

**STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC ETHICS**

Advisory Opinion No. 21-02:

**Declining to extend Public Officers Law § 74
to community colleges affiliated with the
State University of New York.**

INTRODUCTION

Commission staff received a complaint concerning the conduct of an individual employed by [] Community College, which is affiliated with the State University of New York (SUNY). Professor [] allegedly []. []. A threshold question that must be addressed by the Commission is the extent to which, if at all, Section 74 – which, broadly speaking, applies to officers and employees of state, but not local, agencies – applies to employees of SUNY community colleges. Notably, SUNY community colleges are expressly excluded from Sections 73 and 73-a of the Public Officers Law. However, Section 74, unlike Sections 73 and 73-a, is silent with respect to community colleges and only indirectly alludes to SUNY through cross-reference to corporations closely affiliated with specific state agencies. Lacking such an explicit inclusion or exclusion in Section 74, the Commission closely examined the enabling legislation, the legal and administrative structure, and the financing of SUNY community colleges, together with a host of authorities, and all support treating SUNY community colleges as local agencies, not state agencies, under Section 74.

BACKGROUND

A basic understanding of the SUNY structure is necessary to situate properly the affiliated community colleges and to make clear to what institution the Commission is referring when using the term “SUNY”. To start, Section 201 of the state Education Law creates within the state Education Department the “University of the State of New York” (hereinafter “USNY”) which includes:

- More than 7,000 public and private elementary and secondary schools;
- 248 public and private colleges and universities;
- 251 proprietary (for-profit) schools;
- Nearly 7,000 libraries including the New York State Library;
- 750 museums;
- The State Archives;
- Vocational rehabilitation and other services for adults with disabilities;
- Special education services for pre-school and school-age children and teenagers;
- A School for the Blind;
- A School for the Deaf;
- 25 public broadcasting facilities, including seven public television stations;
- More than 750,000 professionals practicing in 48 licensed professions, including, for example, pharmacy, architecture, accounting, and nursing; and

- 240,000 certified public school teachers, counselors, and administrators.^{1,2}

Education Law § 352 provides for a corporation within USNY called the “State University of New York” (hereinafter “SUNY”) that is responsible for “higher education supported in whole or in part with state moneys.” Education Law § 352(1). This article goes on to specify the institutions that are part of SUNY:

The state university shall consist of the four university centers at Albany, Binghamton, Buffalo and Stony Brook, the designated colleges of arts and sciences at Brockport, Buffalo, Cortland, Fredonia, Geneseo, New Paltz, Old Westbury, Oneonta, Oswego, Plattsburgh, Potsdam and Purchase, empire state college, the agricultural and technical colleges at Alfred, Canton, Cobleskill, Delhi, Farmingdale and Morrisville, downstate medical center, upstate medical center, the college of optometry, the college of environmental science and forestry, maritime college, the college of technology at Utica/Rome, the statutory or contract colleges at Cornell university and Alfred university, and such additional universities, colleges and other institutions, facilities and research centers as have been or hereafter may be acquired, established, operated or contracted to be *operated* for the state *by the state university trustees*. New York State Education Law § 352(3) (emphasis added).

Notably, Section 352 does not reference community colleges, which are addressed, separately, in Section 6301 of the state Education Law, which defines community colleges as “[c]olleges established and *operated* pursuant to the provisions of this article, either individually or jointly, *by counties, cities, intermediate school districts, school districts* approved by the state university trustees, *or individually by community college regions* approved by the state university trustees, and providing two-year post-secondary programs pursuant to regulations prescribed by the state university trustees and receiving financial assistance from the state therefor.” Education Law § 6301(2) (emphasis added). This distinction is critical to the applicability of Public Officers Law § 74; for while SUNY universities and colleges, which are specifically enumerated under Section 352, are required to be operated for the state *by the State university trustees* (as discussed below), community colleges, under Section 6301 and by definition, are operated *by counties, cities or other local sponsors*.

APPLICABLE LAW

Section 74 of the Public Officers Law, enacted as the state’s first Code of Ethics in 1954 (*Ethics & Lobbying in New York State*, 2019 ed., at 7-8) first defined the term “state agency” as:

[A]ny state department, or division, board, commission, or bureau of any state department or any public benefit corporation or public authority at least one of whose members is appointed by the governor.

