

April 9, 2021

HOUSE EXECUTIVE MESSAGE NO. 21

The Honorable Brian Egolf, Jr, Speaker of the House and
Members of the House of Representatives
State Capitol Building
Santa Fe, NM 87501

Dear Speaker Egolf and Members of the House:

In January, I submitted to the Legislature a budget recommendation that delivered a responsive, responsible framework for navigating the end of the COVID-19 pandemic while preserving our key investments geared toward a brighter, more inclusive future for all New Mexicans. I called for investments in priority areas like public education, early childhood services, and youth, adolescent, and young adult wellbeing. My budget expanded on behavioral health across appropriate state agencies to ensure New Mexicans have access to care related to behavioral health challenges. My budget maintained vital state programs and services while still planning ahead, continuing record-setting reserves, and thinking creatively and responsibly about our fiscal situation. My budget invested in New Mexico's future through broadband expansion, green energy and getting our tourism economy back up and running. I also called for a continued investment towards the Opportunity Scholarship so all New Mexicans can have access to higher education.

Together, we can move forward from the pandemic and continue to build New Mexico's future. Consistent with my budget plan, House Appropriations and Finance Committee Substitute for House Bills 2 and 3, as amended, with certificate of correction, also known as the General Appropriation Act of 2021 (the "Act"), appropriates significant funds for public schools, early childhood education, statewide infrastructure, and critical public safety and health initiatives. The Act moves New Mexico forward while maintaining a general fund reserve target of 24% of recurring appropriations: a fiscally reasonable reserve target.

My actions on the Act continue the objectives of intelligently meeting core public responsibilities and ensuring an accountable and fiscally responsible government. I have exercised my constitutional veto authority to further achieve these ends.

I have vetoed parts of the Act that attempt impermissibly to create substantive law, a practice that Article IV, Section 16 of the New Mexico Constitution precludes. Similarly, I have vetoed provisions of the Act that attempt to enact general policy by imposing, for example, reporting or other requirements that do not exist in substantive law. Such general policies are “better addressed by general legislation and [are] not suitable for inclusion in the general appropriation bill.” *New Mexico ex rel. Coll v. Carruthers*, 1988-NMSC-057, ¶ 13, 107 N.M. 439, 759 P.2d 1380.

I have also vetoed parts of the Act that impermissibly intrude into the executive managerial function. I object to provisions in the Act that unduly restrict appropriations to specified types of expenditures. These restrictions on agency functions exceed the Legislature’s proper, constitutionally defined role, unduly constraining the Executive’s ability to effectively administer programs to meet the State’s needs, in violation of the distribution of powers established by Article III, Section 1 of the New Mexico Constitution. *See generally Coll*, 1988-NMSC-057, ¶¶ 11-36.

Relatedly, I have vetoed parts of the Act that impermissibly attempt to appropriate or control the allocation of federal funds to a New Mexico governmental entity. The Supreme Court of New Mexico has concluded that federal contributions are not a proper subject of the Legislature’s appropriative power, and the Legislature’s attempt to control the use of such funds infringes “the executive function of administration.” *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975 (internal quotation marks and citation omitted); *see also Coll*, 1988-NMSC-057, ¶ 23.

Finally, I have vetoed inappropriate performance measures that the Legislature unilaterally sought to impose upon various executive agencies. I particularly object to some of these efforts to circumvent the performance-based budgeting process established in the Accountability in Government Act, NMSA 1978, §§ 6-3A-1 to -8 (1999, as amended through 2004). If the Legislature intends to enact either general policy or changes to the performance-based budgeting process, Article IV, Section 16 of the New Mexico Constitution requires that the Legislature do so by legislation separate from the General Appropriations Act.

I this day SIGN and RETURN:

HOUSE APPROPRIATIONS AND FINANCE COMMITTEE SUBSTITUTE FOR HOUSE BILLS 2 AND 3, as amended, with certification of correction, which was enacted during the Fifty-Fifth Legislature, First Session, 2021, except the following item or items, part or parts, which I hereby veto pursuant to the authority granted to me in Article IV, Section 22 of the New Mexico Constitution:

On page 8, I have vetoed lines 22 through 25. The vetoed language is an attempt to impose new performance measures outside of the performance-based budgeting process established in the Accountability in Government Act.

On page 9, I have vetoed lines 1 through 6. The vetoed language is an attempt to impose new performance measures outside of the performance-based budgeting process established in the Accountability in Government Act.

