

VOLUME NO. 38

OPINION NO. 111

BOARD OF PUBLIC EDUCATION - School for Deaf and Blind,
transfer of gifts to non-profit organization;
CHARITABLE ORGANIZATIONS - Transfer of School for Deaf and
Blind funds to non-profit organization;

GIFTS - Transfer of gifts for School for Deaf and Blind to non-profit organization;

PUBLIC FUNDS - School for Deaf and Blind, transfer of gifts to non-profit organization;

MONTANA CODE ANNOTATED - Sections 5-13-101, 5-13-102(1), 5-13-304(1), 5-13-304(7), 7-7-2103, 17-3-1001, 20-8-110, 20-8-111, 20-8-112;

1889 MONTANA CONSTITUTION - Article V, section 11(5), Article VIII, section 12, Article X, section 10;

OPINIONS OF THE ATTORNEY GENERAL - 36 Op. Att'y Gen. No. 106, at 553 (1976), 37 Op. Att'y Gen. No.105 (1978).

HELD: Under section 20-8-111, MCA, the Board of Public Education, in its discretion, may give money that has been donated for the use and benefit of the Montana School for the Deaf and Blind to a private non-profit corporation created and controlled by the Board and operated for the benefit of that school. However, the Board remains accountable for the money until it is used directly for the general support, maintenance, or improvement of the Montana School for the Deaf and Blind.

27 October 1980

Morris L. Brusett
Legislative Auditor
State Capitol
Helena, Montana 59601

Dear Mr. Brusett:

You have requested my opinion on the following question:

May the Board of Public Education transfer from the state treasury to a private non-profit organization, gifts and donations made to the State and intended for the use of the Montana School for the Deaf and Blind and its students?

You and the Board of Public Education have provided me with the following facts. Over a number of years, gifts, largely unrestricted cash donations, have been received by the Montana School for the Deaf and Blind. These funds, together with their accumulated interest, amounting to a sum exceeding \$120,000, are now deposited with the State Treasurer in accordance with a previous Attorney General's Opinion, 36 Op. Att'y Gen. No. 106, at 553 (1976). The Board of Public Education, which is responsible for the

funds, has retained a law firm to create a non-profit corporation or foundation to be operated for the benefit of the Montana School for the Deaf and Blind. The directors of the proposed corporation or foundation are to be appointed by and serve at the pleasure of the Board of Public Education. Some of the members of that Board may be directors. Once the proposed corporation or foundation is established, the Board intends to give the funds referred to above to the newly-created entity. Your question does not refer to the creation of the organization, but only to the transfer of funds from the state treasury to that organization.

Three statutes specifically govern the use of gifts to the Montana School for the Deaf and Blind. Section 20-8-110, MCA, states in part:

[A]ll donations, gifts, devises, or grants which have been heretofore or may hereafter be made by any person or corporation to [the Montana state school for the deaf and blind] shall vest in the state of Montana for the use and benefit thereof.

Section 20-8-111, MCA, states:

The board of public education shall have the power and it shall be its duty to receive, hold, manage, use, and dispose of any and all real and personal property made over to such board or to the state of Montana by purchase, gift, devise, bequest, or otherwise acquired and the proceeds, interest, and income thereof for the use and benefit of said school.

Section 20-8-112, MCA, states:

No moneys belonging to the deaf and blind school fund shall be expended for any purpose other than for the Montana state school for the deaf and blind, and any moneys belonging to any fund or funds which may be hereafter created for such school shall be expended for the express purpose designated in the act or acts creating such fund or funds and for no other purpose.

In addition, section 17-3-1001, MCA, states:

(1) [T]he Montana school for the deaf and blind, ...may accept gifts, donations, grants, devises, or bequests of real or personal property

from any source. Gifts, donations, grants, bequests, or devises may be made directly to the state, in the name of any of the institutions, to any officer or board of the institutions, or to any person in trust for the institutions.

