

March 22, 2004: Charter School Conflicts

Representative Rick Miera

1011 Forrester NW

Albuquerque, NM 87102

Re: Opinion Request re Charter School Conflicts

Dear Representative Miera:

You have requested an Attorney General's opinion concerning the interrelationships between two charter schools and two organizations that provide support and services to those schools. Specifically, you have questioned:

1. Whether Hogares, Inc. and Los Puentes Charter School are, in fact, separate and independent entities.
- 2.
2. Whether Academia de Esperanza Charter School and Desert Hills Center for Youth and Families of New Mexico, Inc., are, in fact, separate and independent entities.
- 3.
3. Whether Los Puentes Charter School, by operating as a charter school which receives public funds, would violate the Anti-Donation Clause contained at Article IX, Section 14 of the New Mexico Constitution, by doing business with Hogares, Inc.
4. Whether Academia de Esperanza Charter School, by operating as a charter school which receives public funds, would violate the Anti-Donation Clause contained at Article IX, Section 14 of the New Mexico Constitution, by doing business with Desert Hills Center for Youth and Families of New Mexico, Inc.

Hogares and Los Puentes

Hogares, Inc., is a New Mexico nonprofit corporation, initially incorporated in 1971, which according to its most recent (1982) amendment to its Articles of Incorporation provides a variety of services to troubled children and their families. Los Puentes Charter School is described in its charter application as providing "individualized academics and extracurricular activities integrated with mental/emotional and behavioral health therapy in a personalized and structured environment," to help "seriously emotionally disturbed students". Los Puentes currently operates in facilities provided by Hogares. Hogares also provides services, including those of a therapist and a case manager, to Los Puentes.

Your first question asks whether these two entities, given these relationships, are “separate and independent”. Los Puentes’ charter school application contains a list of the 12 interim board members. Included in that listing is the CEO of Hogares, Inc. We have also received a current listing of Los Puentes’ governing board. Hogares’ CEO is now the Chairman of the Board, and two additional members of the interim board remain on the now 8 member board. We have also reviewed a list of the current membership of the governing board of Hogares: no members of that board serve on the Los Puentes board.

Based on current board memberships, these two entities appear to be “separate and independent”. Although the CEO of Hogares chairs the Los Puentes board, that crossover does not by itself render the two entities one and the same. In fact, this dual role may be viewed as consistent with the purpose of the 1999 Charter Schools Act, NMSA 1978, §§ 22-8B-1 -15 (1999). As expressed in the Act, its purpose is, in pertinent part:

...to address the needs of all students, including those determined to be at risk;...[and] to encourage parental and community involvement in the public school system.

§ 22-8B-3 (1999). Further, application for charter school status may be made by parents, teachers, or community members. § 22-8B-6(C). And a charter school may negotiate and contract with any third party for the use of a facility, and its operation and maintenance. § 22-8B-4(D). Given the longstanding corporate purpose of Hogares, its interest in and support of a charter school that serves a similar population should not be surprising or unexpected. Of course as a public school, a charter school must comply with applicable laws, rules and charter provisions, some of which are discussed in more detail below. See § 22-8B-5(C) (declaring a charter school to be a public school, accountable to the local school district board for purposes of ensuring such compliance). Assuming such compliance, including provisions regarding contracting for services and avoiding conflicts of interest, Los Puentes’ and Hogares’ status as separate and independent entities can be maintained.

You have also asked whether Los Puentes and Hogares may be engaged in business together without violating the antidonation clause of our state Constitution. That clause prevents a public entity such as a charter school 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. N.M. Const. Art. IX, § 14. A “donation” within the meaning of the clause is “a ‘gift,’ an allocation or appropriation of something of value, without consideration.” *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 28, 303 P.2d 920 (1956). This constitutional bar extends to both for-profit and non-profit corporations or associations. See N.M.A.G. Op. 90-13.

As between Los Puentes and Hogares, we have been advised by counsel for Los Puentes that Hogares provides facilities in which Los Puentes operates. That activity is consistent with the Charter Schools Act. As long as any rent paid by Los Puentes to

Hogares for that space does not substantially exceed the fair market value of the leasehold, then there is no violation of the clause.

