# Opinion 06-03

December 22, 2006

**OPINION OF: PATRICIA A. MADRID** Attorney General

**BY:** Sally Malavé, Assistant Attorney General

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

## QUESTIONS PRESENTED:

(1) Whether the Legislature has the authority to create a statewide magnet school for the arts without amending Article XII, § 11 of the New Mexico Constitution;

(2) If so, whether the magnet school may adopt admissions requirements that limit enrollment to artistically talented students;

(3) Whether a new statewide magnet school may associate with an existing community college or four-year university or be created as a division of either one of these institutions under the current status of the law; and

(4) Whether such a school may operate independently but administratively attached to the Higher Education Department or one of the state educational institutions confirmed by Article XII, § 11 in a manner similar to regional education cooperatives, attached to the Public Education Department under NMSA 1978, § 22-2B-3A.

## CONCLUSIONS:

1. The Legislature has the authority to create a statewide magnet school for the arts without amending Article XII, § 11 of the state constitution.

2-4. See analysis below.

## ANALYSIS:

Article XII, Section 11 of the New Mexico Constitution, confirming certain institutions as state educational institutions, need not be amended before the Legislature enacts legislation establishing a statewide magnet school for the arts. While your initial question to us was limited to the Legislature's authority to create a statewide magnet school for the arts as a state educational institution without amending Article XII, § 11, we believe Article XII, § 1 also is implicated because it mandates the establishment of a "uniform" school system and therefore begs the question whether this constitutional provision precludes the Legislature from creating a singular statewide magnet school for the arts.1 After reviewing that provision as well, we conclude that Article XII, Section 1,

charging the Legislature with establishing and maintaining a uniform system of free public schools sufficient for the education of all school-age children in the state, does not preclude the Legislature from creating a statewide magnet school for the arts.

As a preliminary matter, several principles of statutory construction, applicable also to the interpretation of constitutional provisions, guide our analysis. See Postal Finance Co. v. Sisneros, 84 N.M. 724, 724 (1973). First, in construing a constitutional provision, as in construing a statute, our goal is to give primary effect to the drafter's intent, which intent is evidenced primarily through the provision's language. See Souter v. Ancae Heating and Air Conditioning, 2002-NMCA-078, 132 N.M. 608, 611. We interpret a constitutional provision's language to accord with common sense and reason. See Morning Star Water Users Ass'n, Inc. v. Farmington Mun. Sch. Dist., 120 N.M. 307, 319 (1995). We read provisions concerning the same subject matter together as harmoniously as possible in a way that facilitates their operation and achievement of their goals. See Jicarilla Apache Nation v. Rodarte, 2004-NMSC-035, 136 N.M. 630, 634-5.

Article XII, Section 11.

Applying the above principles to Article XII, Section 11 of the New Mexico Constitution, we find its language clear. It provides in pertinent part that the University of New Mexico, New Mexico State University, New Mexico Highlands University, Western New Mexico University, Eastern New Mexico University, New Mexico Institute of Mining and Technology, New Mexico Military Institute, New Mexico School for Blind and Visually Impaired, New Mexico School for the Deaf, and the New Mexico State School at El Rito "are hereby confirmed as state educational institutions." See N.M. Const., art. XII, § 11, as amended. Simply put, the state is made owner of the educational institutions identified in Article XII, Section 11, those institutions having been previously granted by Congress to the State through the Enabling Act for New Mexico, Act of June 20, 1910, 36 Statutes at Large, chap. 310, § 8. See State v. Regents of University of New Mexico, 32 N.M. 428, 430 (1927). While the Legislature may not alter the status of any of these state educational institutions without amending the state constitution, this provision otherwise does not prohibit the Legislature from establishing additional schools as state educational institutions. See Pollack v. Montoya, 55 N.M. 390, 393 (1951) (enumeration in the Constitution of certain executive officers did not necessarily deprive the Legislature of the power to create other executive officers, although it cannot abolish those created by the Constitution). Thus, we believe that the Legislature may create a publicly funded statewide magnet school for the arts without first amending Article XII, § 11.

Article XII, Section 1.

