordinarily in lieu of sentencing on a criminal conviction, are “required to participate in a comprehensive and integrated program

of alcohol, drug and other related treatment and rehabilitation services as approved by the treatment court.” *See* N.M. Treatment Court Standards, at 4-1. To provide these treatment and rehabilitation services to treatment court participants, the District Courts and Magistrate Courts expend appropriated funds and other public monies. As the request indicates, these expenditures include life skills training services, therapeutic services, exercise classes, fitness memberships, personal hygiene supplies, cleaning supplies, gardening supplies, and gift cards in small amounts for fuel and meals, which are distributed to treatment court participants in recognition of their accomplishments and compliance with treatment court goals.

According to the request, the Department of Finance and Administration, whose mission is to ensure the fiscal accountability of public funds, declined to approve a purchase order created by a District Court for fuel gift cards for treatment court participants absent a legal opinion that the purchase does not violate Article IX, Section 14 of the New Mexico Constitution, commonly known as the “Anti-Donation Clause.” The State Ethics Commission has the authority to enforce and to interpret the Anti-Donation Clause. NMSA 1978, § 10-16G-9(A) & (F) (2021); NMSA 1978, § 10-16G-8(A) (2019); 1.8.1.9(A) NMAC.

## II.

The District Court’s purchases of fuel cards and other expenditures in aid of treatment court participants do not violate the Anti-Donation Clause.

The Anti-Donation Clause provides “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[.]” N.M. Const. art. IX, § 14. Except where an exception applies, the Anti-Donation Clause prohibits “donations” of property or money by the State, a county, a school district or a municipality to a private person for which the government entity receives nothing of value in return. *See, e.g., State ex rel. Mechem v. Hannah*, 1957-NMSC-065, 63 N.M. 110 (invalidating state-backed certificates issued to cattle ranchers to defray cost of hay during drought). The Constitution includes several exceptions to this prohibition. *See* N.M. Const. art. IX, § 14(A)–(H).

At the outset, it is not obvious that the services and associated benefits that treatment courts provide to participants are “donations” in the ordinary sense and meaning of the term, i.e., gifts. *See Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 36, 62 N.M. 18. As the request indicates, treatment court

participants accept these services and benefits as a consequence of both their involvement in the criminal justice system and their agreement to abide by numerous conditions set by the treatment courts. The failure to satisfy those conditions involves sanctions. *See* N.M. Treatment Court Standards, at 6-22. The State exercises a great degree of coercive control over the behavior of treatment court participants. Consequently, the benefits that treatment court participants receive are unlike subsidies to a specific and favored industry. *Cf. Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, ¶ 30, 100 N.M. 342 (holding unconstitutional a “subsidy to the liquor industry”); *Hannah*, 1957-NMSC-065, ¶¶ 39–40, 63 N.M. 110 (holding unconstitutional a subsidy to the livestock industry). Put differently, a carrot (*e.g.*, an incentive in the form of a gift card to a treatment court participant) that the government couples with a stick (*e.g.*, the power to determine whether the participant is sentenced to a period of incarceration) is not necessarily the same thing as a carrot alone. Accordingly, as a threshold question, it is uncertain whether the Anti-Donation Clause applies to these expenditures as “donation[s].” N.M. Const. art. IX, § 14.

However, even if the services and benefits were donations from the Courts to treatment court participants, the Anti-Donation Clause would not prohibit them. The Clause’s first exception provides “[n]othing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.” N.M. Const. art. IX, § 14(A). As in State Ethics Commission Advisory Opinion 2022-07, we make two observations regarding the application of this exception. *See* State Ethics Comm’n Adv. Op. 2022-07, <https://nmonesource.com/nmos/secap/en/item/18594/index.do>.

First, for a governmental entity to provide for the maintenance and care of an individual, the Constitution does not require the targeted recipient to be both sick *and* indigent; the targeted recipient need only be “sick” *or* “indigent.” *See* N.M. Att’y Gen. Op. 83-04 (July 29, 1983) (“A donation for the care and maintenance of either the sick or the indigent is not prohibited.”); N.M. Att’y Gen. Op. 58-135 (June 23, 1958) (quoting N.M. Att’y Gen. Op. 57-26 (Feb. 14, 1957) (“It is our view that such care and maintenance be extended to those who are either sick *or* indigent. It would not seem necessary that a person, in order to secure such assistance, be both sick *and* indigent.” (emphasis original))).