Section 74(1) was later amended in 2007 to read:

¹ <http://www.nysed.gov/about/about-usny>

² New York State Education Law § 201

[A]ny state department, or division, board, commission, or bureau of any state department or any public benefit corporation or public authority at least one of whose members is appointed by the governor or *corporations closely affiliated with specific state agencies* as defined by paragraph (d) of subdivision five of section fifty-three-a of the state finance law or their successors.

POL § 74(1) (emphasis added).

The inclusion of the “corporations closely affiliated with specific state agencies as defined” in State Finance Law § 53-a(5)(d)³ was added in 2007, and thus brought the Research Foundation of the State University of New York (the “RF”) under Section 74’s umbrella.⁴ While SUNY is not specifically identified in the definition of state agency in Section 74, it is clear that SUNY is the “state agency” with which the RF is closely affiliated. As discussed further in this Advisory Opinion, regardless of the addition of the RF in 2007, SUNY has long been treated as a state agency under Section 74, while the affiliated community colleges have not.

DISCUSSION

Historical Treatment and Analysis

As mentioned, the Commission and its predecessor agencies have applied Public Officers Law § 74 to the actions of SUNY system administration officials and the officers and employees of the four-year campuses (enumerated in Education Law § 352) consistently and without challenge for decades, beginning with Advisory Opinion [91-7](#) in 1991.^{5,6} Moreover, the Attorney General’s Office has applied Sections 74 and 73 to “members of the State University Board of Trustees and Councils of state-operated institutions within the University” since as early as 1955.⁷ In addition, long-standing SUNY policies and procedures, including SUNY’s own Code of Ethical Conduct – publicly available on its website – explain that Section 74 is “applicable to all University officers.”⁸ As such, the applicability of Section 74 to officers and employees of the

³ L. 2007, Ch. 14, Section 28.

⁴ See *O’Connor v. Ginsberg*, No. 514200 (Sup. Ct. App. Div 3d Dep’t May 9, 2013) (overturning Supreme Court judgment denying predecessor agency’s motion to compel former SUNY Research Foundation employee to comply with a subpoena ad testificandum and affirming that Research Foundation employees are subject to Section 74 after the 2007 amendment).

⁵ See, e.g., Advisory Opinions [91-07](#), [92-21](#), [93-14](#), [95-21](#), [95-36](#), [96-28](#), [96-30](#), [02-05](#).

⁶ There are numerous Advisory Opinions applying Section 74 to SUNY; however, the only Advisory Opinion that simultaneously deals with SUNY and community colleges does not address the underlying question of whether community colleges should be considered state agencies under Section 74. New York State Ethics Comm’n, Advisory Op. No. [96-30](#) (1996) (finding that a SUNY employee who has some job duties that involve liaising with trustees of various community colleges may serve as a county legislator only if he recuses himself in his SUNY position from all matters involving the county and the county’s community college).

⁷ 1955 N.Y. Op. Att’y Gen. No. 286 (discussed in text, *infra*); see also N.Y. Office of State Comptroller Op. Dec. 16, 1974 (applying Sections 73 and 74 to a dean at a SUNY college).

⁸ See Code of Ethical Conduct for University Officers, https://www.suny.edu/sunypp/documents.cfm?doc_id=61 (“This Code of Ethical Conduct shall apply to the service of the Trustees of the State University of New York (University), the members of the councils of the State-operated campuses appointed pursuant to section 356 of the Education Law, and the Board of Trustees of the College of Environmental Science and Forestry appointed pursuant to section 6003 of the Education Law. *The provisions of this Code shall be in addition to the requirements of section 73(3)(b) of the Public Officers Law applicable to the University Trustees as State policy-makers, and the*

SUNY system and its state-run campuses is well-established, notwithstanding Section 74's lack of any direct – and, until 2007, indirect – reference to SUNY.

Application of Section 74 to SUNY and its state-run campuses is consistent with the widespread and longstanding treatment of SUNY as a state agency. SUNY is described in public facing government communications as a state agency, a majority of its governing body is comprised of gubernatorial appointees and, as noted, SUNY is a creature of state statute and exists within the state Education Department.⁹ In contrast, the courts and other state agencies have historically treated community colleges as local municipal institutions.

