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LEGISLATIVE EDUCATION STUDY COMMITTEE

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November 15, 2011

MEMORANDUM

TO: Legislative Education Study Committee

FR: Kevin Force

RE: STAFF BRIEF: HIGHER EDUCATION LEARNING CENTER, SANTA FE COMMUNITY COLLEGE (SFCC)

According to Santa Fe Community College (SFCC) staff, the college has been engaged in the process of establishing a Higher Learning Center since 2009:

- in 2009, the plan was initially approval by then Secretary of Higher Education , Dr. Viola Flores in 2009 (see Attachment 1, *Sec. Flores Approval of SFCC Higher Education Center*);
- completion of the project, however, has been delayed recently with receipt of a letter from current Secretary of Higher Education, Dr. José Z. Garcia, indicating that SFCC needed approval from both the legislature and the State Board of Finance to proceed with the project (see Attachment 2, *Secretary Garcia Letter 10/26/11*); however,
- in a letter from SFCC, the college disagreed with the Higher Education Department's (HED's) position, and avers that, except for final HED approval of the detailed plans for the Learning Center building, the college has already completed most of the steps necessary to proceed to construction, including:
 - initial approval of the plan by the department; and
 - approval by the voters of general obligation bonds to support the construction of the center.

This staff brief will outline:

- the procedural background and chronology of the project; and
- the potential legal issues implicated by the SFCC learning center proposal.

Procedural Background and Chronology

According to SFCC, in an effort to establish a Higher Education Learning Center, the college followed the process laid out in the *Learning Center Act* (see Attachment 3, *The Learning Center Act*), which requires that:

- a learning center shall not be deemed an “institution”;
- the Commission (HED) develop criteria for determining the process and procedures for establishing and operating a learning center; and
- no one shall undertake the operation of a learning center except with the written approval of the department, and in accordance with the provisions of the *Learning Center Act*.

The criteria required for the establishment and operation of a learning center are found in HED’s administrative rules (see Attachment 4, *Higher Education Department Learning Center Rule*), which provide for a detailed process for department approval, including:

- the submission and acceptance by HED if a preliminary plan for the center; and
- the development of a detailed plan for the center, which must be approved by HED.

SFCC’s attempt to establish the learning center as required by the act and the rules has spanned two executive administrations:

- on December 9, 2009, Dr. Viola Flores, then Secretary of Higher Education, provided the department’s written approval of SFCC’s preliminary plan;
- subsequently, according to the approved plan and the requirements of the *College District Tax Act*¹, the SFCC Board approved an election resolution that included a question regarding the issuance of general obligation bonds, up to \$35.0 million²;
- in August of 2010, HED approved putting the resolution before the voters;
- on August 3, 2010, the voters approved issuance of the bonds for the establishment of the learning center;
- during the 2011 legislative session, the Legislative Education Study Committee (LESC) endorsed legislation, which failed to pass, that would have imposed a six-year moratorium on post-secondary branch campuses, independent community college campuses and learning centers (see Attachment 5, *SB 173, Post-secondary School Building Moratorium*);

¹ Sections 22-2A-1 NMSA 1978 *et seq.*

² Shall Santa Fe Community College District issue up to \$35,000,000 in general obligation bonds, in one series or more, payable from the general (ad valorem) property taxes for the purpose of erecting and furnishing, constructing, purchasing, remodeling, and equipping buildings and utility facilities and making other real property improvements or for purchasing grounds for projects, including, among others, one or more of the following: a higher learning center or downtown campus, the shell space for theatre arts, lighting efficiency retrofit, renewable electricity generation and infrastructure renewal, and information technology upgrades?

- on March 12, 2011, the New Mexico Council of University Presidents, New Mexico Association of Community Colleges, and New Mexico Independent Community Colleges agreed to impose a voluntary two-year moratorium on the establishment of new (meaning not yet approved by HED) learning sites, learning centers, branches, and campuses, which became effective on April 1, 2011. (see Attachment 6, *Voluntary 2-Year Moratorium*) This voluntary moratorium included exemptions:
 - facilities renovation that does not add new, state funded square footage;
 - research or similar facilities that receives no state funds for construction or building renewal and replacement;
 - facilities requiring no state appropriation or formula funding; and
 - projects that received final approval by HED and were funded prior to January 1, 2011;

- on July 26, 2011, Dr. Sheila Ortego, the President of SFCC, submitted a memorandum requesting an exemption from the moratorium;
- on August 8, 2011, Secretary Garcia approved the exemption to the moratorium, based on the third item, “facilities requiring no state appropriation or formula funding,” but noted that he was still engaged in reviewing the proposal for the learning center (see Attachment 7, *Voluntary Moratorium Exemption, 8/8/11*);
- on October 26, 2011, Secretary Garcia sent a letter to Dr. Sheila Ortego, citing “complex legal and policy issues,” but no specific statutes or regulations, that denied final approval for the learning center, pending:
 - approval by the legislature;
 - review by the Capital Projects Committee of HED; and
 - approval by the New Mexico Board of Finance; and

- on October 31, 2011, SFCC responded to Secretary Garcia with a memorandum detailing the history of the learning center, the process that had been completed thus far, and potential responses to the department’s legal and policy objections to the proposed center (see Attachment 8, *SFCC Letter to Sec. Garcia 10/31/11*). In that letter SFCC contends that, according to the *Learning Center Act*, the only remaining step to completion of the statutorily required process is department approval of the detailed plans for the learning center building.

Potential Legal Issues Implicated by the SFCC Learning Center Proposal

According to SFCC, because Secretary Garcia, in his letter dated October 26, 2011, cites no specific statutes or regulations, it is difficult to identify with certainty those legal barriers to completion of the learning center that the department considers to be at issue. However, several of the general provisions relating to state educational institutions that impose requirements and limitations on new institutions may be among those of concern.