On page 40, line 22, I have vetoed from the word “contingent” through the end of the line and on line 23, I have vetoed from the word “finance” through the number “2021”. The vetoed language would require the Department of Information Technology to develop and submit to the Legislative Finance Committee a plan to address cybersecurity by May 1, 2021, which is unnecessary because the Legislature already has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 51, I have vetoed lines 2 through 3. The vetoed language is an attempt to impose new performance measures outside of the performance-based budgeting process established in the Accountability in Government Act.

On page 69, I have vetoed line 6. The vetoed language is an attempt to impose new performance measures outside of the performance-based budgeting process established in the Accountability in Government Act.

On page 100, line 3, I have vetoed from the word “in” through the word “category”. The vetoed language would have unduly constrained the Developmental Disabilities Planning Council’s ability to utilize this funding to carry out the provisions of House Bill 234 from this legislative session appropriately, thereby infringing the executive managerial function.

On page 115, line 15, I have vetoed from the word “for” through the word “officers”. The vetoed language would have unduly constrained the Corrections Department’s ability to use appropriated funds to address more extensive salary issues, thereby infringing the executive managerial function.

On page 115, line 24, I have vetoed from the word “to” through the word “prisons”. The vetoed language would have unduly constrained the Corrections Department’s ability to use appropriated funds to address needs in both public and private correctional facilities, thereby infringing the executive managerial function.

On page 116, line 1, I have vetoed the words “an additional”, on line 2, I have vetoed the words “an additional”, and on line 3, I have vetoed the words “highest-rated” and the comma. The vetoed language is an attempt to increase expenditures in the recidivism reduction division and for inmate programming while reducing the Corrections Department’s overall budget elsewhere in the Act, which is impractical. Additionally, the vetoed language contains the unclear, ambiguous standard of "highest-rated" that makes the requirements on the Corrections Department too vague and subject to interpretation to enforce.

On page 118, line 5, I have vetoed the word “biannual”. The vetoed language would impose a constraint that impermissibly infringes on the Corrections Department’s executive managerial function to administer risk-needs assessments.

On page 118, on lines 9 and 10, I have vetoed the word “highest-rated” and the comma. The vetoed language contains the unclear, ambiguous standard of "highest-rated" that makes the requirements on the Corrections Department too vague and subject to interpretation to enforce.

On page 119, line 17, I have vetoed from the word “in” through the word “category”, and on line 18, I have vetoed from the word “for” through the word “support”. The vetoed language would

have prevented the Crime Victims Reparation Commission's ability to use appropriated funds to meet its statutory obligations and make intradepartmental transfers between victim services and victim payments categories.

On page 130, line 23, I have vetoed from the word “and” through the word “finance” and on line 24, I have vetoed the word “committee”. The vetoed language requires consultation with the Legislative Finance Committee, which is an unclear, ambiguous requirement that is too vague and subject to interpretation to enforce.

On page 131, line 4, I have vetoed the words “to the”, and on line 5, I have vetoed from the word “legislative” through the word “committee”. The vetoed language requires an annual report to the Legislative Finance Committee, which is unnecessary because the Legislature already has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 133, line 12, I have vetoed the words “general student” and the word “and”. On line 13, I have vetoed from the word “shall” through the word “fees”. On line 15, I have vetoed from the word “who” through the end of the line. On line 16, I have vetoed from the word “associates” through the word “degree”. On line 20, I have vetoed the second instance of “and” through the word “committee”, and I have vetoed the words “Any unexpended balances”. I have vetoed lines 21 through 22. The vetoed language limiting eligible fees and requiring priority for certain students would have imposed impracticable conditions on the Higher Education Department’s ability to provide Opportunity Scholarship funding to part-time students. Additionally, the vetoed language requiring reversion of unexpended balances at the end of fiscal year 2022 would make the scholarship inconsistent with other financial aid programs. As such, the vetoed language impermissibly intrudes on the Higher Education Department’s executive managerial function. Moreover, under Article IV, Section 16 of the New Mexico Constitution, the vetoed language is an improper attempt to enact general legislation within the General Appropriations Act. The vetoed language also requires a written report to the Legislative Education Study Committee and the Legislative Finance Committee, which is unnecessary because the Legislature has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 169, line 7, I have vetoed starting with the comma through the end of the line, and on line 8, I have vetoed the word “committee.” The vetoed language requires consultation with the Legislative Education Study Committee and the Legislative Finance Committee, which is an unclear, ambiguous requirement that is too vague and subject to interpretation to enforce. Additionally, it is unnecessary because the Legislature has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 169, line 10, I have vetoed from the first instance of “legislative” through the end of the line. On line 18, I have vetoed from the word “from” through the end of the line, and on line 19, I have vetoed the first instance of “the” through the word “needs”. The vetoed language requires consultation with the Legislative Education Study Committee and the Legislative Finance Committee, which is an unclear, ambiguous requirement that is too vague and subject to interpretation to enforce. Additionally, it is unnecessary because the Legislature already has several opportunities to monitor the progress of executive agencies on various projects. The rest