(2) In the event it is made directly to any institution or to any officer or board of any institution, the gift, donation, grant, devise, or bequest is a gift, donation, grant, devise, or bequest to the state and shall be administered and used by the state for the particular purpose for which it was given, donated, granted, bequeathed, or devised. In the event no particular purpose is mentioned in the gift, grant, devise, or bequest, then it shall be used for the general support, maintenance, or improvement of such institution by the state.

These statutes give the Board of Public Education broad discretion concerning the use of the money you described if the money is spent for the general support, maintenance, or improvement of the Montana School for the Deaf and Blind. The question presented, therefore, is whether the transfer of that money to a private foundation, as outlined above, constitutes an abuse of discretion, under the guidelines given. My opinion is that under the facts presented, it does not.

The Wisconsin Supreme Court addressed a similar question in Glendale Development, Inc. v. Board of Regents, 12 Wis. 2d 120, 106 N.W.2d 430 (1960), cert. denied, 366 U.S. 931 (1961). In that case, the Board of Regents of the University of Wisconsin had given money that had been donated to the university to a non-profit corporation organized by friends of the university. The corporation's purpose as stated in its articles was:

To aid the university of Wisconsin by solicitation for the benefit of said university of gifts of real property or personal property or both; to collect, accept and receive gifts, bequests, devises or things of value and to hold, administer, use or distribute the same for the benefit of the university of Wisconsin.

106 N.W.2d at 435. The court held that the transfer of the donated money to the non-profit corporation by the Board of Regents was not unlawful. The court stated:

There is no doubt but that the anonymous donors of the money to the Board of Regents desired that it should be used by the Board of Regents in any legitimate manner and in its discretion, so long as it was for the benefit of the university.

* * *

While the funds were public funds in a general sense, they were funds earmarked for such purposes as the Board of Regents, in its discretion, deemed proper, so long as they were for the benefit of the university.

* * *

[T]he money given to [the non-profit corporation] was properly used for the benefit of the university within the discretion and best judgment of the Board of Regents.

106 N.W.2d at 439. Just as the court in that case found no abuse of discretion and deferred to the best judgment of the Board of Regents, so I can find no abuse of discretion and must defer to the best judgment of the Board of Public Education.

I emphasize that my opinion is strictly limited to the specific funds, the specific agency, and the specific private non-profit corporation described herein. It is based not on any inherent power of state agencies, but on the specific grant of power by the Legislature to the Board of Public Education contained in section 20-8-111, MCA. I reject the notion that this opinion would allow any other state agency or institution to transfer monies from the state treasury to a nonprofit foundation.

In the memorandum accompanying your opinion request, you suggest that article X, section 10 of the Montana Constitution may prohibit the proposed transfer of funds. That provision states:

The funds of the Montana university system and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be provided by law, and shall be guaranteed by

the state against loss or diversion. The interest from such invested funds, together with the rent from leased lands or properties, shall be devoted to the maintenance and perpetuation of the respective institutions.

Volume 36 Op. Att'y Gen. No. 106, at 553 (1976), applied article X, section 10 to the Montana School for the Deaf and Blind. While I concur with the result reached in that opinion, my agreement is based on statutory provisions. My opinion is that article X, section 10 does not apply to the funds of the Montana School for the Deaf and Blind. In State ex rel. Evans v. Stewart, 53 Mont. 18, 23, 161 P. 309, 312 (1916), the Montana Supreme Court stated:

[The predecessor to article X, section 10] deals with the permanent funds belonging to the higher educational institutions, the university, agricultural college, school of mines, and normal. There is [another] group made up of the permanent funds belonging to the reform school, deaf and dumb asylum, and capitol building. The constitution makes no reference whatever to the investment of the funds belonging to this last group, and therefore the Legislature was free to prescribe such regulations as might seem fit and proper. With reference to the higher educational institution funds constituting the [former] group, the mandate of the Constitution is that they shall be invested under such regulations as "may be prescribed by law."

(Emphasis added.) The provision referred to in that case, article XI, section 12 of the 1889 Montana Constitution, was re-adopted with no substantive change as part of the present Montana Constitution. See 1972 Montana Constitutional Convention Transcript of Proceedings at 6556-58. The "deaf and dumb asylum" referred to was the forerunner to the present Montana School for the Deaf and Blind. See § 20-8-110, MCA. Article X, section 10 does not apply to the Montana School for the Deaf and Blind.