First, Section 21-1-26.9 NMAC 1978³ requires legislative approval for some post-secondary institutions. That provision, however, imposes the limitation on institutions, branch campuses and off-campus instructional centers, but does not explicitly include learning centers. On the contrary, the *Learning Center Act*, which does not require legislative approval for completion of the proposed center, specifically states that learning centers are not considered “institutions.” Moreover, according to HED regulations, “learning centers” are not included in the definition of “institutions” but rather are specifically excepted from that definition.⁴

Similarly, as SFCC contends, the learning center does not appear to be a “campus” as mentioned in the statute, because HED regulations define a community college’s campus to be its taxing district.⁵

Second, Section 21-1-21 NMSA 1978⁶, which may be the source of Secretary Garcia’s concern that state finance board approval is required to proceed with the learning center proposal, applies to educational institutions confirmed by Article 12, Section 11 of the state constitution. SFCC notes that neither the college itself nor the learning center is established by the constitution, but rather by statute. Therefore, it would appear that this provision is also inapplicable.

According to SFCC staff, without a more specific explication from HED regarding their perceived barriers to completion of the proposed center, it is difficult to reply any further to the department’s concerns.

³ Effective January 1, 1998, no new public post-secondary educational institution, branch campus or off-campus instructional center shall be created except as specifically created by the legislature. The higher education department shall review any proposal for the establishment of a new public post-secondary educational institution or campus and submit its recommendations to the legislature. In reviewing proposals, the department may consider:

- A. provisions for a local mill levy of at least two mills;
- B. population base to provide at least five hundred full-time students;
- C. whether at least fifty percent of the costs of initial construction comes from private or local sources;
- D. governance structure;
- E. means for acquisition of property, including purchase, lease, donations or any other means;
- F. eligibility and level of funding request of the state; and
- G. brokering of extended learning provisions.

⁴ See 5.2.2.7 NMAC **Definitions**:

(F) Institution: A public post-secondary educational organization whose primary purpose is to provide post-secondary educational services, which is governed by a statutorily or constitutionally created governing board, and which is eligible to receive state support. Institutions can include structures commonly called community colleges, branch community colleges, junior colleges, technical and vocational institutes, area vocational institutes, comprehensive or regional institutions, research institutions, and the statutorily defined instructional centers. *Not included are learning centers, which broker services by [sic] which cannot provide services.* Institutions can both directly provide and broker post-secondary educational services. (Emphasis added.)

(G) Learning center: A public organization whose purpose is to broker post-secondary educational services, but which cannot directly employ instructors to provide programs leading to degrees or certificates, which is governed by a community based governing board, and which is eligible to receive state support. Learning centers contract with program providers or course providers to offer services in the community.

⁵ 5.3.12.9(C)(1)(c) NMAC For two-year institutions: The geographic boundaries of the campus are the geographic boundaries of their taxing district or approved service area.

⁶ No expenditure shall be made by any state educational institution confirmed by Article 12, Section 11 of the state constitution for the purchase of real property or the construction of buildings or other major structures or for major remodeling projects without prior approval of the proposed purchase or construction or remodeling by the board of educational finance and the state board of finance.



MEMORANDUM

Date: December 2, 2009

To: Dr. Sheila Ortego, President
Santa Fe Community College

From: Dr. Viola Florez, Cabinet Secretary *vi Florez*

Re: SFCC's Proposal for the Higher Education Learning Center

Thank you for submitting the Santa Fe Higher Learning Center Detailed Plan and Survey to the New Mexico Higher Education Department (NMHED). After careful review, I am giving my approval for the Higher Learning Center Plan and have some important considerations for SFCC to consider as you begin the implementation process. I believe the considerations suggested will enhance the operation of the Higher Learning Center.

1. Construction of a Learning Center

State Statute (21-16A-2) specifically states that one of the purposes of the learning center is to avoid construction of new campuses and buildings. Since the SFCC proposes construction of a learning center, NMHED asked Legal Counsel to review the HLC plan. Attached you will find some comments by legal counsel that need to be addressed as you implement the Plan (please see Attachment A). The Higher Education Department understands that the intent of SFCC has been to build a downtown campus, funded by local GO Bonds and to interface the Higher Learning Center as part of the planning.

2. General Obligation Bond Process

The proposal responded appropriately to State Statute (5.3.7) regarding building and improvement bonds. NMHED is evaluating the information submitted to determine whether all of the required material has been provided. The request from SFCC will be put on the agenda of the Capital Outlays Committee meeting on December 10 for local General Obligation Bond approval. Please contact Camille Anaya at 505.476.8433 for further information on requirements needed for the committee review.

3. Shared Governance

The SFCC proposal mentions partnerships with four-year institutions and an RFP process to determine which institutions will be offering BA and MA degrees at the learning center. NMHED's expectation is that a formal collaborative and transparent operational approach be used that includes input from and consideration of postsecondary stakeholders.

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4. Course Offerings

The proposal lists degree programs that will initially be offered at the learning center based on a needs assessment survey. NMHED requests that SFCC seek further assurance that local market demands match the program and course offerings, i.e. health related offerings are not included even though this is a high demand field.

Please be assured that I am supportive of this initiative and that the New Mexico Higher Education Department will provide assistance as able to advance the higher learning center project. The opportunity to offer higher education access to students in the Santa Fe and regional communities is an exciting and visionary opportunity to enhance the economic future of the state of New Mexico.



Attachment A

- 1) Section 5.2.2.12 (C) NMAC requires “the number of students expected to enroll during each of the first three years.” The submitted plan and survey states that a projection of student numbers cannot be done at this time. How can this projection be made in a timely manner?
- 2) Section 5.2.2.12 (F) NMAC requires the plan to “identify all efforts made by the organizing group to work with existing institutions.” The submitted plan and survey states the institutions that the SFCC is currently working with today. Has SFCC worked with other institutions in the past that currently exist?
- 3) Section 5.2.2.12 (G) NMAC requests *detailed evidence* for student facilities/programs. The plan and survey describes what the future facility will have, however classes will begin in 2010. Will the facilities being used prior to the new building have all of the required student facilities, etc.? Which facilities will take part in the interlibrary?
- 4) Section 5.2.2.12 (H) NMAC requires evidence that the proposed institution has at least regional accreditation. NMHED knows that the SFCC is accredited, however to meet the evidentiary requirement, can you please attach the appropriate documents?
- 5) Section 5.2.2.12 (I) NMAC - If the learning center is going to begin in 2010, why does the 5 year financial need documents begin in 2012? Also, is there a “proposed budget for the first two years of operation” included in the plan and survey? It is not mentioned on page 5 of the plan and survey and the documents in attachment F do not appear to address this remaining requirement either.