of the vetoed language would restrict hold harmless funding to federal elementary and secondary school emergency relief funds, which may not be allowed by the United States Department of Education. The vetoed language would also prevent the Public Education Department from using other available funding to meet its funding requirements, thereby infringing the executive managerial function. Finally, the vetoed language impermissibly attempts to control the department's use of federal funds.

On page 170, line 11, I have vetoed from the first comma through the second comma.

On page 170, line 25, I have vetoed the word "legislative", and on page 171, line 1, I have vetoed from the word "finance" through the comma.

On page 171, line 12, I have vetoed from the comma through the end of the line, and on line 13, I have vetoed from the first instance of the word "committee" through the second instance of the word "committee". The vetoed language on pages 170 and 171 requires consultation with the Legislative Education Study Committee and the Legislative Finance Committee, which is an unclear, ambiguous requirement that is too vague and subject to interpretation to enforce. Additionally, it is unnecessary because the Legislature has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 173, line 3, I have vetoed from the comma through the end of the line, I have vetoed lines 4 and 5, and on line 6, I have vetoed from the word "differential" through the number "1978". The vetoed language would prevent the Public Education Department from allowing school districts and charter schools from increasing elementary physical education units relative to the 2020-2021 school year, thereby infringing the department's executive managerial function. Additionally, the vetoed language would inappropriately and artificially reduce funding to elementary physical education programs based on unprecedentedly lower student counts caused by the COVID-19 pandemic.

On page 173, line 11, I have vetoed from the comma through the end of the line, and on line 12, I have vetoed starting with the word "and" through the word "committee". The vetoed language requires a report to the Legislative Education Study Committee and the Legislative Finance Committee, which is unnecessary because the Legislature has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 173, line 18, I have vetoed starting with the word "and" through the end of the line, and on line 19, I have vetoed from the word "sufficient" through the word "students". The reference in the vetoed language to the term "free and appropriate education" creates significant legal liability to the Public Education Department. This is a term of art that has implications for sufficiency litigation and special education law.

On page 173, line 22, I have vetoed the comma, and on line 23, I have vetoed starting with the word "legislative" through the second instance of the word "committee".

On page 174, line 5, I have vetoed the comma, and on line 6, I have vetoed starting with the word "legislative" through the second instance of the word "committee".

On page 174, line 13, I have vetoed starting with the comma through the second instance of the word “committee”. The vetoed language on pages 173 and 174 requires a report to the Legislative Education Study Committee and the Legislative Finance Committee, which is unnecessary because the Legislature has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 174, I have vetoed lines 15-17. The vetoed language contradicts existing law on school year and school length, *see* NMSA 1978, § 22-2-8.1 (2011), and the Variable School Calendar Act, NMSA 1978, §§ 22-22-1 to -6 (1972), which provides boards of education discretion in determining school calendars. Accordingly, under Article IV, Section 16 of the New Mexico Constitution, the vetoed language is an improper attempt to enact general legislation within the General Appropriations Act.

On page 183, line 3, I have vetoed starting with the second instance of the word “and” through the word “committee”.

On page 183, line 15, I have vetoed starting with the second instance of the word “and” through the word “committee”. The vetoed language on page 183 would require the Administrative Office of the District Attorney to provide the Legislative Finance Committee with a “detailed report,” which is unnecessary because the Legislature has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 185, line 22, I have vetoed the word “northwest”. The vetoed language prevents the Department of Finance and Administration from providing assistance to local governments outside of northwest New Mexico, many of which experienced extraordinary costs in connection with the COVID-19 public health emergency. Furthermore, the term “northwest” is an unclear, ambiguous description that makes the requirements on the Department of Finance and Administration too vague and subject to interpretation to enforce.

