

October 17, 2007 Governmental Conduct Act and Community and Branch Community Colleges

The Honorable Clinton D. Harden
New Mexico State Senator
1348 CRH
Clovis, NM 88101

Re: Opinion Request - Governmental Conduct Act and Community and Branch Community Colleges

Dear Senator Harden:

You have requested our opinion whether community colleges and branch community colleges are considered "state agencies" for purposes of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2007), specifically, for purposes of Section 10-16-9, pertaining to contracts of a "state agency" involving state legislators. 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 community colleges are not "state agencies" within the meaning of Section 10-16-9. Branch community colleges are "state agencies" within the meaning of Section 10-16-9.

The Governmental Conduct Act was amended in 2007 to add a definition of "state agency" at Section 10-16-2 (I): "[S]tate agency' means any branch, agency, instrumentality or institution of the state." 2007 N.M. Laws, Ch. 362, § 1. The Governmental Conduct Act prohibits, absent compliance with certain conditions, state agencies from contracting with state legislators at Section 10-16-9 (A) (2007). Section 10-16-9 (A) provides:

A state agency shall not enter into a contract for services, construction or items of personal property with a legislator, the legislator's family or with a business in which the legislator or the legislator's family has a substantial interest unless the legislator has disclosed the legislator's substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code, except the potential contractor shall not be eligible for a sole source or small purchase contract. A person negotiating or executing a contract on behalf of a state agency shall exercise due diligence to ensure compliance with the provisions of this subsection.

Community colleges are provided for in the Community College Act, NMSA 1978, §§ 21-13-1 to -26 (1963, as amended through 2007). Community colleges provide two-year public post-secondary educational programs or two years of a vocational or technical curriculum for persons who may or may not have completed the twelfth grade. See NMSA 1978, § 21-13-2 (A) (1998). Community colleges are governed by an elected board, whose duty it is to determine the financial and educational policies of the

community college and to provide for the management of the community college and the execution of its policies. Section 21-13-8 (B) (1999). The boards employ a president, instructional staff and other personnel. See NMSA 1978, § 21-13-10 (A) (2007). The board has the power to fix tuition and fees, to accept federal aid and to purchase, hold, sell and rent property and equipment. See NMSA 1978, § 21-13-10 (B).

Community colleges are not regarded as "arms of the state" for purposes of Eleventh Amendment immunity, primarily because they have political and financial autonomy and the ability to tax and to issue bonds. See Leach v. New Mexico Junior College, 2002-NMCA-039, 14-18, 132 N.M. 106, 45 P.3d 46, cert. denied, 132 N.M. 83, 44 P.3d 529 (holding that Eleventh Amendment immunity was not available to the New Mexico Junior College in a civil rights action, because the college is not an "arm of the state;" its "operations more closely resemble the operations of a political subdivision than a true 'arm of the state'").[1] The significance of not being an arm of the state is that the entity is more like a local public body than a state agency. State universities, however, are "arms" of the State. See N.M. Att'y Gen. Op. 70-27 (1970) (state university institutions are instrumentalities of the state whose action necessarily is action by the state itself).[2]

In contrast to community colleges, branch community colleges do not have autonomy. Branch community colleges are provided for in NMSA 1978, Sections 21-14-1 to -16 (1957, as amended through 2007). A branch community college's educational program includes either the first two years of college education or vocational and technical curricula of not more than two years' duration, or both. See NMSA 1978, § 21-14-1 (A) (2007). Branch community colleges have a branch community college board that may be either a local board or combined local boards of education or an elected board. See NMSA 1978, § 21-14-2 (A) (2005); § 21-14-2.1 (1985).[3]