First, as noted above, community colleges are not among the components of SUNY enumerated in Education Law § 352(3), but, rather, are contained in a separate Section 6301. *See* N.Y. Educ. L. §§ 352(3), 6301; *Leitner v. Westchester Cmty. College*, 779 F.3d 130, 139 (2d. Cir. Feb. 25, 2015) (“the New York Education Law creates community colleges separately from its creation of SUNY.”); *Brown v. North Country Community College*, 311 N.Y.S.2d 517, 520. (Sup. Ct. Essex Cnty. June 17, 1970) (finding that “[c]ommunity colleges . . . are not a part of the State University of New York corporation” (citing Educ. Law §§ 352, 350)). As such, while courts have found that SUNY is a state agency when considering questions of jurisdiction, they have conversely found that community colleges are not state agencies. *See Leitner*, 779 F.3d at 139 (“The New York Court of Claims, which has exclusive jurisdiction over suits against the state, does not have jurisdiction over SUNY community colleges, as such claims ‘cannot be characterized as being against the State of New York.’”); *Ocasio v. Mohawk Valley Community College, et al.*, Case No. 20-cv-1355 (SDNY), ECF Nos. 8-10 (granting joint stipulation to dismiss the State and SUNY as improper defendants in an action involving a community college).

Second, treating community colleges as municipal entities is consistent with both the process by which community colleges are established in the first instance and how they are governed and operated. Article 126 of the Education Law provides that a community college must be created by a “local sponsor,” defined as “[a]ny city, county, intermediate school district, school district approved by the state university trustees, or community college region approved by the state university trustees, sponsoring or participating in the establishment or operation of a community college.” N.Y. Educ. L. Art. 126 § 6301(3). Community college boards of trustees are distinct from the SUNY Board of Trustees and consist of ten members, five of whom are appointed by the local legislative body in the county in which the community college is located,

Code of Ethics contained in section 74 of the Public Officers Law, applicable to all University officers.”) (emphasis added); *see also* https://www.suny.edu/sunypp/documents.cfm?doc_id=527 (“University faculty and staff are expected to comply with the New York State Public Officers Law provisions on conflict of interest and ethical conduct.”); *see also* <https://www.suny.edu/about/leadership/board-of-trustees/> (linking Public Officers Law 74 under Board of Trustees Handbook information).

⁹ *See* <https://www.ny.gov/agencies>; New York Education Law § 352(1) (prescribing that SUNY is responsible for the “planning, supervision and administration of facilities and programs in accordance with the plan proposed by the state university trustees as approved by the [state] regents[.]” as well the “care, custody, control and management” of grounds and facilities of “state-operated institutions of the state university[.]”); *See also Turner v. State*, 374 N.Y.S. 2d 731, 732-33 (Sup. Ct. App. Div. 3d Dep’t. 1975) (“Pursuant to an act of the Legislature, the State University is a corporate agency created within the State Department of Education to carry out certain governmental functions pertaining to higher education It follows, therefore, that the State University has immunity from suit in the Supreme Court and must be sued in the Court of Claims[.]”).

four – who must be residents of the sponsoring community – appointed by the Governor, and one elected by and among the students. N.Y. Educ. L. Art. 126 § 6306(1). Each community college’s Board of Trustees is responsible for the overall provision of standards and regulations covering the community college, its courses and curricula, financing, tuition charges and fees, and any “such other matters as may be involved in the operation of such colleges.” N.Y. Educ. L. § 355(c); Art. 126, § 6306(2). Moreover, the Board of Trustees is also the entity that ultimately makes recommendations on appointments of community college presidents (subject to approval by the SUNY Board of Trustees). *See also* SUNY Guidelines for Presidential Searches for Community Colleges, Doc. No. 2501, Apr. 1, 2005.