Susana Martinez
New Mexico Governor



Dr. Jose Z. Garcia
Cabinet Secretary

STATE OF NEW MEXICO
NEW MEXICO HIGHER EDUCATION DEPARTMENT

Dr. Sheila Ortego
President, Santa Fe Community College
6401 Richards Avenue
Santa Fe, NM 87505

October 26, 2011

Dear Sheila:

First, I sincerely apologize for this delay in responding to your request for a status update on the proposed Santa Fe Community College's Learning Center. As you know there are complex legal and policy issues related to this project, so our decision has been delayed as we have gone through the process of sorting these out.

As you know, earlier this year we exempted the Learning Center from the self-imposed building moratorium, and we approved a land acquisition for Santa Fe Community College. After a thorough review, we believe that state statutes require Santa Fe Community College to obtain legislative approval on this building project, after receiving approval to move forward from the Higher Education Department. To expedite the approval process through NMHED, we will accommodate your schedule to present the project to us as soon as you feel ready to do so. Should the legislature approve the proposed Learning Center a submission to the Capital Projects Committee at HED would be required, followed by final review by the New Mexico Board of Finance.

Let me take this opportunity to offer my most enthusiastic congratulations for being one of the 2011 honorees as a "Top-Performing CEO" in the Institutional category named by the New Mexico Business Weekly. This honor speaks volumes about your leadership and I look forward to a strong working partnership with you on behalf of the current and future workforce of New Mexico.

Sincerely Yours,

A handwritten signature in black ink, appearing to read "Jose Z. Garcia".

Jose Z. Garcia
Secretary of Higher Education

SOURCE: Santa Fe Community College

The Learning Center Act

21-16A-1. Short title. (2002)

Chapter 21, Article 16A NMSA 1978 may be cited as the "Learning Center Act".

21-16A-2. Findings; purpose. (2000)

- A. The legislature finds that there are significant populations in New Mexico whose post-secondary education and workforce development needs are unserved or underserved and new and more effective means of delivering educational services must be explored.
- B. It is the purpose of the Learning Center Act [21-16A-1 NMSA 1978] to:
- (1) provide quality educational services to residents of the state based upon need and without regard to place of residence by enabling communities to establish learning centers to make necessary and appropriate educational programs available;
 - (2) avoid construction of new campuses and buildings; and
 - (3) encourage the use of technology by promoting innovation, collaboration and cooperation among existing institutions, public schools, government agencies, communities and the private sector through sharing of resources for educational purposes.

21-16A-3. Definitions. (2000)

As used in the Learning Center Act [21-16A-1 NMSA 1978]:

- A. "board" means a learning center district board;
- B. "commission" means the commission on higher education;
- C. "community college board" means the governing body of a community college district;
- D. "district" means a learning center district;
- E. "extended learning services" means academic and vocational educational programs offered by an institution away from a campus of the institution without the facility of a learning center and as defined by commission rule consistent with the Learning Center Act;
- F. "institution" means a regionally accredited public or private post-secondary educational institution;
- G. "local school board" means the governing body of a school district; and
- H. "taxable value of property" means the sum of the following:

The Learning Center Act

- (1) the "net taxable value", as that term is defined in the Property Tax Code [7-35-1 NMSA 1978], of property subject to taxation under the Property Tax Code;
- (2) the "assessed value" of "products" as those terms are defined in the Oil and Gas Ad Valorem Production Tax Act [7-32-1 NMSA 1978];
- (3) the "assessed value" of "equipment" as those terms are defined in the Oil and Gas Production Equipment Ad Valorem Tax Act [7-34-1 NMSA 1978]; and
- (4) the "taxable value" of "copper mineral property" as those terms are defined in the Copper Production Ad Valorem Tax Act [7-39-1 NMSA 1978].

21-16A-4. Establishment of learning center districts; determination of need; approval; advisory committee. (2002)

A. A learning center district may be established in a school district or community college district upon adoption of a resolution by the local school board or community college board calling for establishment of a district and a showing of need for such a district. A district may also be established to include more than one school district and, in that case, the two or more local school boards shall jointly adopt a resolution and determine the need for a learning center. A district may also be established by a board of county commissioners upon adoption of a resolution by the board of county commissioners calling for establishment of a district and a showing of need for such a district; provided that each community college board or local school board located wholly or partially within the county shall approve of the establishment prior to the adoption of the resolution. The boundaries of the district shall be coterminous with the boundaries of the school district, community college district, combined school districts or county constituting the district. No district shall be established without the written approval of the commission.

B. Upon a determination of need and receipt of written approval from the commission, the district shall be established and the local school board, community college board, combined local school boards or board of county commissioners authorizing the district shall serve as the board. The board shall act as a representative of the communities in the district for the purpose of assessing local educational needs and contracting with one or more institutions to offer educational programs or services at one or more learning centers.

C. The board may appoint an advisory committee consisting of business representatives and citizens from the area being served by a learning center to advise and assist the board in determining the most appropriate educational and training programs and services to be offered at the learning center.

D. A learning center shall not be deemed to be an institution, but the students enrolled at the center shall be students of the respective institutions providing educational programs and services.

The Learning Center Act

E. The commission shall develop criteria for determining the need for a district and the process and procedures for establishing and operating a learning center.

21-16A-5. Learning center board; powers and duties. (2000)

A. To carry out the provisions of the Learning Center Act [21-16A-1 NMSA 1978], the board shall:

- (1) manage the operation of one or more learning centers in the district and the contracts with the institutions providing educational programs and services at the learning centers;
- (2) select and contract with one or more institutions to:
 - (a) offer accredited educational programs and services at the learning center that meet local needs or provide degrees and certificates for students completing program requirements at an institution without the requirement that students relocate or commute to existing campuses of the institution;
 - (b) provide for transfer of credits for course work obtained by students from institutions other than the institution contracting to provide an educational program at the learning center; and
 - (c) set tuition and fees for educational programs and services provided by the institution at the learning center;
- (3) monitor and evaluate how well the educational and training needs of the local communities are being served by the learning center and the participating institutions; and
- (4) assess in an ongoing way the educational and training needs of the region to assure delivery and coordination of educational programs and services to the communities located within the district.

B. The board may:

- (1) employ staff and enter into contracts and agreements as necessary to carry out its duties pursuant to the Learning Center Act [21-16A-1 NMSA 1978];
- (2) authorize the imposition of a property tax levy for the purpose of funding the operations of a learning center and provide for an election to submit the proposal to the voters of the district; and
- (3) seek grants, gifts and other sources of funds for the operation of a learning center.