On page 186, line 12, I have vetoed from the word “contingent” through the end of the line, I have vetoed lines 13 and 14, and on line 15, I have vetoed from the beginning of the line through the number “2022”. The first contingency of the vetoed language directs the General Services Department to charge local governments and higher education institutions for matching funds, defeating the purpose of a risk pool and arbitrarily excluding agencies whose health benefits are paid for outside of the general fund. The second contingency in the vetoed language would require the General Services Department to increase health benefits premiums in fiscal year 2022. Both contingencies improperly attempt to control the administration of health benefits, which is within the discretion of the General Services Department, thereby infringing the department’s executive managerial function.

On page 189, line 14, I have vetoed from the word “contingent” through the end of the line and on line 15, I have vetoed from the beginning of the line through the word “expenditures”. The vetoed language imposes an impractical condition for the appropriation to the Energy, Minerals and Natural Resources Department. Given the urgency of brine well remediation and the impact of COVID-19 on local entity budgets, this condition would likely prevent the funding of an important project and thereby increase the risk to public safety.

On page 191, line 3, I have vetoed the word “public”. The vetoed language would prevent the Early Childhood Education and Care Department’s ability to ensure both public and private prekindergarten access, thereby infringing the executive managerial function.

On page 191, line 7, I have vetoed the word “emergency”. The vetoed language would prevent the Aging and Long-Term Services Department from providing advancements to aging network providers in non-emergency situations, thereby infringing the executive managerial function. Additionally, the term “emergency” is an unclear, ambiguous standard that makes the requirements on the Aging and Long-Term Services Department too vague and subject to interpretation to enforce.

On page 191, I have vetoed lines 8 through 15. The vetoed language on 191 is an attempt to appropriate federal funds the state expects to receive pursuant to the state and local fiscal recovery fund under the American Rescue Plan Act of 2021 contingent on the deposit of such funds in the appropriation contingency fund. As an initial matter, the Legislature lacks the authority to direct the executive’s administration of federal funds. Appropriating these funds in this manner is also premature. As of this writing, the state has yet to receive any portion of the state and local fiscal recovery fund, and the federal government may withhold up to 50% of the state’s allocation for another year, putting in doubt when it will be available to spend. The United States Department of the Treasury also has yet to issue any guidance on the allowable uses of these funds and will require repayment of any improper expenditures. Finally, the uncertainty of the COVID-19 pandemic and the need to potentially repay these federal funds require a flexibility that the appropriation contingency fund does not allow.

On page 192, line 13, I have vetoed from the beginning of the line through the word “of”. The vetoed language could prevent the Department of Health from retaining unspent developmental disabilities waiver and support waiver funds, which may violate the guidelines of the federal Centers for Medicare and Medicaid Services, thereby exposing the department to legal liability.

On page 194, line 14, I have vetoed from the word “legislative” through the second instance of the word “the”.

On page 194, line 24, I have vetoed the words “legislative” through the second instance of the word “the”. The vetoed language on page 194 would require the Corrections Department to report to the Legislative Finance Committee, which is unnecessary because the Legislature has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 195, line 2, I have vetoed from the word “contingent” through the end of the line and on line 3, I have vetoed from the beginning of the line through the word “purpose”. The vetoed language would require the Department of Public Safety to first provide its frontline employees with much-deserved hazard pay associated with COVID-19 from federal sources, and the availability of, and restrictions on, such funding is not clear at this time.

On page 196, line 4, I have vetoed from the word “contingent” through the end of the line and on line 5, I have vetoed from the beginning of the line through the word “purpose”. The vetoed language would require the Department of Homeland Security and Emergency Management to

first use federal funds for emergency response efforts along the Mexico border. These emergency response efforts are too urgent to wait for federal funding that may not even exist, and they must be addressed as soon as possible.

On page 197, line 12, I have vetoed the word “the” and the word “fund”. On line 13, I have vetoed from the word “contingent” through the word “expenditures”. The vetoed language would prevent the Public Education Department from soliciting a meaningful number of schools to participate in community school initiatives, thereby infringing the executive managerial function.

On page 198, line 13, I have vetoed from the comma through the end of the line, I have vetoed line 14, and on line 15, I have vetoed from the beginning of the line through the word “student”. The vetoed language would prevent the Public Education Department from ensuring that as many schools as possible could participate in the pilot program for additional instructional time in high-poverty and low-performing elementary schools, thereby infringing the executive managerial function. This would have a particularly adverse impact in the state’s smaller rural communities.

