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February 19, 2008

The Honorable Al Park
New Mexico State Representative
1840 Dakota NE
Albuquerque, NM 87110

Re: Opinion Request - Open Enrollment and Distance Education

Dear Representative Park:

You have requested our opinion whether the open enrollment statute, NMSA 1978, Section 22-1-4 (2003), applies to distance education/virtual schools. If the open enrollment statute does apply to all groups of students across the state, you ask whether the Public Education Department's regulations at NMAC 6.30.8.1 to 6.30.8.11 are inconsistent with Section 22-1-4. 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 Section 22-1-4 does not address distance education/virtual schools and, accordingly, do not find any regulatory inconsistency with that statute.

Section 22-1-4, by its language, does not address distance education/virtual schools. The statute makes available a free public school education for school-age persons and provides for withdrawal, transfer and re-enrollment mechanisms. As evidenced by its language, Section 22-1-4 contemplates the physical presence of students in schools. Section 22-1-4 provides, in part:

- E. A local school board shall adopt and promulgate rules governing enrollment and re-enrollment at public schools other than charter schools within the school district. These rules shall include:
- (1) definition of the school district boundary and the boundaries of attendance areas for each public school;
 - (2) for each public school, definition of the boundaries of areas outside the school district boundary or within the school district but outside the public school's attendance area and within a distance of the public school that would not be

served by a school bus route as determined pursuant to Section 22-16-4 NMSA 1978 if enrolled, which areas shall be designated as “walk zones”;

(3) priorities for enrollment of students as follows:

- (a) first, students residing within the school district and within the attendance area of a public school;
- (b) second, students enrolled in a school ranked as a school that needs improvement or a school subject to corrective action;
- (c) third, students who previously attended the public school; and
- (d) fourth, all other applicants;

(4) establishment of maximum allowable class size if smaller than that permitted by law;

(Emphasis added.) The plain language of Section 22-1-4 focuses upon “residence,” “attendance area,” “allowable class size,” and other descriptive terms that suggest that, when passing this legislation, the legislature had in mind the physical presence of children in school buildings. The statute does not address distance education/virtual schools. Accordingly, no issue is raised whether the Public Education Department’s regulations at NMAC 6.30.8.1 through 6.30.8.11, which establish requirements for distance education, contravene Section 22-1-4.

The Department has defined distance learning as the process of providing educational instruction when the teacher and student are not in the same location. 6.30.8.7(D) NMAC (1/16/97). “Distance learning provides an opportunity for public schools within the state to expand their course offerings ... [but] shall not be used as a substitute for all direct, face-to-face student and teacher interactions....” 6.30.8.8(A) NMAC (1/16/07). Those regulations, which are entitled to deference,¹ support the view that Section 22-1-4 has no application to the special policy considerations attendant distance education/virtual schools. State equalization guarantee funding is an example of such special policy consideration. Addressing this consideration, 6.30.8.9(B) NMAC (1/16/07) provides:

Students must have a primary enrolling district. Should a student enroll in a distance learning course offered by a district or charter school other than the student’s enrolling district, the student can only be counted once as a qualified student for state equalization guarantee funding purposes as defined in Section

¹ See Morningstar Water User’s Assn v. N.M. Public Utility Comm’n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) (court confers on administrative agency heightened degree of deference to legal questions that “implicate special agency expertise or the determination of fundamental policies within the scope of the agency’s statutory determination”) (quoting Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co., 746 P.2d 896, 903 (Alaska 1987)).

22-8-2 of the New Mexico Statutes Annotated for determining membership in the student's enrolling district. Any reimbursement for cross-district enrollment for distance learning courses shall be arranged between the districts or charter school through signed written documents.

Additionally, the legislature could have amended Section 22-1-4 to cover distance education/virtual schools when it enacted the Statewide Cyber Academy Act.² The statewide cyber academy provides distance learning courses for grades six through twelve and professional development for teachers, instructional support providers and school administrators. The Act reflects the special treatment the legislature provides for distance education, particularly when addressing funding issues. For example, Section 6 (A) of that Act provides:

A student must be enrolled in a public school or a state-supported school and must have the permission of the student's local distance education learning site to enroll in a distance learning course. A distance learning student shall only be counted in the student's primary enrolling district for the purpose of determining the membership used to calculate a school district's state equalization guarantee. A student shall have only one primary enrolling district.

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

² 2007 N.M. Laws, Ch. 292 and Ch. 293, codified at NMSA 1978, §§ 22-15E-1 to -8 (2007). The Act creates in the public education department the "statewide cyber academy" program. The statewide cyber academy is a collaborative program among the public education department, the higher education department, telecommunications networks and representatives of other state agencies engaged in providing distance education.