November 05, 2007 Higher Education Department's Authority to Approve Degree Programs at State Universities

Paula Tackett, Director
Legislative Council Service
411 State Capitol
Santa Fe, NM 87501

Re: Opinion Request--Higher Education Department's Authority to Approve Degree Programs at State Universities

Dear Ms. Tackett:

You have requested an opinion of the Attorney General about the New Mexico higher education department's statutory authority to approve degree programs at state universities. Specifically, you ask whether constitutionally created universities may develop and offer new baccalaureate degree programs without the approval of the higher education department or the secretary of higher education. In this regard, you also ask whether NMSA 1978, Section 21-1-24 (1971) and NMSA 1978, Section 21-1-26(B) (2005) conflict and, if so, which statute prevails. As more fully explained in this opinion letter, and based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that both statutes remain operative, with each operating within their legislatively defined spheres. Thus, consultation and review by the higher education department would be required for all new baccalaureate, graduate or professional degree programs instituted after July 1, 2005 in order for the universities to be able to offer those programs. In addition to consultation and review, as to new graduate programs, approval by the higher education department, as well as by the state board of finance, would be necessary in order for state funding to the universities, through the general appropriations act, to be available.

Section 21-1-24 provides:

> None of the funds appropriated in the general appropriations act to the state educational institutions confirmed by Article 12, Section 11 of the state constitution may be used for the support of any program or programs of graduate study beyond the level of the bachelor's degree other than programs that were maintained by each institution previous to September 1, 1954, except by explicit approval of each such program by the board of educational finance and the state board of finance prior to such use of the funds.

The effect of Section 21-1-24 is to "condition" the use of funds appropriated by the general appropriations act to the universities to support graduate study programs beyond a bachelor's degree. Unless those graduate programs were maintained prior to September 1, 1954, approval of the board of educational finance and of the state board

of finance are necessary before general appropriations act money may be used by the universities for the support of post-1954 programs.

The “board of educational finance,” the entity mentioned in Section 21-1-24, is generally regarded as having been succeeded by the commission on higher education,[1] which has now been succeeded by the higher education department. See NMSA 1978, § 9-25-4.1(C)(2005) (“[A]ll references in law to the commission on higher education shall be deemed to be references to the higher education department and all references in law to the executive director of the commission on higher education shall be deemed to be references to the secretary of higher education”).

Section 21-1-26(B) provides:

> Effective July 1, 2005, all new state-funded baccalaureate, graduate and professional degree programs shall be offered by public four-year educational institutions and all new associate degree programs shall be offered by public post-secondary educational institutions after a timely and thorough consultation with and review by the department.

Section 21-1-26(B) applies to “new” baccalaureate, graduate and professional degree programs that are offered by universities after July 1, 2005. The offering by the universities of those programs is conditioned upon a “timely and thorough consultation with and review by the [higher education] department.” Section 21-1-26(B) does not impose any requirement that those “new” programs be “approved” by the higher education department as a condition to their being offered, but only that the universities and the department “consult” about those programs and that the department “review” those programs. The plain meaning of “consult” is “to seek advice or information from.” Webster’s New World Dictionary, 131 (3d ed. 1990). The meaning of “review” is “a critical evaluation” of an item. Id. at 505. The meaning of “approve” is “to give one’s consent.” Id. at 29.