Further, we have been advised by counsel for Los Puentes that Hogares, as a provider of services to Los Puentes, including therapy and case management, is paid by Medicaid through the Mental Health in School Program; there is no payment by Los Puentes. Without any expenditure of public funds, there could be no donation by Los Puentes; rather, the donation—to the extent there is one—is by Hogares. Moreover, because services are being provided, there would be no violation under the clause if payment of public funds commensurate with the value of services received were made. This, however, is one example where other state law would come into play: if Los Puentes were to pay for these services, the school would first have to select the service provider through a proper procurement pursuant to the Procurement Code, including its conflict of interest provisions. NMSA 1978, §§ 13-1-21 -199 (as amended through 2003). 1

Desert Hills and La Academia de Esperanza

Desert Hills Center for Youth & Families of New Mexico, Inc. (also doing business as Youth and Family Centered Services of New Mexico, Inc., hereinafter “Desert Hills” or “YFCS”) was incorporated in 1988 as a for profit company providing residential treatment for adolescents. La Academia de Esperanza’s (hereinafter “ADE”) mission statement in its charter school application declares it will “provide quality academic and vocational learning for students from age 11 to 18 in preparation for their role as socially responsible individuals, within a community-based, ethnically and culturally-sensitive educational environment.” ADE currently rents facilities from YFCS. YFCS also provides a whole range of services to ADE, pursuant to an RFP issued by the charter school last year.

Again, your first question as to these two entities and their relationship to each other is whether they are “separate and independent”. Ten representatives of Desert Hills/YFCS were part of the design team which developed ADE’s charter application. The application provides, however, that no more than two design team members can be on the five to seven member interim governing council of the school. Based on a listing provided by ADE’s counsel, the seven member interim council is still in place; two of its members are Desert Hills/YFCS representatives who served on the design team. We have also obtained information from ADE’s counsel showing that the sole board member of Desert Hills/YFCS is not on the interim board. The charter application also establishes that only one representative from Desert Hills/YFCS may be on the permanent governing council, which council must have at least seven members.

Based on these board memberships, these two entities also appear to be “separate and independent”. Again, as is true in the Hogares-Los Puentes scenario, given the stated intent of the intent of the Charter Schools Act, which encourages community involvement, the presence of Desert Hills/YFCS representatives on the design team, to a significantly lesser extent on the interim governing council, and to an even lesser

extent on the eventual permanent governing council, reflects one of the reasons for charter schools: to allow members of a community to develop an alternative means of educating students based on community-recognized needs. Again, as is true for Los Puentes, ADE as a charter school is a public school, and must comply with applicable laws, rules and its own charter provisions. Further, compliance with such provisions, including those regarding procurement of goods and services and avoiding conflicts of interest, allows ADE's and YFCS's status as separate and independent entities to be maintained.

You have also asked whether ADE and YFCS may do business with each other without violating the antidonation clause of our state Constitution. Again, like Hogares and Los Puentes, as long as the rent paid by ADE for space provided by YFCS does not substantially exceed the fair market value of the leasehold and the fees paid by ADE for services provided by YFCS is similarly reflective of the cost of such services in the marketplace, there is no violation of Article IX, [Section 14.2](#)

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.

Sincerely,

Martha A. Daly

Assistant Attorney General

Cc: Stuart Bluestone, Chief Deputy Attorney General

[1] Section [13-1-190](#) of the Code prohibits an "employee" (defined in § [13-1-54](#) to include an uncompensated individual who is performing personal services as an elected or appointed official for a "local public body", which term is defined in § [13-1-67](#) to expressly include school districts) from participating directly or indirectly in a procurement when the employee knows she or he or a family member has a "financial interest" (defined in § [13-1-57](#) to include holding a position as officer or manager) in the business seeking or obtaining a contract. Further, we note Section 10 of Los Puentes' Bylaws governing conflicts of interest, which declares "Business with suppliers to [Los Puentes] will not be influenced or appear to be influenced by a Board member's financial interest."

[2] We note that ADE did issue an RFP for services which process eventually resulted in the services agreement with YFCS. In its charter application, the school recognizes that pertinent legislation such as the Procurement Code and the Public Works Contracts apply to its expenditures. We also note that ADE's charter application limits the number

of “interested persons” serving on the permanent governing council to 49%. “Interested person” is defined there as any person receiving compensation from the council or the school for services currently rendered or those within the last 12 months, and any family member of such person. Further, ADE has also agreed to the APS conflict of interest policy, which contains the same language as that contained in Los Puentes’ Bylaws set out in footnote 1. Again, we call attention to § [13-1-190](#), discussed in footnote 1.