On page 198, line 18, I have vetoed from the comma through the end of the line, and on line 19, I have vetoed from the beginning of the line through the word “committee”. The vetoed language on page 183 would require the Public Education Department to report to the Legislative Education Study Committee and Legislative Finance Committee, which is unnecessary because the Legislature has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 199, line 12, I have vetoed starting with the word “related” through the word “articulation”. The vetoed language would prevent the Higher Education Department from implementing the associated program with the necessary flexibility to implement the longitudinal data system and track student success, thereby infringing the executive managerial function.

On page 200, line 1, I have vetoed the word “modification”. The vetoed language would prevent New Mexico State University from developing a weather program not centered on weather modification, thereby infringing the executive managerial function.

On page 202, line 3, I have vetoed the words “shut down”.

On page 202, line 7, I have vetoed the words “shut down”. The term “shut down” on page 202 is an unclear, ambiguous term that makes the requirements on the New Mexico State Fair too vague and subject to interpretation to enforce. Additionally, the vetoed language would prevent the New Mexico State Fair from addressing shortfalls related to COVID-19, but not necessarily the associated “shut down,” thereby infringing the executive managerial function.

On page 205, line 13, I have vetoed from the comma through the end of the line, and on line 14, I have vetoed starting with the word “and” through the word “committee”. The vetoed language would require the Regulation and Licensing Department to provide the Legislative Finance Committee with quarterly reports, which is unnecessary because the Legislature has several opportunities throughout the year to monitor the progress of executive agencies on various projects.

On page 210, line 2, I have vetoed starting with the third instance of “the” through the end of the line, and I have vetoed lines 3 through 4. The vetoed language contains unclear, ambiguous standards of “successful implementation of the pilot” and “federal approval” that make the requirements for the Children, Youth and Families Department too vague to enforce.

On page 211, line 9, I have vetoed starting with the word “for” through the word “system”. The vetoed language would require the Department of Information Technology to purchase a predictive analytics software system, which in practice is not used to report or analyze performance. Accordingly, the vetoed language infringes the executive managerial function.

On page 211, line 23, I have vetoed the word “average” and on line 24, the word “salary”.

On page 212, line 3, I have vetoed the words “average salary”.

On page 212, line 9, I have vetoed the words “average salary”.

On page 212, line 16, I have vetoed the words “average salary”.

On page 212, line 19, I have vetoed the words “an average” and on line 21, I have vetoed the words “an average”.

On page 212, line 24, I have vetoed the word “an average”.

On page 213, line 1, I have vetoed the words “an average.” I have vetoed the words “average salary” and “an average” on pages 211 through 213 to ensure that every employee contemplated by Sections 8(A)(1), (2), (4), (6), (7) and (8) of the Act receives a 1.5% salary increase. Relatedly, the vetoed language is too vague and subject to interpretation to enforce.

On page 216, I have vetoed lines 7 through 11.

On page 216, I have vetoed lines 21 through 25.

On page 217, I have vetoed lines 1 through 6.

On page 217, I have vetoed lines 14 through 19.

On page 218, I have vetoed lines 8 through 11.

On page 218, I have vetoed lines 18 through 25.

On page 219, I have vetoed lines 1 through 25.

On page 220, I have vetoed lines 1 through 25.

On page 221, I have vetoed lines 1 through 5. All of the vetoed language on pages 216 through 221 is an attempt to appropriate federal funds the state expects to receive pursuant to the state and local fiscal recovery fund under the American Rescue Plan Act of 2021 contingent on the deposit of such funds in the appropriation contingency fund. As an initial matter, the Legislature lacks the authority to direct the executive’s administration of federal funds. While some of these

appropriations have merit, appropriating these funds in this manner is also premature. As of this writing, the state has yet to receive any portion of the state and local fiscal recovery fund, and the federal government may withhold up to 50% of the state's allocation for another year, putting in doubt when it will be available to spend. The United States Department of the Treasury also has yet to issue any guidance on the allowable uses of these funds and will require repayment of any improper expenditures. Finally, the uncertainty of the COVID-19 pandemic and the need to potentially repay these federal funds require a flexibility that the appropriation contingency fund does not allow.

Respectfully yours,

Michelle Lujan Grisham
Governor

RECEIVED FROM THE OFFICE OF THE GOVERNOR

Time: _____ a.m. p.m.
Date: _____ 2021

By _____
Secretary of State

Time: _____ a.m. p.m.
Date: _____ 2021

By _____
Chief Clerk of the House