It is a familiar rule of statutory construction that “two statutes covering the same subject matter should be harmonized and construed together when possible, in a way that facilitates their operation and the achievement of their goals.” N.M. Pub. Serv. Co. v. Pub. Util. Comm’n, 1999-NMSC-040, ¶ 23, 128 N.M. 309, 992 P.2d 860 (internal quotations, emphasis, and citations omitted). “All of the provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent.” Quintana v. N.M. Dep’t of Corr., 100 N.M. 224, 225, 668 P.2d 1101, 1102 (1983). Reading together Sections 21-1-24 and 21-1-26(B), it is apparent that the reach of those two statutes is not identical. Section 21-1-24 does not apply to baccalaureate programs. Rather, Section 21-1-24 applies to graduate programs beyond that level, except for those maintained prior to September 1, 1954. Section 21-1-26(B) also applies to graduate programs if the graduate programs are “new,” meaning instituted after July 1, 2005.[2] As to those “new” graduate programs, “approval” of the higher education department is required under Section 21-1-24 for programs funded by the general appropriations act and “consultation and review” by the higher education department is

required under Section 21-1-26 (B). Since Section 21-1-24 does not apply to baccalaureate programs, those programs instituted after July 1, 2005 require only "consultation and review" by the higher education department.

Because they can be harmonized, we conclude that both Section 21-1-24(B) and Section 21-1-26 remain operative within their respective legislatively defined spheres. Thus, "consultation and review" by the higher education department would be required for all "new" baccalaureate, graduate or professional degree programs instituted after July 1, 2005 in order for the universities to be able to offer those programs. In addition to "consultation and review," as to "new" graduate programs, "approval" by the higher education department, as well as by the state board of finance, would be necessary in order for state funding to the universities, through the general appropriations act, to be available. The legislature lacks the authority to "appropriate" the universities' use or expenditure of federal funds, or scholarships, gifts, donations private endowments or other gratuities given to the universities. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 370, 524 P.2d 975, 986 (1974). Therefore, Section 21-1-24 does not and could not apply to the expenditure of funds that the legislature lacks the authority to appropriate in the general appropriations acts.

In addition, the higher education department, in exercising its approval authority under Section 21-1-24 must bear in mind that the universities, whose governance by boards of regents and authority are provided for in N.M. Const., Art. XII, § 13, possess "a very real, though somewhat ill-defined, independence from outside control." Regents of the University of New Mexico v. New Mexico Federation of Teachers, 1998-NMSC-020, ¶ 50, 125 N.M. 401, 962 P.2d 1236 (upholding the applicability of the Public Employee Bargaining Act to the University of New Mexico against the contention that the Act undermined the University's autonomy). The constitutional autonomy and authority of the boards of regents of the universities extends to the regents' authority to determine educational policy. Id. at ¶ 50. The court, in Regents of the University of New Mexico, observed that any potential intrusions into the University's educational or academic policies could be addressed by the Public Employee Labor Relations Board as they arise. Id. ¶ 60. In a like vein, the higher education department must carefully weigh and consider, when exercising its approval authority, the constitutional authority and autonomy of the universities with respect to their judgments about those graduate educational programs that they believe serve the educational policies of their institutions and are in the best interest of the students they serve.

Your request to us was for a formal Attorney General 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 advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ANDREA R. BUZZARD
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] Many current statutes retain the entity name of "board of educational finance," although the complier of the New Mexico statutes inserts in brackets "commission on higher education" to indicate the latter commission as the successor entity. See e.g., the "Student Loan Act," NMSA 1978, §§ 21-21-2 (C) (1973); 21-21-3 (B) (1972); 21-21-4 (1970); the "Student Choice Act," NMSA 1978, § 21-21C-3 (A) (1983); the "Senior Citizens Reduced Tuition Act, NMSA 1978, § 21-21D-3 (A) (1984); the "Fire Fighter and Peace Officer Survivors Scholarship Act, NMSA 1978, § 21-21F-3 (1986); the "Osteopathic Intern Act," NMSA 1978, § 21-26-3 (1983); the "Two-Year College Maintenance Act," NMSA 1978, § 21-27-2 (1983).

[2] Neither Section 21-1-24 nor Section 21-1-26(B) applies to graduate programs that existed before September 1, 1954. Those programs are excluded from the operation of Section 21-1-24 by the express language of that section, and those programs are not "new," for purposes of Section 21-1-26(B), because they did not come into being after July 1, 2005.