Thus, Article 126 of the Education Law makes clear not only that community colleges are *established* by local sponsors, but also that they are *operated* “either individually or jointly, by counties, cities, intermediate school districts, school districts approved by the state university trustees, or individually by community college regions approved by the state university trustees[.]” Education Law § 6301(2). While SUNY does retain some oversight and involvement in the operation of community colleges, this does not mean that community colleges constitute state agencies. *See Leitner v. Westchester Cmty. College*, 779 F.3d 130 (2d. Cir. Feb. 25, 2015) (finding “. . . state[] oversight. . . does not equate to state control[.]” and that a community college was “not substantially controlled by the state[.]” noting that there is a “balance between state and local appointment” for a community college’s Board of Trustees and that there was no indication that the state had control over [the community college’s] daily operations).¹⁰ Moreover, the fact that some state purpose is served by community colleges does not affect their municipal nature. *Id.* (noting that “[t]he New York Court of Appeals has held that operation of SUNY community colleges serves a municipal function.”) (citing *Grimm v. Rensselaer Cnty.*, 4 N.Y.2d 416, 421 (N.Y. Ct. App. June 25, 1958)).

Further, by statute, employees of community colleges are indemnified by the local sponsor, and not by the state. Article 126 of the Education Law prescribes that “the *local* sponsor of a community college shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties. . . .” N.Y. Educ. L. Art. 126 § 6308(2)(a) (emphasis added); *See also* SUNY Guidelines for Defense and Indemnification of Community College employees, Doc. No. 6302, Aug. 22, 1980.

Finally, SUNY’s own policies and procedures with respect to ethics and conflicts of interest explicitly distinguish between its “State-operated campuses” and community colleges. For example, on the SUNY website, among the twelve topics listed in the “Legal & Compliance”

¹⁰ The Court also found that the fact that the community college received one third of its budget from state financial aid pursuant to the state Education Law was “not sufficient to establish state responsibility for a community college’s financial obligations.” *Leitner*, 779 F.3d at 138. Further, the Court noted that New York Education Law “require[s] local sponsors to levy taxes if a college’s budget exceeds the maximum costs allowed by the state.” *Id.* (citing N.Y. Educ. L. § 6304(3)). Analyzing the college’s financial obligations to the state, citing to Education Law § 6304(1)(c), the Court noted that it is the county in which the college is located, not the State of New York, that is responsible for satisfying judgments against the college, and that the county, “which appoints half of the college’s Board of Trustees, has the power to issue bonds and levy taxes to raise funds for [the community college].” *Id.* at 137-140.

section under “SUNY Policies and Procedures” for state-operated campuses are the code of ethics and conflict of interest rules prescribed by the Public Officers Law, while the “Legal & Compliance” section relating to community colleges, in contrast, makes no reference to the Public Officers Law and refers only to the defense and indemnification policies applicable to community colleges, which, as noted above, provide that community college employees are to be indemnified by the local sponsor, not by the state.¹¹

Ratifying many of these positions, the above-referenced 1955 Attorney General opinion that applied Sections 73 and 74 of the Public Officers Law to “members of the State University Board of Trustees and Councils of state-operated institutions within the University” explicitly declined to extend Sections 73 and 74 to “members of local boards of trustees of the community colleges,” finding that community college trustees “are not officers or employees of any State department, being basically local officials, and consequently are not covered by [Sections 73 and 74] of the Public Officers Law.” 1955 N.Y. Op. Att’y. Gen. No. 286 (*supra* at 3). The Opinion explains that “community colleges are locally sponsored and locally operated by certain specified municipalities. They are State aided and subject to the general supervision of the State University Trustees, but they are not state-operated.” *Id.* at 287. Additionally, a 1959 State Attorney General Opinion held that “[t]he State University is a State agency within the meaning of Public Officers Law [Section] 73,” reasoning that because the State University was created in the State Education Department, and Section 73 defines state agency as “any state department, or division, board commission or bureau of any state department,” that the State University is in fact a “state agency.” (*citing* 1955 Att’y Gen. Op.).

In short, the historical record, including statutes, case law, advisory opinions and internal SUNY policies shows that Public Officers Law § 74 has consistently been treated as applicable to SUNY but not to SUNY community colleges. The historical treatment of SUNY community colleges as outside Section 74’s definition of State agency is wholly consistent with their clear status as municipal entities created separately from the SUNY system that cannot reasonably be deemed “state agencies” for purposes of application of the Public Officers Law, especially as they are not treated as such in any other context.

