

## November 19, 2007 Elementary School Physical Education Funding

The Honorable Vernon D. Asbill  
New Mexico State Senator  
1502 Mountain Shadow  
Carlsbad, NM 88220

**Re:** Opinion Request – Elementary School Physical Education Funding

Dear Senator Asbill:

You have requested our advice regarding whether the New Mexico Public Education Department (“Department”) erred in its determination of how to administer the funding for elementary school physical education programs for the school year 2007-08. Specifically, according to your letter: “It is my contention that the funding should be included in the unit value, distributed through the funding formula and each elementary school should share and share alike.” Based on our examination of relevant New Mexico statutory authority, case law, and on the information available to us at this time, we conclude that the legislature authorized the Department Secretary to fund elementary school physical education programs by giving priority to schools with the highest proportion of students eligible for Free or Reduced-Fee Lunch (“FRL”).

There are two rules of statutory construction that apply to this matter. First, “[w]hen different statutes cover the same subject matter, they should be harmonized and construed together in a way that facilitates their operation when possible.” Qwest Corp. v. NMPRC, 2006–NMSC–042, ¶ 59, 140 N.M. 440, 494. “Statutes enacted at the same legislative session are peculiarly in pari material.” State v. Fidelity & Deposit Co. of Maryland, 36 N.M. 166, 166, 9 P.2d 700 (1932). Second, “principles of statutory construction require that a statute be interpreted with logic and common sense to avoid an absurd result.” State v. Portillo, 110 N.M. 135, 137, 793 P.2d 265 (1990).

Two relevant 2007 laws deal with funding for elementary school physical education programs. First, the appropriation, found in House Bill 2, provides, in part:

The general fund appropriation to the “state equalization guarantee” distribution contains eight million dollars (\$8,000,000) for elementary physical education. After considering those elementary physical education programs eligible for state financial support and the amount of state funding available for elementary physical education, the secretary shall annually determine the programs and the consequent number of students in elementary physical education that will be used to calculate the number of elementary physical education program units.

2007 N.M. Laws, Ch. 28 (emphasis added). It is our understanding that appropriations under the state equalization guarantee distribution are generally distributed systematically to all the schools. Your letter refers to this as “share and share alike.” However, the language used in the appropriation for elementary school physical

education indicates that the legislature intended the Department Secretary to have a role in the funding process and that there may be other calculation factors involved that are inconsistent with a systematic, equal distribution.

Second, the 2007 legislature enacted House Bill 208, which provides the details for implementing House Bill 2:

- A. The number of elementary physical education program units is determined by multiplying the number of students in elementary physical education by the cost differential factor of six one-hundredths.
- B. As used in this section, “elementary physical education” means eligible physical education programs that serve students in kindergarten through grade six in a public school classified by the department as an elementary school.

2007 N.M. Laws, Ch. 348, § 1 (emphasis added). The law places a priority on FRL. It states, in pertinent part:

- C. In granting approval for funding of elementary physical education programs, the department shall provide that programs are first implemented in public schools that have the highest proportion of students most in need based on the percentage of students eligible for free or reduced-fee lunch or grade-level schools that serve an entire school district and in public schools with available space.

...

- E. The department shall annually determine the programs and the consequent number of students in elementary physical education that will receive state financial support in accordance with funding available in each school year.

2007 N.M. Laws, Ch.348, § 3 (emphasis added).

Based on House Bill 208, the legislature apparently did not intend the elementary school physical education program funding to follow the “share and share alike model.” Instead, when House Bill 2 and House Bill 208 are harmonized and construed together, it appears that the legislature has given the Department Secretary the authority to prioritize the implementation and funding of physical education programs, based on student eligibility for FRLs, among other factors.

According to Department officials, there are two permissible models to implement this program. They are: (a) the Participation Program and (b) the Schedule A Program. Our understanding is that the Participation Program model combines the percentage of children in each school that the federal government determines are eligible for FRLs with the percentage of children that a school district administration is willing to fund. For example, if sixty-eight percent of the students in one school qualify for FRLs, then a

school district administration may pick up the costs for the remaining thirty-two percent of the students and thus achieve one hundred percent eligibility. Thus, a school may obtain a rating of one hundred percent if the district administration has the ability and willingness to pay for the percentage of students not covered by the federal government. In contrast, the Schedule A Program is based on the actual percentage of students in each school that the federal government considers eligible for FRLs.

The state Supreme Court has provided that “[w]hen an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency’s interpretation.” Morningstar Water Users Ass’n v. New Mexico Public Utility Com’n, 120 N.M. 579, 583, 904 P.2d 28 (1995). “The court will confer a heightened degree of deference to ... questions that ‘implicate ... expertise or the determination of fundamental policies within the scope of the agency’s statutory function.’” Id. (quoting Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Cop., 746 P.2d 896, 903 (Alaska, 1987)). Therefore, we will defer to the Department’s determination in selecting the appropriate model for this matter.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY SHANDLER  
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General