

## **Opinion No. 80-03**

February 4, 1980

**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Jill Z. Cooper, Deputy Attorney General

**TO:** The Honorable Vernon Kerr, New Mexico State Representative, Executive-Legislative Building, Santa Fe, New Mexico 87503

### **EDUCATIONAL INSTITUTIONS**

The legislature is not required to make an appropriation to a branch community college as recommended by the Board of Educational Finance.

### **FACTS**

(1) On October 15, 1979, the local board of education for the Los Alamos school district approved the establishment of a branch community college in Los Alamos pursuant to Section 21-14-3 NMSA 1978.

(2) On November 16, 1979, the Board of Educational Finance approved the branch and recommended an appropriation of \$311,650.

(3) On January 22, 1980, the Los Alamos school district voted to levy a tax for the branch pursuant to Section 21-14-6 NMSA 1978.

This levy will not, however, be certified for collection until July 1, 1980.

(4) On January 29, 1980, the Board of Regents of the University of New Mexico entered into an agreement with the Los Alamos school board for the operation of the branch pursuant to Section 21-14-2(E) NMSA 1978.

### **QUESTIONS**

May the legislature decline to fund the branch or fund it at such a level as to inhibit its operation?

### **CONCLUSIONS**

Yes.

### **ANALYSIS**

State appropriations for branch community colleges are authorized by Section 21-14-9 NMSA 1978 which provides:

"The board of educational finance shall recommend an appropriation for each branch community college based upon its financial requirements in relation to its authorized program and its available funds from non-general fund sources; provided, such recommended appropriation shall be an amount not less than three hundred twenty-five dollars (\$325) for each full-time-equivalent student."

### OPINION

As directed by this statute, the Board of Educational Finance has recommended an appropriation of \$311,650.

Section 21-14-9, *supra*, does not, however, require the legislature to fund the branch. None of the actions taken by the Los Alamos board of education, the Board of Educational Finance, the voters in the Los Alamos school district or the Regents of University of New Mexico can bind the legislature to an appropriation.

Plenary law-making authority is vested solely in the legislature by *{\*109}* Article IV, Section 1 of the New Mexico Constitution, and is limited only by the federal and state constitution. **Albuquerque Metropolitan Arroyo Flood Control v. Swinburne**, 74 N.M. 487, 394 P.2d 998 (1964). The legislature may delegate some authority to control the expenditure of the funds appropriated, **State ex rel. Holmes v. State Board of Finance**, 69 N.M. 430, 367 P.2d 925 (1961), but it may not delegate its authority to make appropriations. The Board of Educational Finance recommendation does not control legislative authority to make appropriations.

Nevertheless, legislative authority over appropriations is subject to constitutional limitation, and the failure to make the appropriation would raise two constitutional questions. First, Article IV, Section 16 provides that the general appropriations bill shall contain only appropriations. Although this would include such matters as are "germane to and naturally connected with the expenditure of moneys provided in the bill," **State ex rel. Whittier v. Safford**, 28 N.M. 531, 535, 214 P. 759 (1923), the legislature may not use a general appropriations bill to so reduce the appropriation to an administrative agency as "to put it out of business as effectively as if repealed," **State ex rel. Prater v. State Board of Finance**, 59 N.M. 121, 127, 279 P.2d 1042 (1955). The Court in **Prater** explained that the legislature could, of course, repeal outright an act establishing an agency but then "the matter is out in the open." 59 N.M. at 128.

The **Prater** case dealt with the barber's board, an agency specifically established by a particular act. The Court found that failure to fund the agency was substantive legislation which effectively repealed that act. The Los Alamos branch is not, however, created by a particular act, but is established pursuant to a statutory procedure. Failure to fund the branch may, as a practical matter, put it "out of business," but it does not effectively repeal any applicable law. The statutes governing branch community

colleges, including those which would authorize other financing of a branch, Sections 21-14-5, 21-14-6, 21-14-7, and 21-14-12 NMSA 1978, remain intact whatever the legislature chooses to do pursuant to Section 21-14-9, **supra**.

Thus, the failure of the legislature to fund the Los Alamos branch in the amount recommended by the Board of Educational Finance does not have the effect of substantive legislation and does not violate Article IV, Section 16.

Second, pursuant to Section 21-14-2(E), **supra**, the Los Alamos branch is established under the authority of the University of New Mexico, a state educational institution confirmed by the New Mexico Constitution at Article XII, Section 11. It has been suggested that because of the relationship of the branch to the University, it cannot be put "out of business" by the legislature.

In this regard, the Supreme Court explained in **Torres v. Grant**, 63 N.M. 106, 109, 314 P.2d 712 (1957), that:

"Of course the legislature cannot abolish a constitutional office nor deprive the office of a single prescribed constitutional duty. Nor can this be done by indirection, such as depriving him of all statutory duties, thereby leaving the office in name only, an empty shell . . ."

{\*110} And, in **Thompson v. Legislative Audit Commission**, 79 N.M. 693, 448 P.2d 799 (1968), the Court held that statutes which attempted to indirectly abolish a constitutional office by depriving it of all its duties were in violation of Article V, Section 1, the constitutional provision creating the office.

Obviously, the failure to fund the Los Alamos branch does not put the University of New Mexico "out of business." Nor, does it constitute an invalid intrusion of the legislature into another branch of government. Although the Court has held that the legislature has no authority with respect to non-state funds made available to state educational institutions named in the constitution, **State ex rel. Sego v. Kirkpatrick**, 86 N.M. 359, 524 P.2d 975 (1974), this limitation of legislative authority does not extend to the power to appropriate state funds to those institutions.

## **ATTORNEY GENERAL**

Jeff Bingaman, Attorney General