21-16A-6. Learning center tax levy authorized; election. (2000)

A. A board may adopt a resolution authorizing, for learning center operational purposes, the imposition of a property tax upon the taxable value of property in the district. The total tax

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imposition that may be authorized under the Learning Center Act [21-16A-1 NMSA 1978] shall not exceed a rate of five dollars (\$5.00) on each one thousand dollars (\$1,000) of taxable value of property in each district. A tax authorized pursuant to this section may not be imposed for a period of more than six years.

B. The tax authorized in Subsection A of this section shall not be imposed in a district unless the question of authorizing the imposition of the tax is submitted to the voters of the district at a regular school district election or a special election called for that purpose.

C. A resolution adopted pursuant to Subsection A of this section shall specify:

- (1) the rate of the proposed tax;
- (2) the date of the election at which the question of imposition of the tax will be submitted to the voters of the district;
- (3) the period of time the tax is authorized to be imposed; and
- (4) the proposed use of the revenues from the proposed tax.

D. The election required by this section shall be called, conducted and canvassed as provided in the School Election Law [1-22-1 NMSA 1978].

E. If a majority of the voters voting on the question votes for a learning center tax levy pursuant to a resolution adopted under the Learning Center Act, the tax shall be imposed. The tax rate shall be certified by the department of finance and administration and imposed, administered and collected in accordance with the provisions of the Oil and Gas Ad Valorem Production Tax Act [7-32-1 NMSA 1978], the Oil and Gas Production Equipment Ad Valorem Tax Act [7-34-1 NMSA 1978], the Copper Production Ad Valorem Tax Act [7-39-1 NMSA 1978] and the Property Tax Code [7-35-1 NMSA 1978].

F. If a majority of the voters voting on the question votes against a learning center tax levy pursuant to a resolution adopted under the Learning Center Act, the tax shall not be imposed. The board shall not again adopt a resolution authorizing the imposition of a tax levy pursuant to the Learning Center Act for at least two years after the date of the resolution that the voters rejected.

G. The board may discontinue by resolution the imposition of any tax authorized pursuant to the Learning Center Act. The discontinuance resolution shall be mailed to the department of finance and administration no later than June 15 of the year in which a tax rate pursuant to that act is not to be certified.

21-16A-7. Availability of school facilities. (2000)

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Public school facilities in a district shall be available to a learning center, if needed, but in a manner that will not interfere with the regular program of instruction and provided no public school funds shall be expended for the learning center. The learning center may arrange for the use of any other available facilities as needed and appropriate.

21-16A-8. Learning centers subject to approval and provisions of Learning Center Act. (2000)

No person, institution or other entity shall undertake to operate a learning center except with the written approval of the commission and in accordance with the provisions of the Learning Center Act [21-16A-1 NMSA 1978]; provided that nothing in the Learning Center Act shall prohibit the provision of extended learning services or the provision of educational services by any organization or business for its own members or employees directly or by contracting with a provider of educational programs.

ATTACHMENT 4

This rule was filed as 5 NMAC 2.2.

TITLE 5 POST-SECONDARY EDUCATION**CHAPTER 2 ESTABLISHMENT OF POST-SECONDARY EDUCATIONAL INSTITUTIONS****PART 2 REQUIREMENTS FOR ESTABLISHING POST-SECONDARY INSTITUTIONS,
LEARNING CENTERS, OR CAMPUSES**

5.2.2.1 ISSUING AGENCY: Commission on Higher Education, 1068 Cerrillos Road, Santa Fe, New Mexico, 87501, (505)827-7383.
[3/16/51, 7/1/94; Recompiled 10/31/01]

5.2.2.2 SCOPE: All public post-secondary educational institutions, any local public school board(s), or any community group wishing to establish within their community a learning center or institution, or campus of an existing learning center or institution, whose purpose is to offer post-secondary educational services to citizens within the community. Proposals to establish new campuses of existing two-year institutions within the current taxing district of that two-year institution shall not be subject to the requirements of 5 NMAC 2.2 [now 5.2.2 NMAC]. In addition, any employer wishing to offer services only for the benefit of its employees shall not be subject to the requirements of 5 NMAC 2.2 [now 5.2.2 NMAC]. Any local public school board(s) wishing to join an existing contiguous taxing district of an existing institution or branch campus must follow the requirements of 5 NMAC 2.2 [now 5.2.2 NMAC].
[11/30/96; Recompiled 10/31/01]

5.2.2.3 STATUTORY AUTHORITY: Section 21-2-5 of the Post-Secondary Educational Planning Act authorizes the commission on higher education to identify cases where "establishment of new institutions and programs are needed in order to meet the present and projected needs for post-secondary education on a statewide basis in an effective and efficient manner." Requirement that specific new educational sites receive approval from the commission prior to their operation is established through a pattern of statutory requirements, specifically in Sections 21-13-5, 21-14-2, and 21-14A-3 NMSA 1978 (1996 Repl. Pamph.).
[7/1/73, 7/1/85, 6/18/93; Recompiled 10/31/01]

5.2.2.4 DURATION: Permanent.
[11/30/96; Recompiled 10/31/01]

5.2.2.5 EFFECTIVE DATE: November 30, 1996 [unless a later date is cited at the end of a section].
[11/30/96; Recompiled 10/31/01]

5.2.2.6 OBJECTIVE: The objective of Part 2 of Chapter 2 [now 5.2.2 NMAC] is to delineate standards and procedures required to establish publicly supported institutions, learning centers, or campuses of existing institutions or learning centers, whose purpose is to provide or broker post-secondary educational services in New Mexico. These standards and procedures are intended to summarize statutory guidelines for the establishment of higher education institutions as well as to define procedures for the creation of public post-secondary educational learning centers. It is anticipated that these learning centers will provide for rapid response to community needs and will collaborate with existing institutions, public schools, government agencies and the private sector to share resources in ways that promote efficiency and productivity.
[11/30/96; Recompiled 10/31/01]

