

AUG 11 2011

State of New Mexico

# Legislative Council Service

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## Information Memorandum

DATE: August 11, 2011

TO: David Abbey, Director, Legislative Finance Committee  
Frances Ramirez-Maestas, Director, Legislative Education Study Committee  
Raúl E. Burciaga, Director, Legislative Council Service (LCS)

FROM: Teresa Ryan, Law Student Intern, LCS

SUBJECT: UPDATE TO MEMO ON CONTINGENT LANGUAGE IN HB 2  
APPROPRIATION TO THE PUBLIC EDUCATION DEPARTMENT

You have requested information on whether the Department of Finance and Administration (DFA) may distribute \$2.5 million to the Public Education Department (PED) in light of the contingency language contained in Subsection (25) of Section 5 of Chapter 179 of Laws 2011 (House Appropriations and Finance Committee Substitute for House Bills 2, 3, 4, 5 and 6, as amended (HB 2)). The following memorandum is submitted in compliance with that request. Any opinions expressed are those of the author and do not necessarily reflect the opinions of the New Mexico Legislative Council or any other member of its staff.

Subsection (25) of Section 5 of HB 2, which was signed into law on April 8, 2011, provides for an appropriation of \$2.5 million to the PED. In relevant part, it reads:

For the governor's educational reforms and initiatives, including third-grade retention, contingent on enactment of House Bill 21 or similar legislation of the [most recent legislative session]; providing technical assistance to low performing schools; improving data systems; innovative digital education and learning; computer-administered assessments and common core standards implementation. (Emphasis added.)

HB 21 concerned the retention of third-grade students who are not proficient in reading. Neither HB 21 nor similar legislation was enacted. Therefore, the contingency was not met.

The uncertainty here deals with whether the third, contingency phrase modifies "educational reforms and initiatives" or "third-grade retention". Using the first interpretation, the

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failed contingency would strike funding for *all* initiatives listed in the statute, and no money would be distributed to the PED. Using the second interpretation, the failed contingency would strike funding *only* for the third-grade retention initiative. The \$2.5 million would thus be appropriated for the remaining listed initiatives. In support of the second interpretation, one consideration stands out: the remaining listed initiatives are unrelated to HB 21. In substance, if not wording, it might seem that the contingency applies more to "third-grade initiatives" than to "educational reforms and initiatives".

Were this second interpretation adopted and the DFA's transfer of money to the PED the subject of a legal challenge, a court would foremost consider the legislature's intent when enacting the statute. To determine this intent, a court would first examine the statute's plain meaning. *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353 (N.M. 1994). Courts are reserved in this exercise and prefer not to "second guess" the legislature's policy choices. *Id.* at 352. That is, they "will assume that the legislature used specific language for a reason, and that it had a purpose in preferring a specific course of action with regard to a certain issue". *Pueblo of Picuris v. New Mexico Energy, Minerals & Natural Res. Dept.*, 2001-NMCA-084, ¶ 14.

If the statute's language is "clear and unambiguous", the court will give that language effect and refrain from further statutory interpretation. *Gallegos*, 117 N.M. at 348. A court would only proceed in order to resolve a complication, such as an "ambiguity", an "absurdity" or a "mistake". *New Mexico Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 11. In that process, a separation of powers tension sometimes arises. The court in *Coslett v. Third Street Grocery* discussed this tension and offered related guidance:

[Courts] should not use inexactitude in the drafting of statutes as an excuse to impose . . . personal values on a legislative compromise. But the fear of judicial usurpation of the legislative role should not compel the courts always to adopt a literal interpretation . . . When the context strongly suggests that an alternative interpretation better advances the purpose of the legislation and there is no apparent reason why the legislature would have preferred the literal interpretation, judicial adoption of the literal interpretation is an abdication of responsibility. 117 N.M. 727, 730 (N.M. Ct. App. 1994). (Emphasis added.)

In correcting the problem, a court would consider the act's legislative history, its purposes and its effects under the different constructions to arrive at the legislature's intent. *Vaughn v. United Nuclear Corp.*, 98 N.M. 481, 485 (N.M. Ct. App. 1982). A court would have a duty "to

recognize what is necessarily implicit in statutory language". *Padilla v. Montano*, 116 N.M. 398, 403 (N.M. Ct. App. 1993).

The plain meaning of the statute at issue here is seemingly beyond dispute. The statute opens with the appropriation's broad purpose ("For the governor's educational reforms and initiatives"), names an aspect of that purpose ("including third-grade retention") and then makes a qualification ("contingent on enactment"). Such structure is most straightforwardly read to give the second phrase a secondary, or incidental, effect: it appears to elaborate on the first, or purpose, phrase. The third phrase then seems to resume where the first left off — not modify the phrase that immediately precedes it. Thus — and arguably *most* plainly — the contingency appears to modify the first phrase. Furthermore, this construction's result is not absurd; it simply creates a condition on which one incidental appropriation to the PED depends. A court adopting this view might conclude that the statute is clear and unambiguous, end its statutory interpretation at that point and hold that the money should not be distributed.