Next, we turn our attention to Article XII, Section 1 of the New Mexico Constitution to examine whether this constitutional provision precludes the Legislature from creating a singular statewide magnet school for the arts. Article XII, § 1 mandates the establishment and maintenance of a uniform system of free public schools sufficient for

the education of all school-age children in the State. It may be argued that this provision prohibits the establishment of a statewide magnet school because magnet schools by definition focus on specific subjects, operate according to certain models, are made up of students from different districts, and are not intended to be traditional schools within a uniform system. See, e.g., Sheff v. O'Neill, 733 A.2d 925, 929 (Conn. 1999).

New Mexico courts have not addressed this question specifically, but a review of the New Mexico Supreme Court's analysis of Article XII, § 1 in Norton v. Board of Education of School District No. 16, Hobbs Municipal Schools, 89 N.M. 470 (1976), as well as case law from other jurisdictions, lends support to the conclusion that Article XII, § 1 does not prevent the Legislature from creating a statewide magnet school for the arts. While not directly on point, the Norton Court's discussion is instructive because the Court in essence concludes that Article XII, § 1's language should be interpreted liberally and not literally.

In Norton, the New Mexico Supreme Court was called upon to determine whether the term 'free' in Article XII, § 1 allowed the Hobbs Municipal School District to charge fees for certain student courses and activities. A group of parents had brought a class action in State District Court challenging the school district's practice. The State District Court denied the parents' request that all fees collected by the school district be declared unconstitutional. It also denied the parents' request for an injunction to prohibit the collection of such fees in the future and for the return of all fees collected for a certain period after the issuance of N.M. Atty.Gen. Op. No. 72-19, wherein the Attorney General concluded that it was unconstitutional for a public school to charge its students a mandatory fee on courses required for graduation. The District Court granted parents partial relief by barring fees for identification cards, physical education towels, general science handbooks, and driver's education courses.

On appeal, the parents argued that Article XII, § 1 prohibited the school system from charging fees of any kind for courses or activities reasonably related to the educational goals of the Hobbs school district because the constitutional provision mandated the establishment and maintenance of 'free' public schools. See 89 N.M. at 471. The Supreme Court disagreed. It opined:

> the words in our Constitution 'free public schools sufficient for the education . . .,' do not mean all courses offered should be free. Only those courses 'sufficient for the education' should be 'free' in the sense of the constitutional provision.

Id. The Court then held that the school district had to provide "required" courses, as defined by the State Board of Education, free of charge to its students but could provide "elective" courses for a reasonable fee. See id., at 471-2. In other words, once the school district complied with the "sufficient for the education of all school age children" threshold, Article XII, § 1 did not preclude the school district from expanding its offerings and reasonably offsetting its costs. In the same manner, it stands to reason that once the Legislature has complied with its constitutional duty to provide for a uniform system of free public schools sufficient for the education of all children of school age in the

State (the "required" courses in Norton), it may also create a statewide specialized school for the arts (the "elective" courses).

This conclusion is consistent with the Attorney General's analysis of Article XII, § 1 in N.M. Atty. Gen. Op. 99-01 (1999), as it related to a proposed school voucher program under which vouchers would be issued to the parents of children attending private school to help defray the tuition costs of those schools. There, the Attorney General opined that the use of public money to provide parents of private school children with tuition assistance raised serious and substantial questions under various state constitutional provisions. See N.M. Atty. Gen. Op. 99-01 (1999). With respect to Article XII, § 1, however, the Attorney General found that, even though that provision might support a constitutional challenge to a school voucher program if the program diverted state funds from the public schools to the extent that it compromised the state's ability to meet its obligation to establish and maintain a uniform system of free public schools sufficient to educate all school age children, "[o]n its face, Article XII, § 1 does not preclude the state from providing tuition assistance for parents of private school children, as long as it continues to maintain a uniform system of free public schools in the state." Id. The same would seem to hold true here. That is, on its face, Article XII, § 1 does not preclude the Legislature from establishing a statewide publicly funded magnet school, provided it continues to maintain a uniform system of free public schools in the State.