5.2.2.7 DEFINITIONS:

- A. **Campus:** The grounds of an institution or learning center, whether leased or owned, upon which there is a continuous administrative presence, and which is identifiable by the community as belonging to the institution or learning center. The grounds upon which the primary administrative support for the governing board are found shall constitute the main campus of the institution or learning center. Other locations in which there is a continuous administrative presence shall constitute branch campuses.
- B. **Commission:** The New Mexico commission on higher education.
- C. **Course provider:** A regionally accredited institution that provides a course to an institution or learning center for inclusion in a program leading to a degree or a certificate provided by another institution, or for other educational purposes not associated with a degree or certificate program.
- D. **Delivery model:** The organizational structure for providing access to post-secondary educational services. This can include institutions or learning centers.
- E. **Extended learning:** The full range of available and developing modes for bringing instruction to learners, including live instructor delivery, instructional television, computer conferencing, video conferencing, audio conferencing, etc.
- F. **Institution:** A public post-secondary educational organization whose primary purpose is to provide post-secondary educational services, which is governed by a statutorily or constitutionally created governing board, and which is eligible to receive state support. Institutions can include structures commonly called community colleges, branch community colleges, junior colleges, technical and vocational institutes, area vocational institutes, comprehensive or regional institutions, research institutions, and the statutorily defined instructional centers. Not included are learning centers, which broker services by [sic] which

SOURCE: NMAC

cannot provide services. Institutions can both directly provide and broker post-secondary educational services.

G. Learning center: A public organization whose purpose is to broker post-secondary educational services, but which cannot directly employ instructors to provide programs leading to degrees or certificates, which is governed by a community based governing board, and which is eligible to receive state support. Learning centers contract with program providers or course providers to offer services in the community.

H. Program provider: A regionally accredited institution that provides academic or vocational programs leading to degrees or certificates to an institution or a learning center on a contractual basis.

[11/30/96; Recompiled 10/31/01]

5.2.2.8 GENERAL PRINCIPLES:

A. The commission believes that extended learning programs from existing institutions can offer high quality post-secondary educational services to under served communities in an efficient manner. Therefore, communities should collaborate with existing institutions to meet educational needs through extended learning programs. Communities should consider the establishment of a new institution or learning center only after it has been demonstrated that services offered through extended learning programs are not sufficient.

B. As evidence of local support for a new institution, learning center, or campus of an institution or learning center that would be eligible for state support, it must be demonstrated that the community is willing to impose a local tax levy that is appropriate to the nature of the proposed institution, learning center, or campus.

C. The commission believes that learning centers, which contract with institutions to provide services rather than provide those services directly, will be able to respond to rapidly changing educational needs in a community efficiently and effectively. It is anticipated that a learning center would contract with regionally accredited institutions to provide needed educational programs through the learning center for a limited period of time. At the end of the contract, the community based governing board would reassess the contract to determine whether the services called for in the contract were still needed, and if so, whether those services were being provided in an efficient and effective manner. If demand for the program were no longer sufficient, or if services were not being provided efficiently and effectively, then the contract would not be renewed.

D. The commission believes that learning centers can provide a more efficient option for providing access to higher education when extended learning is not sufficient. Therefore, an applicant for a new institution will have to demonstrate that a learning center is inadequate before a proposal to establish that institution will be considered by the commission.

E. It is important to the commission that any programs offered by institutions or through learning centers maintain high standards of quality.

(1) In order to help ensure the quality of programs offered through a learning center, learning centers will only enter into contracts with regionally accredited institutions. In other words, individual programs offered through a learning center need not be accredited, but the providing institution must be regionally accredited. It is also expected that any new institution will be eligible for regional accreditation either directly or through a possible parent campus's accreditation.

(2) Any existing institution that is unable to maintain regional accreditation shall be subject to special review by the commission.

F. Students enrolled in programs through a learning center shall generally be deemed students of the provider institution of the degree or certificate program in which they are enrolled, and any degrees or certificates shall be awarded by that provider institution and the student's permanent records shall be maintained by that provider institution. Records for students not enrolled in programs leading to degrees or certificates, but enrolled in individual courses, shall generally be maintained by the course provider unless the center has specifically contracted with an accredited institution to provide those record keeping services.

G. The commission believes that significant educational need must be demonstrated before a new institution, learning center, or campus can be endorsed. In addition, it is expected that existing institutions, learning centers, or campuses should continue to be able to demonstrate significant educational need within the community.

(1) The following conditions shall be considered evidence of need for the establishment of a new institution, learning center, or campus:

(a) evidence that efforts to use extended learning programs have been made, and that those efforts have been insufficient;

(b) ability to maintain appropriate enrollment levels;

(c) evidence of collaboration with other institutions, government agencies, and/or private sector organizations;

(d) indication from employers in the community that the programs provided will be useful, and evidence that employment opportunities will be available for graduates if the mission of the institution, center, or campus is to prepare students for the workforce.

(2) Existing institutions, learning centers, or branch campuses of institutions or learning centers that can no longer provide the minimum evidence of need required for establishment will be subject to special review by the commission.

H. It is the expectation of the commission that a preliminary plan for creating an institution, learning center, or campus of an existing institution or learning center, shall demonstrate that there is evidence of community need for post-secondary educational services sufficient to justify further detailed planning and analysis needed for state approval or disapproval of the establishment of institution, learning center, or campus. Therefore, all proposals for the establishment of an institution, learning center, or campus must contain a preliminary plan following the guidelines in 5 NMAC 2.2.9 [now 5.2.2.9 NMAC]. If the commission determines that there is sufficient evidence of need, the commission shall accept the preliminary plan, and a detailed plan and survey will be prepared. The detailed plan and survey shall provide information sufficient for the commission to verify that there

is significant need for establishing a new post-secondary entity that cannot be met by existing post-secondary institutions, that the community is fully ready and equipped to support the institution or learning center, and that there is a high expectation that the proposed institution or learning center will succeed in its mission at a cost acceptable to the state.

[9/21/84, 11/30/96; Recompiled 10/31/01]

5.2.2.9 PRELIMINARY PLAN: A sponsoring institution(s), board(s) of education, or community group shall present to the commission a preliminary plan meeting the specifications described below. The commission shall invite public comment on the preliminary plan prior to reaching its decision regarding the justification for further detailed planning and analysis of need.

A. The preliminary plan shall identify the organizing group, the entities that have been involved in the preparation of the preliminary plan, and the individuals primarily responsible for developing and advancing the request.

