

December 30, 2011 Advisory Letter---Santa Fe Community College Learning Center

The Honorable Luciano “Lucky” Varela
New Mexico State Representative
1709 Callejon Zenaida
Santa Fe, NM 87501

Re: Opinion Request – Santa Fe Community College Learning Center

Dear Representative Varela:

You have requested our advice regarding the issuance of a bond to construct a learning center facility at the Santa Fe Community College (“SFCC”). Specifically, you would like an answer to the following questions:

1. Does the construction of a facility for the learning center established by the Santa Fe Community College District under the Learning Center Act, NMSA 1978, ch. 21, art. 16A (as amended through 2002), require legislative approval under NMSA 1978, Section 21-1-26.9 or any other law?
2. Does the construction of a facility for the learning center established by the Santa Fe Community College District under the Learning Center Act require State Board of Finance review and approval under any law?

Based on our examination of the relevant constitutional, statutory, and case law authorities, and the information available to us at this time, we conclude that neither legislative approval nor approval by the State Board of Finance (“SBOF”) is required for the construction of a learning center facility under the Learning Center Act or any other law.

Factual Background

According to your request, the SFCC District created the SFCC Higher Education Center (“Center”) pursuant to the Learning Center Act (“Act”) and regulations adopted by the New Mexico Higher Education Department (“HED”). The Center currently operates from the SFCC campus as a pilot project serving a limited number of students, but intends to serve a larger number of students by relocating to a larger facility, to be constructed on the grounds of the former College of Santa Fe. The transfer of the former College of Santa Fe property to the SFCC was agreed to by the General Services Department under a contract of sale and ratified by a joint resolution passed and signed into law during the 2011 regular legislative session. SFCC contends that it has satisfied all the steps required to establish and construct a learning center on the grounds of the former College of Santa Fe.

On December 2, 2009, Viola Flores, then Secretary of Higher Education, provided written approval of the Center. According to the plan approved by HED in December 2009, SFCC planned to issue general obligation bonds to provide funds to construct a facility to house the Center. The SFCC Board approved an election resolution that included, among other things, issuing up to \$35,000,000 in general obligation bonds for the purposes constructing the learning facility. HED approved putting the resolution to the voters on April 8, 2010, thus approving the use of GO bond proceeds for the Center facility. HED noted that the proposed learning center project would not be submitted to the SBOF because the Center is not a constitutionally created post-secondary school under Article XII, Section 11 of the Constitution of New Mexico. The voters approved the issuance of the bonds on August 3, 2010. On November 12, 2010, SFCC issued \$20,000,000 for the construction of the proposed learning center. According to SFCC, the only step left before it can begin construction of the Center is HED's approval of the detailed plans for the Center building pursuant to the College District Tax Act, NMSA 1978 Section 21-2A-6(D) (1995) (requiring prior approval of HED for construction of a building with proceeds of general obligation bonds issued by a college governing board).

According to your request, on October 26, 2011, Secretary of Higher Education Jose Z. Garcia expressed the opinion that state statutes require SFCC to obtain legislative approval on this building project, followed by a submission to the Capital Projects Committee at the HED and final review by the SBOF.

Legal Analysis

1. Need for Legislative Approval of Center Facility

The Learning Center Act was designed to address workforce development needs for unserved and underserved populations of the state. NMSA 1978, § 21-16A-2(A). The Act allows community college governing boards, among others, to establish learning centers to meet these needs. NMSA 1978, § 21-16A-4(A).

The Act lays out specific procedures for establishing a learning center. In pertinent part, the Act provides that the first step in constructing a learning center is the establishment of a "learning center district" within a community college district. See NMSA 1978, § 21-16A-4(A). This may be accomplished through a resolution of the governing board of the community college district. *Id.* From your request, it appears that such a district was established within the SFCC District. The Act requires that HED approve the establishment of the district. See NMSA 1978, §§ 21-16A-4(B), -8. However, the Act is silent with regard to approval from the New Mexico legislature.

Courts read a legislative act "in its entirety and construe each part in connection with every other part to produce a harmonious whole." *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 14, 121 N.M. 764, 918 P.2d 350. Thus, all provisions of an act will be considered in relation to one another so that no part is rendered surplusage or superfluous. See *Regents of Univ. of N.M. v. New Mexico Fed'n of Teachers*, 1998-

NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236. While “legislative silence is at best a tenuous guide to determining legislative intent,” *Swink v. Fingado*, 115 N.M. 275, 283, 850 P.2d 978, 986 (1993), we believe that the legislature’s silence in the Learning Center Act with regard to legislative approval is instructive, particularly when viewed in the context of the Act as a whole.

The Act affirmatively requires approval by HED. See NMSA 1978, § 21-16A-8 (“no person, institution or other entity shall undertake to operate a learning center except with the written approval of the commission and in accordance with the provisions of the Learning Center Act”). In addition, the Act tasks HED with developing “criteria for determining the need for a district and the process and procedures for establishing and operating a learning center.” NMSA 1978, § 21-16A-4(E). HED established the required criteria by regulation in 5.2.2 NMAC. The regulations provide a detailed process for approval by HED, including the submission to and acceptance by HED of a preliminary plan for the learning center, followed by the development and approval by HED of a detailed plan. 5.2.2.8(H) NMAC. The Act’s enumerated requirement of HED approval coupled with its silence with regard to legislative approval indicates that the legislature did not intend learning centers to be approved by the legislature. Therefore, we conclude that the Act does not require legislative approval.

