

August 14, 2012 Advisory Letter--Opinion Request – Tribal Colleges and Private Colleges

The Honorable Ray Begaye
New Mexico House of Representatives
P.O. Box 4080
Shiprock, NM 87420

Re: Opinion Request – Tribal Colleges and Private Colleges

Dear Representative Begaye:

You have requested our advice regarding your contention that tribal colleges are not “private colleges.” According to your letter’s supporting materials, you assert that Diné College (Main Campus: Tsaile, AZ with branch campuses in Shiprock, NM and Crownpoint, NM), Institute of American Indian Arts (Main Campus: Santa Fe, NM) and Navajo Technical College (Main Campus: Crownpoint, NM) are not private colleges. Based on our examination of the relevant constitutional, statutory and case law authorities, and the information available to us at this time, we conclude that a tribal college is not a private college when it is administratively managed and controlled by governmental or tribal entities.

Many New Mexico constitutional and statutory authorities explain what constitutes a New Mexico “public post-secondary educational institution or state college.” See N.M. Const. art. IV, § 31; NMSA 1978, § 6-24-23 (2001); NMSA 1978, § 21-1-1(A) (1997). However, there is no New Mexico constitutional, statutory or case law authority that explains what constitutes a “private college.” The constitution only refers to a private college in the context that: “no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated...shall be used for the support of any...private school, college or university.” N.M. Const. XII, sec. 3. The statutes governing institutions of higher education do not provide any definition.

Since there is no statutory definition for “private college” one may look to the rule of statutory interpretation that language should be read according an ordinary and plain meaning. See Cooper v. Chevron, 2002-NMSC-020, 132 N.M. 382, 388. One dictionary definition of private school is “a school that is established, **conducted**, and primarily supported by a **nongovernmental agency**.” Webster’s 3rd New International Dictionary, 1805 (3rd ed. 1986) (emphasis added). Another dictionary definition is that a private school is a “school established and **controlled privately** and supported by endowment and tuition.” AudioEnglish.net Dictionary, www.AudioEnglish.net (emphasis added).

The above-stated definitions focus on management and control of a school. This focus is analogous to the definition of “private school” found in the primary education statutes. It reads: “a school ... that offers on-site programs of instruction and **that is not under** the control, supervision or management of a local school board.” NMSA 1978, § 22-1-2(K) (2005) (emphasis added); see also 6.81.2.7.Q NMAC. The state Supreme Court

has stated: “We interpret ‘control’ to mean control over the curriculum, disciplinary control, financial control, administrative control and, in general, control over all of the affairs of the school.” Prince v. Board of Ed., 88 N.M. 548, 554, 543 P.2d 1176 (1975).

Therefore, we conclude that a private college is an institution of higher education where a private entity maintains curriculum control, disciplinary control, financial control and administrative control.

The tribal colleges listed in your letter, such as Diné College, Institute of American Indian Arts and Navajo Technical College, are not institutions of higher education where a private entity maintains curriculum control, disciplinary control, financial control and administrative control. Instead, they have two key governmental attributes. First, “[t]he tribally controlled institutions were chartered by one or more tribes and are locally managed, while the federally chartered institutions are governed by national boards.” American Indian Higher Education Consortium (“AIHEC”) website, www.aihec.org/colleges/documents/TCU_intro.pdf. This is significant because “the Navajo Nation and New Mexico’s other tribes and pueblos [are recognized] as governmental entities...” N.M. Att’y Gen. Advisory Letter to Mr. Brian Lee, Dep. Director, New Mexico Office of Indian Affairs (Oct. 31, 1996) (tribal schools do not fall under the definition of “private schools” under anti-donation clause analysis). It is our understanding that some tribal entities are part of the process of selecting a board of regents that govern the management of the colleges.

Second, “[t]he treaty obligations and trust responsibility between the sovereign Indian tribes and nations and the U.S. federal government sets Tribal Colleges apart ... the federal government is committed to providing funding for Indians for a variety of programs, including higher education.” AIHEC website, www.aihec.org/colleges/documents/TCU_intro.pdf.

Tribal Colleges have been described as “[i]n many ways ... similar to mainstream community colleges.” AIHEC website, www.aihec.org/colleges/documents/TCU_intro.pdf. According to its website, “Diné College is a public institution of higher education chartered by the Navajo Nation.” www.dinecollege.edu. According to its website, “IAIA became one of three Congressionally chartered colleges in the United States in 1986.” www.iaia.edu. On its website, Navajo Technical College states: “Legal Status: Public.” www.navajotech.edu.

Based on the above-stated information, we conclude that Diné College, Institute of American Indian Arts and Navajo Technical College are not private colleges.

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.

Sincerely,

ZACHARY SHANDLER
Assistant Attorney General