Statutory Interpretation

Neither the plain language of Section 74 nor principles of statutory interpretation suggest that the Commission should depart from the longstanding judicial and administrative practice of excluding community colleges from the ambit of Section 74. As noted above, Section 74 does not specifically reference SUNY community colleges and only alludes to SUNY in its inclusion of closely affiliated entities. In contrast, Section 73 – which lays out specific rules and restrictions on post-employment, gifts, and the conducting of private business – explicitly *includes* SUNY and *excludes* the SUNY community colleges in its definition of “state agency”:

The term ‘state agency’ shall mean any state department, or division, board, commission, or bureau of any state department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the governor, or the state university of New York or the city university of New York, including all their constituent units except community colleges of the state university of New York and the independent

¹¹ https://www.suny.edu/sunyp/documents.cfm?directory=pol_proc&cat_id=36&tpc_id=40.

institutions operating statutory or contract colleges on behalf of the state. POL § 73(1)(g).¹²

As originally enacted (also in 1954), Section 73 made no reference to SUNY or its community colleges; however, as part of the seminal Ethics in Government Act of 1987, Section 73 was amended such that its rules and prohibitions were specifically extended to “the state university of New York or the city university of New York, including all their constituent units except *community colleges* and the independent institutions operating statutory or contract colleges on behalf of the state.” (Ch. 813, L. 1987, Ethics Act Section 2.1(g), codified as N.Y. Pub. Off. L. § 73(1)(g)). (Emphasis added). This language was modified in 1996 to clarify that the community college carve-out was specific to SUNY, *i.e.*, “...except community colleges of *the state university of New York...*” L. 1996, Ch. 183, § 1. (emphasis added).

Despite the differing approaches incorporating SUNY into sections 73 and 74, nothing in either Section 73(1)(g) or 74(1) demonstrates any clear legislative intent to treat SUNY community colleges as state agencies. Section 73 explicitly says community colleges are not state agencies and Section 74 (since 2007) only evidences an intent to add the Research Foundation (and other closely-affiliated corporations) to the entities covered by the Public Officers Law.¹³

Notably, the Court of Claims, while acknowledging the semantic differences between the statutes’ operative definitions, has stated that Sections 73 and 74 must be read *in pari materia* because “they were enacted at the same session of the Legislature and their subjects are interrelated” and, therefore, “must be construed and applied harmoniously and consistently” *Gilbert v. State*, 711 N.Y.S.2d 279, 282 (N.Y. Ct. Cl. Mar. 28, 2000) (finding that, based on the statutory text, the legislature clearly elected not to prohibit all compensated testimonial appearances by its employees in Section 73, and applied section 74 in the same manner). Thus, reading Section 74 as not applying to SUNY community colleges does not create a conflict in how Sections 73 and 74 are applied; rather, it continues to apply them “harmoniously and consistently” in light of the lack of legislative guidance. *Id.*

CONCLUSION

Based upon the foregoing, only SUNY Administration and the enumerated SUNY institutions in Education Law § 352, *i.e.*, not its community colleges, should be deemed state agencies under Public Officers Law § 74. Such an interpretation accords with the well-established and long-standing treatment of SUNY community colleges as distinct from the SUNY system overall in the state’s education law, in federal and state case law, and by the SUNY system itself. As such the Commission does not have jurisdiction over the conduct in the

¹² Public Officers Law § 73-a, which governs annual statements of financial disclosure, also utilizes the same definition of “state agency” as that set forth in 73. As such, an entity not considered a state agency under § 73 would similarly not be a state agency under § 73-a.

¹³ See POL §§ 73(1)(g) and 74 (1).

above-referenced complaint that prompted the instant inquiry into this threshold question; and the matter involving Professor [] has been referred to the [] County Board of Ethics.¹⁴

All concur:

Jose L. Nieves, Chair

Richard F. Braun
Terryl L. Brown
Colleen C. DiPirro
William P. Fisher
Sharon Stern Gerstman
C. Randall Hinrichs
Marvin E. Jacob
Gary J. Lavine
David J. McNamara
George H. Weissman
James A. Yates

Members

Dated: October 19, 2021

¹⁴ The Commission notes that Article 18 of the General Municipal Law sets forth the provisions concerning conflicts of interest for municipal officers and employees, and that employees of community colleges have been found subject to Article 18, assuring, among other thing, that claimants are not without recourse. *See People v. Wendel*, 455 N.Y.S. 2d 322, 323 (Nassau Cnty. Ct. 1982) (finding a Nassau community college professor was a county employee and thus subject to the General Municipal Law).