January 25, 2007

The Honorable Peter Wirth
State Representative, District 47
1035 Camino de la Cruz Blanca
Santa Fe, New Mexico 87505

Re: Opinion Request – Legislative Authority to Create a Statewide Charter School for the Arts: Part Two

Dear Representative Wirth:

You have requested our advice regarding the Legislature's authority to create a statewide charter school for the arts. More specifically, you have asked (1) whether the Legislature has the authority to create a new statewide charter school for the arts without amending Article XII, section 11 of the New Mexico Constitution, with admissions requirements similar to those in place for schools in other states that limit enrollment to students with demonstrable talent, promise and aptitude for the arts; and (2) again, without amending Article XII, section 11 of the New Mexico Constitution, whether the Legislature has the authority to make the proposed new statewide charter school a residential school in which the parents of each residential student would pay for the costs of room and board of their student on a sliding scale and the state would reimburse the school for the difference between the revenue received from the students and the actual cost of room and board. Based on our examination of relevant New Mexico constitutional, statutory, and case law authorities, and on the information available to us, we conclude that the Legislature has the authority to create a statewide residential charter school for the arts without amending Article XII, § 11 of the state constitution. We further conclude that the proposed charter school may offer room and board on a sliding scale to those students who have demonstrated financial need, without running afoul of Article IX, § 14 of the state constitution (the "antidonation clause"), provided the school is statutorily authorized to do so.

In response to your first question, we direct your attention to the analysis provided in N.M. Atty. Gen. Op. 06-03 (2006), relating to the Legislature's authority to create a statewide magnet school for the arts without amending Article XII, § 11 of the New Mexico Constitution ("Part One"). We believe the same analysis applies to the Legislature's authority to create a statewide charter school for the arts because charter

schools and magnet schools are essentially the same for the purposes of this analysis. Both charter schools and magnet schools are intended to provide alternative educational opportunities to parents and students in the public school system and, by design, are not intended to be traditional schools within a uniform system. See Sheff v. O'Neill, 733 A. 2d 925, 929 (Conn. 1999). Among the few differences we discern between the two, generally charter schools are specifically authorized by statute and are made up of students within the same school district, while magnet schools by definition are made up of students from different districts. See, e.g., NMSA 1978, §§ 22-8B-1 et seq. (the "1999 Charter Schools Act"), and Sheff v. O'Neill, 733 A. 2d at 929. In New Mexico, however, the Legislature has eliminated this distinction between charter and magnet schools by amending the definition of "charter school" in the 1999 Charter Schools Act, effective July 1, 2007, to delete the qualification that charter schools be located within the same school district. See N.M. Laws 2006, chap. 94, §§ 27 and 32. It also has expressly authorized the creation of "state-chartered charter schools," in addition to "locally chartered charter schools." See id. Thus, for the same reasons the Attorney General concluded that Article XII, § 11 of the state constitution need not be amended in order for the Legislature to create a statewide magnet school for the arts, we conclude that the Legislature also may create a statewide charter school for the arts without amending Article XII, § 11.[1]

In response to your second question, we believe a proposed public residential charter school may offer room and board on a sliding scale under limited circumstances, consistent with N.M. Constitution, Article IX, § 14, the state's antidonation clause.[2] We are guided by the analysis in N.M. Atty. Gen. Op. 97-02 (1997). The Attorney General opined that Albuquerque Technical-Vocational Institute ("T-VI"), a public educational institution, could make certain expenditures if the expenditures were demonstrably related to T-VI's constitutionally or statutorily authorized functions. The Attorney General further opined that T-VI could provide scholarships by varying rates of tuition to its students, including waiving tuition entirely, as long as it was acting reasonably and in T-VI's interest, without violating the antidonation clause. See N.M. Atty. Gen. Op. 97-02 (1997).

---

[1] In N.M. Atty. Gen Op. 06-03, the Attorney General opined that while the Legislature could not alter the status of any institution confirmed by Article XII, § 11 as a "state educational institution" without a constitutional amendment, this constitutional provision did not prohibit the Legislature from establishing a statewide magnet school for the arts. See id. (citation omitted).

[2] The antidonation clause prevents a public entity from directly or indirectly lending or pledging its credit or making any donation to or in aid of any person, association or public or private corporation. It also provides, however, that "[n]othing in this section shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons." N.M. Const., Art. IX, § 14(A).

The Attorney General reached these conclusions after closely examining the antidonation clause and "the evils it was intended to correct." [3] See N.M. Atty. Gen. Op. 97-02 (1997) (quoting City of Clovis v. Southwestern Public Service Co., 49 N.M. 270, 276 (1945)). Based on the underlying intent of the antidonation clause, the Attorney General opined that T-VI could constitutionally spend public money to achieve its educational purposes and perform its statutory functions, even when the expenditures provide an incidental benefit to private individuals or entities, as long as the benefit, based on the amount, duration, frequency or other characteristic, does not amount to an actual grant or subsidy condemned by the clause. See id. T-VI also could charge varying rates of tuition without implicating the antidonation clause because the resulting benefit to students consists of a recognized governmental service, i.e., education.[4] The Opinion stated, "[t]o be permissible, a scholarship must be for the purpose of obtaining public education provided by a government entity, awarded in accordance with a rational and even-handed policy and within the granting agency's constitutional or statutory authority." Id. With respect to other types of benefits, however, the Attorney General concluded that T-VI could not offer stipends, reimbursements for living expenses or cash support if such expenditures were made with public money because T-VI had no *statutory* duty to pay its students' living expenses. See id. (emphasis added).

Applying the same analysis, we believe the governing body of a proposed statewide charter school may offer room and board to its residential students on a sliding scale, provided the Legislature vests the governing body with the statutory authority to charge for room and board and the students to whom discounted room and board is offered have demonstrated financial need. Under these circumstances, we believe it is reasonable to conclude that the antidonation clause would not be implicated because the proposed charter school for the arts, like T-VI, would be a public educational institution providing an established governmental service and the resulting benefit to the proposed school's students, like the benefit to the T-VI students, would be their education.

Our advice is limited to an analysis of the legal questions asked and their constitutional implications. We are not opining on the policy merits or wisdom of establishing a

[3] The New Mexico Supreme Court's reasoning in City of Clovis v. Southwestern Public Service Co., that the need for a constitutional amendment became apparent during the late nineteenth and early twentieth centuries when state and local governments by legislative enactments became stockholders or bondholders in, loaned their credit to, or otherwise became interested in railroads, banks and other commercial enterprises, weighed heavily in the Attorney General's analysis. See N.M. Atty. Gen. Op. 97-02 (1997) (citations omitted).

[4] In New Mexico, as elsewhere, the provision of education is a well recognized and established governmental function. See N.M. Atty. Gen. Op. 97-02 (1997) (citations omitted).

statewide school for the arts. Additionally, as noted above, we are not and cannot be rendering an analysis of any proposed legislation until it is actually introduced. If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's 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.

Very truly yours,

Sally Malavé
Assistant Attorney General

Cc: Gary K. King, Attorney General
Stuart M. Bluestone, Chief Deputy Attorney General