Courts in other jurisdictions likewise have concluded that constitutional provisions, like Article XII, § 1 do not preclude legislatures from creating educational opportunities beyond the traditional uniform systems of free public schools. See, e.g., Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Ed., 285 S.E. 2d 110, 113 (N.C. Ct.App.), appeal dismissed, 291 S.E.2d 150 (N.C. 1981) (constitutional provision mandating uniform system of free public schools does not require that every school within every county or throughout the state be identical in all respects); see also St. Johns County v. Northeast Florida Builders Ass'n, Inc., 583 So.2d 635 (Fla. 1991) (constitutional requirement of "uniform system" of public schools only requires that every student be given equal chance to achieve educational goals, not that each educational program be equivalent); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (constitutional mandate to establish "thorough and uniform system" does not mandate equality in educational services or expenditures).

In Kiddie Korner Day Schools, corporate and individual owners and operators of private daycare centers sued to enjoin the Charlotte-Mecklenburg school board from allowing a school-sponsored committee to operate an extended daycare program at one of its elementary schools. On appeal, the plaintiffs argued, among other things, that the extended daycare program violated North Carolina's constitutional mandate requiring a general and uniform system of free public schools. The North Carolina Court of Appeals rejected plaintiffs' argument, recalling an earlier statement of its Supreme Court:

> The term "uniform" here clearly does not relate to "schools," requiring that each and every school in the same or other district throughout the State shall be of the

> same fixed grade, regardless of the age or the attainments of the pupils, but the term has reference to and qualifies the word "system" and is sufficiently complied with where, by statute or authorized regulation of public-school authorities, provision is made for the establishment of schools of like kind throughout all sections of the state and available to all of the school age population.

285 N.E.2d at 113 (quoting Board of Educ. v. Board of Comm'rs, 93 S.E. 1001, 1002 (N.C. 1917)). The Court found that the school board had provided a general and uniform education for the students in the Charlotte-Mecklenburg system. See id. It also found that there was no requirement that the school board provide identical opportunities to each and every student. See id. For these reasons, the Court of Appeals held that the school board had not violated the constitutional uniform public school system requirement by formulating or allowing the extended daycare program to be operated at one of its schools.

Finally, a recent decision by the Ohio Supreme Court in State ex rel. Ohio Congress of Parents and Teachers v. State Bd. of Educ., et al., 2006 WL 3053072, ____ N.E.2d ____ (Ohio 2006), provides a valuable and insightful analysis of constitutional claims arising from the Ohio constitution's thorough and efficient clause that is helpful in reviewing Article XII, § 1's limits on legislative authority.2 In that case, certain education associations, teachers' unions, parents, taxpayers, and school district boards of education sued the state board of education, state superintendent, various charter schools and community school operators, challenging the constitutionality of laws for the establishment and operation of Ohio's community schools. The district court dismissed their claims against the State and granted judgment on the pleadings in favor of the charter schools and community school operators. See id., at ¶¶ 11-14.

On appeal, the plaintiffs argued that community schools violated the thorough and efficient clause of the state constitution because they were not part of the State's system of common schools, the community schools being publicly funded but privately owned and not subject to uniform statewide standards. See 2006 WL 3053072, ¶ 25. The plaintiffs also argued that because the community schools were publicly funded, they diverted money from local school districts, thus depriving the districts of the ability to provide a thorough and efficient educational school system. See id. The defendant-appellees responded that once the Ohio General Assembly declared them to be "public schools, independent of any school district and . . . part of the state's program of education," the thorough and efficient clause authorized the General Assembly to create community schools as a part of Ohio's system of common schools. Id., at ¶ 26. Furthermore, the defendant-appellees asserted that because the term "common schools" is not defined in the constitution and because there is no constitutional requirement that all public schools must be governmentally owned and operated, the General Assembly should be allowed to determine the requirements of "common schools." Id.

The Ohio Court agreed that the State's thorough and efficient clause authorized the General Assembly to create community schools as a part of Ohio's system of common