B. The preliminary plan shall indicate the post-secondary delivery model that the organizing group wishes to create. If the organizing group wishes to establish an institution by following one of the various statutes for creating a post-secondary institution, then that statute must be clearly identified.

C. The preliminary plan shall describe the rationale for establishing a new institution, learning center, or campus, including the principal arguments why existing institutions cannot meet the educational needs to be addressed by the proposed institution, learning center or campus. It shall describe existing post-secondary educational opportunities offered by both public and private institutions that may be available in the community including but not limited to: degree/certificate programs offered; courses offered leading to a degree or certificate but not a part of a degree or certificate program available in the community, and continuing education courses offered. For any programs or courses that are available, the plan should include a description of which post-secondary institution is offering those courses, the accreditation status of the offering institution, how those programs/courses are being delivered, why those offerings are insufficient, and why additional post-secondary education opportunities are needed in the community.

D. The preliminary plan shall describe the proposed governance structure for an institution or learning center.

E. The preliminary plan shall indicate the nature and level of educational programs to be provided. This should include a description of the rationale for choosing the proposed program(s).

F. The preliminary plan shall describe the population(s) and numbers of students to be served.

G. The preliminary plan shall describe the geographic area from which students are primarily expected to be enrolled.

[9/21/84; Recompiled 10/31/01]

5.2.2.10 LETTER(S) OF SUPPORT: The organizing group must submit, along with the preliminary plan, letters of support from existing community organizations or agencies indicating their willingness to develop agreements to share facilities, equipment, or other resources with the new institution, learning center, or campus. If the proposal is to create a branch campus of an existing institution or learning center, then a letter of endorsement from the governing board of the institution or learning center must be included.

[11/30/96; Recompiled 10/31/01]

5.2.2.11 PETITION: In addition to the preliminary plan and letter(s) of support, local board(s) of education or interested community groups wishing to establish either an independent community college or a technical-vocational institute must also present a petition as required by Sections 21-13-4, 21-13-5, 21-16-3, 21-16-14, and 21-16-15 NMSA 1978.

[9/21/84; Recompiled 10/31/01]

5.2.2.12 DETAILED PLAN AND SURVEY: After reviewing the preliminary plan, if the commission determines that there is sufficient need for post-secondary educational services that cannot be met by existing institutions, that the proposed model promotes efficiency and effectiveness through the sharing of all types of resources among existing institutions, public schools, government agencies, communities, and/or the private sector, that the proposed model allows for rapid response to changing educational needs in the community, and that the community and organizing group are prepared to fully accomplish the goals of the proposed post-secondary entity, then the commission shall act to accept the preliminary plan. If the decision of the commission is to accept the preliminary plan, then the commission shall request a detailed plan and survey. The purpose of the detailed plan and survey shall be to document sound and verifiable evidence of significant need for the proposed post-secondary educational services, and to provide strong evidence that the proposed delivery model will be successful in addressing that need in an efficient and effective manner. The advocates shall meet with commission staff to agree upon a procedure and schedule for development and presentation of the detailed plan for consideration by the commission. It shall be the responsibility of the organizing group to prepare a detailed plan and survey of need consistent with specifications agreed upon between the commission and the organizing group. At a minimum, the detailed plan and survey shall include the components described below.

A. An objective survey of need for and support for establishment of the institution, learning center, or campus should be conducted. The survey shall be sufficient in its scope and methodology to provide reliable information about the extent of community endorsement for the project, and the likelihood of residents to enroll in courses.

B. A written statement of support for the establishment of the institution, learning center, or campus should be provided by the governing board of the sponsoring institution, if applicable, and by each local school board within the area to be served by the proposed institution or learning center. Each local school board within the proposed taxing district should indicate its support or objection to local taxation for support of the institution, learning center, or campus.

C. A statement of the educational mission of the proposed institution, learning center, or campus and a list of educational programs that will initially be available, including for each: a brief description of its purpose and content; the certificate or degree to be awarded; a draft of request for proposals for programs to be offered through learning centers or an objective analysis of available staff and qualifications of key faculty if the institution will provide programs directly; the method(s) for course delivery; and the number of students expected to enroll during each of the first three years.

D. The plan should include an analysis of the local economy which provides evidence that the proposed programs are needed in the community and will contribute to the community's economic growth.

E. A description of the nearest similar program(s), and the distance to those programs should be provided. This analysis should include a description of the nearest similar programs available through extended learning programs by other institutions.

F. The plan must identify all efforts made by the organizing group to work with existing institutions to address the educational need of the community by using extended learning methods.

G. The plan shall include detailed evidence that the physical facilities, equipment, and support services available through collaboration with other institutions, government agencies, or private sector entities or those provided directly by the new institution or learning center are sufficient to provide high quality educational programs. This analysis shall include information about academic support services, including library and electronic information resources and access to experiential education opportunities, and student support services, including academic and career advisement and financial assistance.

H. The plan must provide evidence that a proposed institution or campus of an institution will be of sufficient quality to receive regional accreditation either directly or through a possible parent campus's accreditation.

I. The plan shall include a detailed analysis of the financial need of the proposed institution, learning center, or campus over at least a five year period and how that need will be met. The financial plan operating revenue shall address all potential sources of revenue, including tuition and fees, local support, federal support, and the projected need for state general fund revenue. A proposed budget for the first two years of operation should be included.

J. The plan shall include enrollment projections for the next ten years.

K. The plan shall include a general plan for proposed construction for the next ten years.

L. For proposals that would establish an institution following guidelines found in existing statutes, the proposal must also include any additional requirements specified in the appropriate statute but not detailed here.

[11/30/96; Recompiled 10/31/01]

5.2.2.13 ENDORSEMENT OF THE DETAILED PLAN AND SURVEY: Upon receipt of the detailed plan and survey, the commission shall determine whether there is sound and verifiable empirical evidence of significant need for establishing a new post-secondary entity that cannot be met by existing post-secondary institutions, whether the proposed model demonstrates a commitment to promoting innovation, collaboration, and cooperation among institutions, government agencies, public schools, business, and communities, whether the model will allow for rapid response to changing community needs and allow for the easy elimination of programs that are no longer necessary, whether the proposed model is the most efficient and effective option for the community, whether the community is ready and equipped to support the institution, learning center, or campus, and whether there is a sufficiently high expectation that the proposed institution, learning center, or campus will succeed in its mission at a cost acceptable to the state. If so, the commission will endorse the creation of the new institution, learning center or campus.