The branch community college boards "act in an advisory capacity to the board of regents of the parent institution in all matters relating to the conduct of the branch community college." See NMSA 1978, § 21-14-2 (B)(2). The "parent" institution is a state university and, hence, a state educational institution. Such boards of the branches must enter into an agreement with the board of regents of the parent university, under which the board of regents has "full authority and responsibility in relation to all academic matters." See NMSA 1978, § 21-14-2 (D)(1). The board of regents of the parent university sets the tuition and fees for the branch and grants scholarships to branch students. See NMSA 1978, § 21-14-5 (1999). The branch board's agreement with the parent board of regents must provide a "detailed agreement of financing and financial control of the branch community college." See NMSA 1978, § 21-14-2 (D)(6). The branch board must approve a budget for the branch community college "for recommendation to the board of regents of the parent institution." See NMSA 1978, § 21-14-2 (B)(3). The branch board and the board of regents of the parent university jointly conduct a search for qualified candidates for director, although the board of regents selects the director for the branch. See NMSA 1978, § 21-14-2 (C). The agreement of the branch board and the board of regents of the parent university must

provide that the university will honor all credits earned by students at the branch "as though they were earned on the parent campus." See NMSA 1978, § 21-14-2 (D)(2).

The legislature's new definition of "state agency" made by Chapter 362, amending Section 10-16-2 of the Governmental Conduct Act, includes "institutions of the state," a term which encompasses "state educational institutions." See N.M. Att'y Gen. Op. 85-17 (1985) (state institutions of higher education are "state agencies" for purposes of the Conflict of Interest Act, now the Governmental Conduct Act); N.M. Att'y Gen. Op. 91-05 (1990) (state university is within the term "state" as used in NMSA 1978, §§ 2-1-3 and 2-1-4 (1977), prohibiting legislators from simultaneously engaging in state employment). Branch community colleges are not independent from their parent universities and, therefore, are "state agencies" for purposes of the Governmental Conduct Act.

"Political subdivisions" are not embraced within the term "state agency" as used in Section 10-16-2 and Section 10-16-9. See N.M. Att'y Gen. Op. 69-19 (1969) (provisions of the Conflict of Interest Act that apply to "state agencies" do not apply to "political subdivisions"); N.M. Att'y Gen. Op. 06-01 (2006) (Luna Vocational-Technical Institute [now called Luna Community College] is not the "state," being more akin to a political subdivision, and, therefore, state legislator may simultaneously serve as president of the institute and as legislator consistent with Sections 2-1-3 and 2-1-4).

The legislature, by its 2007 amendments made by Chapter 362 to the Governmental Conduct Act, maintained the distinction between "state agency" and "political subdivision." See Section 10-16-13 ("No state agency or political subdivision shall accept any bid or proposal from a person who directly participated in the preparation in the preparation of specifications, qualifications or evaluation criteria on which the specific competitive bid or proposal was based...." (Emphasis added to reflect amendment)).[4]

We conclude, therefore, that community colleges are not "state agencies" within the meaning of Section 10-16-9. Branch community colleges are "state agencies" within the meaning of Section 10-16-9.

Your request to us was for a formal Attorney General Opinion on the matters discussed above.[5] 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] The Junior College Act was enacted by Chapter 17 of the Session Laws of 1963, codified as NMSA 1953, §§ 73-33-1 to -20, predecessor statutes to the Community College Act. See Daniels v. Watson, 75 N.M. 661, 410 P.2d (1966) and compiler's history notes to the Community College Act.

[2] See, e.g., Korgich v. Regents of the New Mexico School of Mines, 582 F.2d 549 (10th. Cir. 1978) (New Mexico's institutions of higher learning are state agencies and perform a state function for purposes of Eleventh Amendment immunity from suit);

[3] In 2007, the legislature enacted Chapter 27 (SB 984), which provides that a branch community college board might adopt a resolution to establish a board composed of five members elected from single-member districts. In the fiscal impact report for this bill, it is noted the higher education department states that the branch boards serve exclusively in an advisory role and that "[t]he branch campuses derive their authority from the parent institutions' board of regents for all matters of policy and governance." Although Chapter 27 provides for an elected board from single-member districts, Chapter 27 does not alter the statutory relationship of that board to the parent university or the university's retention of control of the branch as set forth in Sections 21-14-2 and 21-14-5.

[4] The amendment also expands the scope of Section 10-16-13 to include proposal submission.

[5] You also requested an opinion on how Article IV, Section 28 of the state constitution applies to legislators and councils of government. We are working on this same issue for another legislator and will send you a courtesy copy when it is completed.