As a matter of law, therefore, the proposed transfer is permissible. However, I agree with you that as a matter of public policy the proposed transfer is inadvisable. I would advise the Board of Public Education to reconsider its decision to transfer the funds, for two reasons. First, the purposes for the transfer stated in the memorandum from the

Board of Public Education do not necessitate the transfer. The first two stated purposes are the establishment of an entity "whose exclusive concern is the needs and interests of the school and its students" and "which can actually solicit charitable contributions from the general public." The establishment of the entity is not being challenged. If the entity is to engage in the solicitation of funds, there is no need for public funds to be transferred to it. The third stated purpose is "to remove these funds from the State Treasury to eliminate the temptation for future legislatures to base their appropriations for the school upon the existence of such a fund." This goal cannot be accomplished by transferring the money to a private organization. The funds will remain public funds until they are actually expended, "for the general support, maintenance, or improvement" of the Montana School for the Deaf and Blind, whether the expenditure is administered directly by the Board of Public Education, or indirectly by the private organization. Any temptation for the Legislature to base its appropriations on the existence of a fund will be present regardless of whether the fund is kept in the state treasury or by a private organization under the control of the Board of Public Education.

Second, the citizens of this State have long demanded strict accountability of all money received and spent by the State. Cf. Mont. Const. of 1889, art. XII, §§ 13 and 14; Mont. Const. of 1972, art. VIII, § 12 (mandate to Legislature). And they have scrutinized carefully payments to private associations for charitable purposes. Cf. Mont. Const. of 1889, art. V, § 35; Mont. Const. of 1972, art. V, § 11(5) (legislative appropriations); § 7-7-2103, MCA; 37 Op. Att'y. Gen. No. 105, at 5-8 (1978) (county expenditures). While the provisions cited are not directly applicable to the situation presented by your request, the public policy is clear. The Board of Public Education should maintain the strictest control possible over the funds that are the subject of this request. If, upon reconsideration, the Board of Public Education adheres to its decision to transfer the funds, I would recommend that it require the organization to contract to provide specific materials or services in return for the funds.

In addition, I recognize that this opinion may provide some practical problems for you and your staff, as you are charged with the duty of auditing fiscal accounts and records so that it may be assured that the directives of the Legislature have been faithfully carried out. § 5-13-101,

MCA. Your concern extends, therefore, not only to the gift of money to an appropriate organization, but also to that organization's ultimate use of the money "for the general support, maintenance, or improvement" of the Montana School for the Deaf and Blind. It is arguable that the organization to be created and controlled by the Board of Education may be a "state agency" within the meaning of your mandate to "audit the financial affairs and transactions of every state agency." See §§ 5-13-102(1) and 5-13-304(1), MCA. Or the gift from the Board of Public Education may be considered a grant from a state agency to an organization within the meaning of section 5-13-304(7), MCA. That provision states:

The legislative auditor shall...have the authority to audit records of organizations and individuals receiving grants from or on behalf of the state to determine that the grants are administered in accordance with the grant terms and conditions. Whenever a state agency enters into an agreement to grant resources under its control to others, the agency must obtain the written consent of the grantee to the audit provided for in this subsection.

Under either interpretation of your mandate, it appears that your office may audit the fiscal accounts and records of the organization that the Board of Public Education proposes to create, to ensure that the money is devoted to the purposes for which it was given to the state--"for the general support, maintenance, or improvement" of the Montana School for the Deaf and Blind.

THEREFORE, IT IS MY OPINION:

Under section 20-8-111, MCA, the Board of Public Education, in its discretion, may give money that has been donated for the use and benefit of the Montana School for the Deaf and Blind to a private non-profit corporation created and controlled by the Board and operated for the benefit of that school. However, the Board remains accountable for the money until it is used directly for the general support, maintenance, or improvement of the Montana School for the Deaf and Blind.

Very truly yours,

MIKE GREELY
Attorney General