[11/30/96; Recompiled 10/31/01]

5.2.2.14 ELECTION: If the commission decides to endorse the establishment of the institution, learning center or campus, the commission shall authorize an election as required by the appropriate statute.

[9/21/84; Recompiled 10/31/01]

HISTORY OF 5.2.2 NMAC:

Pre-NMAC History: The material in this Part was derived from that previously filed with the State Records Center and Archives under:

BEF Rule 510, Branch Community College and Junior College District - Approved by BEF, 2/27/85.

BEF Rule 520, Branch Community College - Guidelines for Establishment, 2/27/85.

BEF Rule 230, Instructional Centers - Off-Campus Creation, 2/26/85.

BEF Rule 530, Junior College District Organization Options, 2/27/85.

BEF Rule 540, Junior College District Froam A Branch Community College - Guidelines for Establishment, 2/27/85.

History of Repealed Material:

BEF Rule 510, Branch Community College and Junior College District - Approved by BEF, Repealed 11/30/96.

BEF Rule 520, Branch Community College - Guidelines for Establishment, Repealed 11/30/96.

BEF Rule 230, Instructional Centers - Off-Campus Creation, Repealed 11/30/96.

BEF Rule 530, Junior College District Organization Options, Repealed 11/30/96.

BEF Rule 540, Junior College District Froam A Branch Community College - Guidelines for Establishment, Repealed 11/30/96.

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SENATE BILL 173

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

Gay G. Kernan

FOR THE LEGISLATIVE EDUCATION STUDY COMMITTEE

AN ACT

RELATING TO HIGHER EDUCATION; PLACING A MORATORIUM ON
EDUCATIONAL SITES OR BUILDINGS AT NEW MEXICO PUBLIC POST-
SECONDARY EDUCATIONAL INSTITUTIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. A new section of Chapter 21 NMSA 1978 is
enacted to read:

"~~[NEW MATERIAL]~~ PUBLIC POST-SECONDARY EDUCATIONAL
INSTITUTIONS--MORATORIUM ON NEW BUILDINGS.--

A. Between January 1, 2011 and January 1, 2017,
there shall be no new educational sites or new buildings
constructed or opened by an institution of higher education
specified in Article 12, Section 11 of the constitution of New
Mexico, including a branch of the institution, unless the site
or construction or its opening received final approval by the

.184123.1

underscoring material = new
[bracketed material] = delete

underscoring material = new
~~[bracketed material] = delete~~

1 higher education department and was funded prior to January 1,
2 2011 or unless the higher education department and the state
3 board of finance certify that a particular building must be
4 replaced because of serious health and safety concerns or built
5 because of significant enrollment growth. In no event shall an
6 institution of higher education build, renovate or occupy any
7 building at a location that did not exist prior to January 1,
8 2011 as an established location at which the institution's
9 students were taught.

10 B. Between January 1, 2011 and January 1, 2017,
11 there shall be no new educational sites or new buildings
12 constructed or opened by an independent community college or
13 technical-vocational institute for which the community college
14 or technical-vocational institute expects to receive any state
15 funding through the funding formula for operations, including
16 building and equipment replacement funding, or for capital
17 outlay funded by the legislature during or after the moratorium
18 unless the site was established or building was begun prior to
19 January 1, 2011 or unless the higher education department and
20 the state board of finance certify that a particular building
21 must be replaced because of serious health and safety concerns
22 or built because of significant enrollment growth."

March 12, 2011

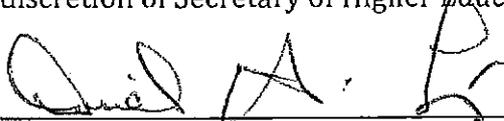
The New Mexico Council of University Presidents, New Mexico Association of Community Colleges, and New Mexico Independent Community College agree to impose a voluntary two-year moratorium on the establishment of new (meaning not yet approved by the New Mexico Higher Education Department) learning sites, learning centers, branches, or campuses. For the duration and aforementioned purpose of this moratorium, state-supported public higher education institutions agree there will be no construction of new facilities.

This voluntary moratorium shall become effective April, 1, 2011.

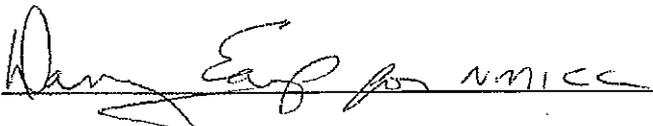
Exemptions include a:

- Facility renovation that does not add new, state funded square footage,
- Research or similar facility that receives no state funds for construction or building renewal and replacement, or
- Facility requiring no state appropriation or formula funding,
- Project that received final approval by the Higher Education Department and was funded prior to January 1, 2011.

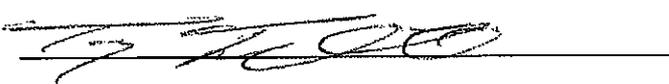
Exceptions to the terms of this voluntary moratorium may be approved at the discretion of Secretary of Higher Education on a case-by-case basis.



I, Daniel H. Lopez, President, New Mexico Tech, authorize this action on behalf of the New Mexico Council of University Presidents



I, Steve McCleery, President, New Mexico Junior College, authorize this action on behalf of the New Mexico Association of Independent Community Colleges





I, Cedric Page, Executive Director, University of New Mexico, Los Alamos Branch,
authorize this action on behalf of the New Mexico Association of Community
Colleges

NEW MEXICO HIGHER EDUCATION DEPARTMENT



1
TVE
AUG 12 2011

August 8, 2011

Dr. Sheila Ortego
President
Santa Fe Community College
6401 Richards Ave. |
Santa Fe, New Mexico 87508

Dear Sheila:

Thank you for submitting your memorandum dated July 26, 2011, requesting an exemption from the moratorium on construction of new higher education facilities. Your request is based on Exemption #3 as listed on the moratorium document, related to "facilities requiring no state appropriation or formula funding." I concur that pursuant to the cited exemption that SFCC's Learning Center is not subject to the moratorium.

I am still in the process of reviewing the proposal for the Learning Center and I will be in touch with you shortly.

Sincerely,

A handwritten signature in black ink, appearing to read "Jose Z. Garcia".