schools. The Court began its analysis of the constitutional claims by providing a historical overview of the common school movement in Ohio and its culmination in the adoption of the thorough and efficient clause in 1851. See id., at ¶ 28. Noting that the drafters of the Ohio constitution had committed the responsibility of ascribing meaning to the phrase 'thorough and efficient' to the General Assembly and not to the court, the Ohio Court concluded that the General Assembly, functioning according to its constitutional directive, had the authority and latitude to set the standards and requirements for common schools, including different standards for community schools. See id., at ¶¶ 29. In enacting community school legislation, the General Assembly added to the traditional school system by providing for statewide schools that have more flexibility in their operation. Id. at ¶ 30. The court reasoned that "the Ohio Constitution requires establishment of a system of common schools . . . grounded in the state's interest in ensuring that all children receive an adequate education that complies with the Thorough and Efficient Clause. To achieve the goal of improving and customizing public education programs, the General Assembly has augmented the state's public school system with public community schools." Id., at ¶ 33. The Court then held that the General Assembly was the branch of state government charged by the Ohio constitution with making educational policy choices for the education of our state's children. See id., at ¶ 34. As such, the Ohio General Assembly had not exceeded its powers by providing for community schools within the system of common schools. See id.

Applying a similar analysis here, just as the Ohio Court concluded that its General Assembly had not exceeded its constitutional authority by creating community schools, we believe it is reasonable to conclude that the New Mexico Legislature may create a statewide magnet school for the arts without exceeding the constitutional directives of Article XII, §1 to establish a uniform system of free public schools sufficient for the education of all the state's school-age children. And, in light of the Norton court's liberal reading of Article XII, § 1, we believe New Mexico courts would likely agree that, rather than exceeding its authority under Article XII, § 1 to establish a uniform system of free public schools, the Legislature is acting within the provision's limits and simply expanding the educational opportunities available within that system by establishing a statewide magnet school for the arts.

Article IV, Section 1.

We analyze the remaining questions against the backdrop of the plenary legislative authority Article IV, Section 1 of the New Mexico Constitution vests in the Legislature.3 See N.M. Const., art. IV, § 1. This plenary authority is limited only by the state and federal constitutions. See Ferguson v. New Mexico State Highway Commission, 99 N.M. 194, 195 (Ct. App. 1982). It is within the exclusive province of the Legislature to determine what laws "are necessary" for the "effective exercise" of the powers reserved to it by the state constitution. See State v. Perrault, 34 N.M. 438, 440 (1929). A large discretion is necessarily vested in the Legislature to determine not only what the interests of the public require, but also what measures are necessary for the protection

of such interests. Board of Education of Alamogordo Public Schools District No. 1 v. Bryant, 95 N.M. 620, 624 (Ct. App. 1980).

Within this broad discretion, but necessarily cognizant of the limitations placed on it by the state and federal constitutions, the Legislature may formulate a wide variety of legislation to achieve its goals, including legislation that would allow a statewide magnet school to adopt competitive admissions requirements that limit enrollment to artistically talented students, to associate or be created as a division of an existing community college or four-year university, or to operate independently but administratively attached to the Higher Education Department or one of the state educational institutions confirmed by Article XII, § 11. Generally, magnet schools are designed to attract students from diverse social, economic, ethnic and racial backgrounds. They focus on specific subjects, follow specific themes or operate according to certain models. Magnet schools may also require applicants for admission to take an exam or demonstrate knowledge or skill in the school's specialty to attend the school. See www.edgov/parents/schools/choice/definitions.html.

While the details of any specific proposal cannot be reviewed until legislation is actually introduced, the Legislature should be careful that competitive admissions requirements do not run afoul of federal or state anti-discrimination laws. The Legislature also should be mindful that legislation associating the statewide magnet school with a public four-year university not infringe upon the authority vested by Article XII, § 13 of the state constitution in the university's board of regents to control and manage its affairs. See Regents of the University of New Mexico v. New Mexico Federation of Teachers, 1998-NMSC-020, 125 N.M 401 (1998) (legislation that intrudes upon the authority of a state university's board of regents to determine educational policy will be struck down as unconstitutional).

This opinion 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 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.

[1] Article XII, § 1 states in its entirety: A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.

[2] Ohio's thorough and efficient clause states in pertinent part: the General Assembly shall make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the state . . ." Ohio Const. Art. 6, § 2.

[3] Article IV, § 1 vests the Legislature with the authority to enact laws necessary for the effective exercise of the powers reserved to it, including the authority to enact "general appropriation laws, laws for the preservation of the public peace, health and safety, for the payment of the public debt or interest thereon, or the creation or funding of the

same, . . . and for the maintenance of the public schools or state institutions, and local or special laws." See N.M. Const., art. IV, § 1.