Your request also asks if legislative approval is required under NMSA 1978, Section 21-1-26.9. That provision provides, in pertinent part:

[N]o new public post-secondary educational institution, branch campus or off-campus instructional center shall be created except as specifically created by the legislature. The higher education department shall review any proposal for the establishment of a new public post-secondary educational institution or campus and submit its recommendations to the legislature.

This provision effectively requires three types of entities to get legislative approval: (1) public post-secondary educational institutions, (2) branch campuses and (3) off campus instructional centers. We must determine whether the Center falls under any of these categories.

First, the Learning Center Act provides that a learning center “shall not be deemed to be an institution ...” NMSA 1978, § 21-16A-4(D). The Act defines an “institution” as “a regionally accredited public or private post-secondary educational institution.” NMSA 1978, § 21-16A-3(F). Therefore, the Center is not a “new public post-secondary educational institution” for purposes of NMSA 1978, § 21-1-26.9.

Second, the Center is not a branch campus at this time because it currently operates from the SFCC. However, your request states that SFCC plans to relocate the center to the grounds of the former College of Santa Fe. Therefore, we must examine whether the learning center can be considered a branch campus. The creation and operation of branch community colleges are governed by NMSA 1978, ch. 21, art. 14 (as amended through 2009). They are established by local school boards by written agreement with a

parent institution and approved by HED. See NMSA 1978, § 21-14-2. This situation is distinguishable from the situation of the SFCC Center. As discussed above, the Center was created by the SFCC Board within the SFCC District pursuant to the Learning Center Act and not through an agreement between a parent institution and a local school board. Therefore, it is not a branch community college and cannot reasonably be considered a “branch campus” for purposes of Section 21-1-26.9.

Third, the SFCC Learning Center is not an off-campus instructional center because it currently operates from the SFCC. However, we must examine whether the move to the old College of Santa Fe would make it one. Off-campus instructional centers are created pursuant to the Off-Campus Instruction Act, NMSA 1978, Sections 21-14A-1 to -10 (as amended through 2007). Like branch community colleges, the formation of an off-campus instructional center is initiated by one or more local school boards. See NMSA 1978, 21-14A-3. An off-campus instructional center operates under an agreement with a parent institution that is a constitutionally-created state educational institution or a state educational institution established under NMSA 1978, Chapter 21. See NMSA 1978, 21-14A-3(C)(2). Again, the Center was established by the SFCC Board under the Learning Center Act. It was not established under the Off-Campus Instruction Act by a local school board under an agreement with a parent institution. Therefore, just as the Center is not a branch campus, it cannot reasonably be considered an off-campus instructional center for purposes of Section 21-1-26.9.

Finally, although the second sentence of NMSA 1978, Section 21-1-26.9 refers to a “new campus,” we believe that the legislature intended to refer to the “branch campus” or “off-campus instructional center” described in the first sentence. We have already concluded that the Center is neither a “branch campus” nor an “off-campus instructional center” for purposes of Section 21-1-26.9. In any event, even assuming a more expansive interpretation of the term, the Center is not a “new campus” of the SFCC. A community college’s campus is defined in HED regulations to be its taxing district. See, e.g., 5.3.12.9 NMAC (the “campus” of a two-year institution is its taxing district). Accordingly, as long as the Center is located within SFCC’s taxing district, it will be considered part of SFCC’s existing campus and not a new campus of SFCC.

2. Need for Prior Review by and Approval of SBOF

The Center appears to have been properly created by the SFCC Board with the approval of HED pursuant to the Learning Center Act. As discussed above, the Act does not require the prior approval of the legislature for the establishment of a learning center. Similarly, by its terms, the Act does not require the prior approval of the SBOF.

We did not find any other law outside the Act requiring SBOF approval under the circumstances presented to us. Under NMSA 1978, Section 21-1-21:

No expenditure shall be made by any state educational institution confirmed by Article 12, Section 11 of the state constitution for the purchase of real property or the construction of buildings or other major structures or for major remodeling

projects without prior approval of the proposed purchase or construction or remodeling by the board of educational finance and the state board of finance.

This provision is inapplicable to both SFCC and the Center. Neither SFCC nor the HEC is established in the New Mexico Constitution, but rather by statute. Therefore, SFCC does not need SBOF approval to purchase real property or construct buildings for use of the Center.[1]

If we may be of further assistance, please let us know. Your request to us was for a formal investigation and opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal analysis in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document. Therefore, we may provide copies of this letter to the public.

Sincerely,

STEPHEN A. VIGIL
Assistant Attorney General

[1] We note that the College District Tax Act requires HED and the SBOF to approve the sale of revenue bonds by board of a college district "for the purpose of constructing, purchasing, improving, remodeling, furnishing or equipping any necessary buildings, structures or facilities of the college district." NMSA 1978, § 21-2A-9(A), (B). That provision does not apply under the facts presented to us because the SFCC Board issued general obligation bonds to finance construction of the facility for the Center. In contrast to revenue bonds, general obligation bonds issued by a college district board for constructing buildings require the approval of HED and voters in the district, but do not require SBOF approval. See NMSA 1978, § 21-2A-6.