

January 13, 2025

OPINION  
OF  
RAÚL TORREZ  
Attorney General

Opinion No. 2025-04

To: Senator Pat Woods, New Mexico State Senator  
Representative Jack Chatfield, New Mexico State Representative

Re: Attorney General Opinion – Mesalands Community College Foundation

---

### **Question**

What obligation, if any, does the Mesalands Community College Foundation (“Foundation”) have to the financial well-being of Mesalands Community College (“College”)? More specifically, does the Mesalands Community College Board (also referred to herein as the “College” or the “College Board”) have the authority to request funds from the Foundation?

### **Answer**

Although the College may request funds from the Foundation, the Foundation is not obligated to comply with any specific request. Rather, the Foundation must exercise its lawful fiduciary duties when deciding when and in what amount it donates to the College.

### **Background**

Generally, legal obligations arise under law, agreement, legal instrument, or judicial determination. Whether the College may require distribution of funds from the Foundation depends on whether any legally enforceable obligation to support, or right to demand support, is established under any such legal mechanism.

There is no law that by itself requires the Foundation to donate to the College upon any specific request. The law that governs the financial relationship between the College and the Foundation is NMSA 1978, Section 6-5A-1 (2023). That statute imposes financial and accounting controls where, as here, a foundation is established to support a college. The statute implicitly recognizes the symbiotic relationship between a college and a foundation, and that the latter may exist

to complement, contribute to and support or aid the function of or forward the purposes of a single [college] through financial support or contribution of services, goods, data or information that help or aid the [college] in carrying out its statutory purpose and goals, including, but not limited to, the provision of scholarships to students of educational institutions and the provision of grants to supplement ongoing research or to provide funds for research and programs being carried out by an agency.

*Id.* Nothing in Section 6-5A-1 mandates any particular amount, purpose, or timing of a foundation's financial support of its affiliated college.

In addition, New Mexico law precludes the Foundation from having a non-discretionary duty to support the College. This is provided in the Uniform Prudent Management of Institutional Funds Act (UPMIFA or Act), NMSA 1978, §§ 46-9A-1 to -10 (2009). The Act requires institutions, defined as “a person, other than an individual, organized and operated exclusively for charitable purposes,” to analyze the purpose of the institution as well as the purpose of its fund when managing gifts and donations. UPMIFA allows institutions to accumulate or expend as “much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes and duration for which the endowment fund is established.”<sup>1</sup> In determining whether to expend funds, UPMIFA requires institutions to exercise the duties of good faith, care, and loyalty. These obligations are collectively referred to as fiduciary duties.

A compelled obligation of support would be contrary to the fiduciary responsibilities of the Foundation. By law, the Foundation is required to consider, within the scope of its mission and donor intent, whether it will appropriate funds to the College. The Foundation must conduct this analysis in a manner that ensures continuing loyalty to the mission of the Foundation—not necessarily the College—and must comply with the duties of care and obedience. In other words, the Foundation's fiduciary obligations face inwards, not outwards.

In addition, UPMIFA provides seven factors institutions must consider to determine whether an expenditure violates the institution's duty of care. One of the key factors requires the institution to consider “the needs of the institution and the fund to make distributions and to preserve capital[.]” *See* § 46-9A-3(E)(1)(g). The institution determines its fund expenditures. In sum, New Mexico law contains no obligation for the Foundation to provide funds to the College upon request or demand.

As for other potential sources of obligation—such as agreement, legal instrument, or judicial determination—the governance and operation of a foundation is generally governed by a set of bylaws. Bylaws are a legal instrument expressing both what a foundation will do and, in some instances, when and how the foundation will implement its mission and purpose. The Foundation's bylaws grants the Board of Directors the discretion “to direct and control the disbursement of its

---

<sup>1</sup> *See* § 46-9A-3 (providing standard of conduct in managing and investing institutional fund); *see also* Gordon Beeman, Uniform Prudent Management of Institutional Funds Act, NACUA, <https://www.higheredcompliance.org/wp-content/uploads/2018/10/UPMIFA-NACUANOTE.pdf> (last visited Jan. 25, 2024) (explaining effects of UPMIFA). Institutions have discretion to determine, in good faith, how to ensure an endowment fund's value continues. The institutions cannot, however, alter donor language if the gift instrument seeks to “preserve the principal intact,” as an example.

funds.”<sup>2</sup> The bylaws further indicate that the Foundation has a discretionary financial relationship with the College that is subject to donor limitations.