However, a court would probably wrestle with the possibility that the statute presents an ambiguity. Specifically, a court might find that the statute could also be interpreted to mean that the contingency modifies the second phrase, particularly in light of HB 21's content and its apparent correspondence to that phrase. Moreover, the separation between the second phrase and other listed initiatives in the statute might strengthen the notion that the second and contingency phrases are connected not only by position in the sentence, but by a substantive relationship. But a court would be careful not to violate the separation of powers principle by imposing its own preference on its interpretation. Rather, the legislative context would have to suggest "strongly" that the second interpretation best fulfills the legislative purpose in order for a court to adopt the second interpretation in favor of the first. Here, though this alternative theory can be entertained, it cannot necessarily be relied upon. The second interpretation's meaning is not "necessarily implicit". Although HB 21 relates to only one of the many listed initiatives, it is plausible that the legislature intended for the entire appropriation to hinge on passage of that bill. Perhaps as a political bargaining tactic, legislative proponents of third-grade retention had designed the statute according to the first interpretation in order to garner support for HB 21 by linking it to funding for other educational initiatives. In other words, there is a possible, valid reason for the legislature's having preferred the first interpretation. This possibility compromises

the second interpretation's relative strength and might hinder a court from adopting it.

Alternatively, a court might recognize that the legislature made a drafting mistake — that it intended the second interpretation in spite of its word and punctuation choice. That is, a court might recognize internal disharmony — an "anomaly" — in the statute and correct it by adopting the second interpretation. (*See, e.g., Gallegos*, 117 N.M. at 356, holding that contemporaneous documents submitted to the legislature were properly admitted for the purpose of determining legislative intent and concluding that, because such documents supported the alternative theory and because the legislature probably did not intend its statute to treat employees disparately, that alternative theory should prevail.) In this case, a court might rely on contemporaneous documents submitted to the legislature, if they exist, for evidence of a drafting mistake. Similarly, any other evidence pointing to this conclusion, if admissible, would likely be given great weight in the court's analysis. Or, for the separation of powers reasons described above, a court might tend toward deference to the legislature and refrain from adopting, on the basis of an alleged mistake, the second interpretation.

Each interpretation of this statute is compelling in its own right. The first reads most literally. The second, bolstered by the apparent link between HB 21 and the statute's second phrase, might present an ambiguity or — especially if evidence leads to such a finding — evince a mistake, and a court might elect to resolve the confusion. To this aim, a court would attempt to discern the legislature's intent in drafting the statute. Depending on the presence of indication of legislative intent, a court would either be cautious about encroaching on legislative territory or feel compelled to rectify what it views as an ambiguity or mistake.

## Nava to retire from GISD position

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VIA E-MAIL

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By Diana M. Alba  
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LAS CRUCES - Gadsden Independent School District Superintendent Cynthia Nava is retiring after a three-decade tenure with the school district, she confirmed Wednesday.

Nava, 59, also a Democratic state senator, said she recently married and is hoping for more free time. She also said she wants to put more time into her legislative work and feels like she's served long enough in her career as an educator.

"It has everything to do with the fact I was recently married and I feel like I've met my commitment to the board," she said. "They're in really good shape, and I need to move on."

Nava sent a letter July 25 to the school board president, and her resignation is effective Sept. 1 - meeting a requirement to end her one-year contract with at least 30 days notice, she said.

Most of the district's 14,000 students started back to school last week for the fall semester.

The school board is slated to take action on Nava's resignation at 5 p.m. today in Chaparral.

Nava, a Las Cruces resident, was appointed in July 2007 to head the district, when former Superintendent Ron Haugen retired and went to work for a neighboring district in Texas. Then, in August of that year, the school board installed her as permanent superintendent with a 4-1 vote, according to Sun-News records.

Gadsden school board member Gloria Irigoyen said she hasn't had much time to work with Nava because she was elected to the seat in February.

"I don't really have a history with her, but from what

I've heard as a resident of Sunland Park and parent of somebody in the Gadsden district, it seems like she's doing a good job," she said.

When she became superintendent, Nava said, the district was struggling financially and was four years behind on its audits. But now, she said, the district is fiscally sound and is caught up on its audits.

According to her biography, Nava started her teaching career in 1973 in Illinois. She was first hired at Gadsden in 1980 and has held several titles, including gifted-student instructor, educational diagnostician, assistant superintendent of instruction and deputy superintendent.

Nava said she never actually applied for the Gadsden superintendent job, but "I found myself in that position."

"I made a commitment to the board, once I discovered all the problems that were there, that I'd stay there until things got fixed, and that's what I've done," she said.

Nava earns \$141,000 annually, a figure that has remained flat the past two years, she said.

The school board tonight will talk about its options for an interim superintendent, according to a meeting agenda. The meeting will be held at Sunrise Elementary School, 1000 County Line Drive, Chaparral.

One month ago today, Nava married former New Mexico Environment Department Secretary Ron Curry, who was part of the Gov. Bill Richardson administration. Nava said she'll continue living in Las Cruces, and she plans to seek re-election to her Senate seat next year.

Diana M. Alba can be reached at (575) 541-5443.

Source: Gadsden Independent School District website