Second, in view of the Supreme Court’s opinion in *Humana of New Mexico v. Board of County Commissioners*, 1978-NMSC-036, 92 N.M. 34, the interpretation of the phrase “for the care and maintenance of sick and indigent persons” is not tied to how the public understood the terms “sick” and “indigent”

in 1912, when the state Constitution (including the exception at issue) was adopted. *See id.* at ¶¶ 12-15 (rejecting an interpretation of “indigent” that fixed its application to the standard of indigence in 1912); *see also* N.M. Const. art. IX, § 14 (1912). Rather, when interpreting Article IX, Subsection 14(A), the *Humana* Court said “[w]ords employed in a constitution are not necessarily static in meaning but grow and change as the conditions of modern society and knowledge grow and change through the passage of years.” *Id.* at 13. Based on the Supreme Court’s approach to the interpretation of Article IX, Subsection 14(A), the Anti-Donation Clause does not prohibit the State from providing for the maintenance and care of individuals who are “sick,” understood by how we conceive, diagnose and treat illness today.

The Anti-Donation Clause does not prohibit the treatment court expenditures that the request describes because, in light of the Treatment Court Standards, treatment court expenditures are clearly targeted to aid persons who suffer from cognizable disorders—persons who, in more antiquated language, might be described as “sick.” N.M. Const. art. IX, § 14(A). For example, the N.M. Treatment Court Standards *require* treatment courts to include for consideration for admission those individuals who: (i) have been arrested or convicted of drug offenses; (ii) have committed offenses while under the influence of or committed to support addiction or dependence; (iii) have violated probation by commission of a drug offense, drug related crime or drug use; (iv) have been arrested or convicted of a crime due to behavior that is the result of mental illness; and (v) have a severe alcohol or other drug abuse problems. *See* N.M. Treatment Court Standards, at 3-2. The standards further *require* treatment courts to “target individuals classified as moderate to high risk and high need” and to require treatment court participants “to participate in a comprehensive and integrated program of alcohol, drug and other related treatment and rehabilitation services[.]” N.M. Treatment Court Standards, at 3-7 & 4-1. The primary goal of those programs “must be abstinence from alcohol, drugs, an other non-prescribed or non-medically indicated mind-altering substances consistent with the judicial requirements of the program.” *Id.* at 4-3. Considering the minimum standards that the Supreme Court requires for all treatment courts, treatment courts provide treatment and rehabilitation services and benefits to individuals who are suffering from alcohol and substance abuse disorders.

Furthermore, these services and benefits effectively promote the “maintenance and care” of treatment court participants. N.M. Const. art. IX, § 14(A). According to the AOC, “[m]ore research has been published on the effects of Adult Drug Courts than all other criminal justice programs *combined.*” New

Mexico Treatment Courts Report: FY2022, at 20. Based on that research, there are dramatic differences in the rates of recidivism between participants and non-participants in treatment courts. *See generally id.* at 18–21. The average graduation rate among New Mexico treatment courts is 57%. *See id.* at 20. Among those graduates, the average three-year recidivism rate is less than 10%. *See id.* It is evident, therefore, that the services that treatment courts provide work to maintain, care for, and rehabilitate individuals who are suffering from alcohol and substance abuse disorders.

The Anti-Donation Clause does not prohibit state agencies, as a matter of New Mexico’s foundational law, from making expenditures to treat, care for, and rehabilitate individuals who suffer from alcohol and substance abuse disorders. The services and benefits that treatment courts provide are “for the care and maintenance of sick and indigent persons.” N.M. Const. art. IX, § 14(A).

## CONCLUSION

For the foregoing reasons, the Courts’ provision of alcohol-and-drug-treatment services and supplies—including life skills training, alternative therapeutic training, exercise classes, fitness memberships, personal hygiene supplies, cleaning supplies, gardening supplies, and gift cards—to individuals participating in treatment courts does not violate Article 9, Section 14 of the New Mexico Constitution.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**  
**JEFFREY L. BAKER, Commissioner**  
**STUART M. BLUESTONE, Commissioner**  
**HON. GARREY CARRUTHERS, Commissioner**  
**HON. CELIA FOY CASTILLO, Commissioner**  
**RON SOLIMON, Commissioner**  
**JUDY VILLANUEVA, Commissioner**