However, even if an obligation appeared in the Foundation’s bylaws or existed by some other source of obligation, the Foundation’s obligations are still subject to UPMIFA, relevant state law, and donor limitations. Thus, as pertinent to the question presented, to the extent an *obligation* to provide funds to the college merely upon request were found within the bylaws or other obligation, such an obligation would conflict with the UPMIFA and would therefore be unenforceable. *See, e.g., State ex rel. Black v. Aztec Ditch Co.*, 1919-NMSC-057, ¶ 13, 25 N.M. 590 (New Mexico law has long provided that terms found within a contract or bylaw, which conflict with statute, are unenforceable).

### **Analysis**

While the College Board may always request funds from the Foundation, it has no right to compel distribution of monies that are not already appropriated to the College.

The relevant law governing the duties of a community college board of directors is outlined in NMSA 1978, Section 21-13-10 (2014). Section 21-13-10 does not provide a college board with the authority to compel funds from related institutions. Likewise, although the College Board Policies allow the College to accept gifts, grants, donations, devises, and titles to property on behalf of the College, it does not provide authority to compel funding from the Foundation.<sup>3</sup>

The Foundation is separate from the College. Its stated purpose is, in relevant part, to solicit, maintain, and receive donations and properties for the benefit of the College. It does not obligate itself to expend funds under the specific direction or in response to any specific request of the College or its Board. The Nonprofit Corporation Act elucidates the duties owed to a nonprofit corporation by its director(s).<sup>4</sup> In relevant part, the statute provides that “[a] director shall perform his duties as a director including his duties as a member of any committee of the board upon which the director may serve, in *good faith*, in a manner the director believes to be in or not opposed to the best interests of the corporation and with such care as an *ordinarily prudent person would use under similar circumstances in a like position*.”<sup>5</sup> In essence, a director owes a fiduciary duty of good faith to the nonprofit corporation itself. When exercising this fiduciary duty, a director must (1) act with the judgement of a prudent individual and (2) perform his duties in a manner that a similarly situated (hypothetical) director would do under similar circumstances. Similarly, the Internal Revenue Service (IRS) has observed that “[t]he directors of a charity owe it a duty of loyalty. The duty of loyalty requires a director to act in the interest of the charity rather than in the personal interest of the director or some other person or organization.”<sup>6</sup> In essence, this fiduciary

---

<sup>2</sup> See Amended Bylaws of Mesalands Community College Foundation, Inc., Section 3.2.

<sup>3</sup> See Mesalands Community College Board Policies, Section 9.4.1. <https://www.mesalands.edu/about/board-trustees/board-of-trustees-policies/> (last visited Jan. 7, 2025).

<sup>4</sup> See NMSA 1978, §§ 53-8-1 to -99.

<sup>5</sup> *Id.* § 53-8-25.1 (1987) (emphasis added). See also *Saylor v. Valles*, 2003-NMCA-037, ¶ 19, 133 N.M. 432 (“Directors of nonprofit corporations have a fiduciary duty to act in the best interests of the corporation.”).

<sup>6</sup> Internal Revenue Service, Governance and Related Topics – 501(c)(3) Organizations, [https://www.irs.gov/pub/irs-tege/governance\\_practices.pdf](https://www.irs.gov/pub/irs-tege/governance_practices.pdf) (explaining policies and practices the IRS commends for 501(c)(3) organizations) (last visited Dec. 12, 2024).

duty of loyalty requires that the financial well-being of the charity *itself* be a paramount consideration when entering into a monetary transaction on behalf of the charity.

Although the Foundation's purpose is to support the College, it must consider expenditures to the College in light of the preservation and duration of the fund, and it is required by law to exercise the care that an ordinarily prudent person would under similar circumstances. The Foundation may only appropriate those funds in a manner prudent to the situation, and it has discretion to appropriate or withhold funds based on the seven factors listed in Section 46-9A-4(A).

### **Conclusion**

For the foregoing reasons, although the Board may request funds from the Foundation, the Foundation has no legal obligation to honor the request.

Please note that this opinion is a public document and is not protected by the attorney-client privilege. It will be published on our website and made available to the general public.

RAÚL TORREZ  
ATTORNEY GENERAL

/s/ Alexander W. Tucker  
Alexander W. Tucker  
Assistant Solicitor General