Jose Z. Garcia,
Secretary New Mexico Higher Education Department



6401 Richards Avenue
 Santa Fe, NM 87508-4887
 (505) 428-1000
 www.sfccnm.edu

October 31, 2011

Dr. Jose Garcia
 Cabinet Secretary
 New Mexico Higher Education Department
 2048 Galisteo Street
 Santa Fe, NM 87505

SFCC's Higher Education Center

Dear Dr. Garcia,

Thank you for your October 26, 2011 letter regarding the Higher Education Center, (the "HEC") and your kind words regarding my New Mexico Business Weekly award. I have reviewed your letter with our attorneys and wanted to provide you the College's position with respect to the history of the HEC and why we believe that neither legislative approval, nor State Board of Finance approval is required for this project to move forward.

History of HEC

As you know, the Learning Center Act, §21-16A-1, NMSA 1978 *et seq.* allows community college governing boards, among others, to create learning centers pursuant to that act. §21-16A-4(A) NMSA 1978. The Learning Center Act provides that a learning center, "shall not be deemed to be an institution ..." [§21-16A-4(D) NMSA 1978] and that, "the Commission shall develop criteria for determining the need for a district and the process and procedures for establishing and operating a learning center." §21-16A-4(E) NMSA 1978. The Learning Center Act further provides that, "no person, institution or other entity shall undertake to operate a learning center except with the written approval of the commission and in accordance with the provisions of the Learning Center Act ..." §21-16A-8 NMSA 1978.

The criteria for establishing learning centers is set forth in Part 5.2.2. NMAC. Those regulations provide a detailed process for approval by the Higher Education Department (the

SOURCE: Santa Fe Community College

“Department”), including the submission and acceptance by the Department of a preliminary plan for the center [5.2.2.8(H) NMAC], followed by the development and approval by the Department of a detailed plan. *Id.* Neither the law nor the regulations require legislative approval to establish a learning center. The College went through all the steps required to establish a learning center, and on December 2, 2009, Dr. Viola Flores, Secretary of Higher Education, provided written approval of the HEC.

According to the plan approved in December 2009 by the Department, the College planned to issue general obligation bonds to provide funds to build a building to house the HEC. The issuance of such bonds by community colleges is governed by the College District Tax Act, §21-2A-1, NMSA 1978 *et seq.* That act provides that prior to holding an election to approve a GO bond issue, the College must obtain Department approval; that the bond issuance must be approved by a majority of district voters; that the proceeds obtained from the issuance of the bonds may not be diverted or expended for any other purpose than those provided; and that no building shall be built with the proceeds of the bonds without prior approval of detailed plans by the Department. *See* §21-2A-6(A), NMSA 1978; §21-2A-6(D), NMSA 1978.

The Santa Fe Community College Board approved an election resolution that, among other things, included the question:

Shall Santa Fe Community College District issue up to \$35,000,000 in general obligation bonds, in one series or more, payable from general (ad valorem) property taxes for the purposes of erecting and furnishing, constructing, purchasing, remodeling and equipping buildings and utility facilities and making other real property improvements or for purchasing grounds for projects, including, among others, one or more of the following: a higher learning center or downtown campus, the shell space for theatre arts, lighting efficiency retrofit, renewable electricity generation and infrastructure renewal and information technology upgrades?

The Department approved putting this question to the voters on April 8, 2010, thus approving the use of GO bond proceeds for the HEC. The voters approved the issuance of the bonds on August 3, 2010. On November 12, 2010, the College issued \$20,000,000 for the purposes set forth above. Currently, the only step left before the College can begin construction of the HEC is approval of the detailed plans for the HEC building by the Department, pursuant to §21-2A-6(D) NMSA 1978.

Legal Status

As described above, the College believes that the HEC has been properly established under state law and is only awaiting a review of the plans for the HEC building by the Department. Because your October 26 letter does not provide citations for the state statutes, we cannot know with certainty why you believe otherwise. However, we have reviewed the provision of law that places limitation on new educational institutions and believe that it does not apply to the HEC.

We are aware that §21-1-26.9 NMSA 1978 requires legislative approval for certain post-secondary institutions. That provision states:

Effective January 1, 1998, no new public post-secondary educational institution, branch campus or off-campus instructional center shall be created except as specifically created by the legislature. The higher education department shall review any proposal for the establishment of a new public post-secondary educational institution or campus and submit its recommendations to the legislature.

We do not believe this provision applies to learning centers based on the plain language of the provision. First, it does not include learning centers in its prohibition, but only new institutions, branch campuses or off-campus instructional centers. As noted above, the Learning Center Act specifically states that a learning center is not an institution [§21-16A-4(D) NMSA 1978]. Branch community colleges are established by local school boards and constitutionally-created universities under §21-14-1, NSMA 1978 *et seq.*, as are off-campus instructional centers under §21-14A-1, NMSA 1978 *et seq.* Although the second sentence of the provision refers to a “campus,” we believe that it is qualified by the first sentence of the provision, and that the learning center is not a new “campus” of the College, because a community college’s campus is defined in HED regulations to be its taxing district. See, e.g. Section 5.3.12.9 NMAC (the “campus” of a two year institution is its taxing district). Finally, as noted above, neither the Learning Center Act, nor its regulations, requires legislative approval for a center (in contrast with, for example, the Branch Community College Act, that includes such a limitation. §21-14-2.2 NMSA, 1978).

We also believe that your reference to approval of the building by the State Board of Finance is also misplaced. It is possible that you base your position on §21-1-21 NMSA 1978, which states that,

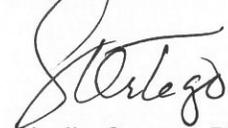
No expenditure shall be made by any state educational institution confirmed by Article 12, Section 11 of the state constitution for the purchase of real property or the

construction of buildings or other major structures or for major remodeling projects without prior approval of the proposed purchase or construction or remodeling by the board of educational finance and the state board of finance.

Neither SFCC nor the HEC is established in the New Mexico Constitution, but rather by statute. There is no provision of law that requires the College or the HEC to seek State Board of Finance approval for construction of a building.

I apologize if the Department's position is based on statutes other than those we have analyzed. If it is, we would be interested in receiving your analysis and discussing it further with you. In any event, I would appreciate the opportunity for us to meet with our legal counsel and go through these positions in detail.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Ortego', written over the word 'Sincerely,'.

Sheila Ortego, Ph.D.
President, SFCC