

**LETTER OPINION
2020-L-01**

May 18, 2020

Lieutenant Governor Brent Sanford
Chair, North Dakota Higher Education
Challenge Grant Fund Committee
600 East Boulevard Avenue
Bismarck, ND 58505-0001

Dear Lieutenant Governor Sanford:

Thank you for your letter asking for clarification as to the correct interpretation of the North Dakota Higher Education Challenge Grant Fund statute. You asked how the Higher Education Challenge Grant Fund Committee must apply the athletics exclusion when distributing the state match for raised funds, based on the language of N.D.C.C. § 15-10-53, and how the exclusion applies to various scenarios. It is my opinion that the state match may indirectly benefit students who are also athletes, so long as the basis for the scholarship is academic, rather than athletic.

BACKGROUND

The Higher Education Challenge Grant Fund was established by the 63rd Legislative Assembly as part of S.B. 2003 – the North Dakota University System (NDUS) appropriations bill.¹ The Challenge Grant Fund was established to support “projects dedicated exclusively to the advancement of academics.”² The enrolled bill permitted the Challenge Grant Committee to award matching funds for:

investments in research, scholarships, technology, endowed chairs, and investments in educational infrastructure, including new capital construction projects that conform with the university system campus master plan and space utilization study.³

¹ S.B. 2003, 2013 N.D. Leg., § 2 (appropriating \$29,000,000 in matching funds for the 2013-2015 biennium); S.B. 2013, 2013 N.D. Leg., §§ 5-10 (establishing the Challenge Grant Committee and the terms for the disbursement of matching funds).

² S.B. 2003, 2013 N.D. Leg., § 5; S.B. 2003, N.D. Leg., § 6.

³ S.B. 2003, 2013 N.D. Leg., § 10.

This definition would form the basis for N.D.C.C. § 15-10-53. The statute included a June 30, 2015, sunset date, and the NDUS was instructed to report on how the money was used.⁴

The 64th Legislative Assembly took up the Challenge Grant Fund during the 2015 legislative session. During hearings on H.B. 1151, concerns surfaced that Challenge Grant Fund match had been used to provide scholarships for athletes. This concern first appeared during a February 12, 2015, hearing before the Appropriations Committee, but the question was held over until more information could be gathered.⁵

The provision was next discussed during a committee discussion on February 16, 2015, after which the language permitting use of matching funds for capital construction projects was removed and the language at issue was added:

For purposes of Sections 15-10-48 through 15-10-52, projects dedicated to the advancement of enhanced academics include investments in research, scholarships, technology, endowed chairs, and investments in educational infrastructure, but *exclude scholarships intended solely for the benefit of athletics*, campus facility repair projects, and new capital construction projects. (Emphasis added.)⁶

The language in question was not altered during the 65th and 66th Legislative Assemblies.⁷

ANALYSIS

You ask whether and how to interpret the provision of N.D.C.C. § 15-10-53 which provides that state matching funds available from the North Dakota Higher Education Grant Fund may not be used for “scholarships intended solely for the benefit of athletics.” It is my opinion student athletes are eligible for matched academic scholarships, and therefore the state match may indirectly benefit athletics, so long as the basis for the scholarship is academic, rather than athletic.

The primary goal when interpreting a statute is to determine the legislative intent by first looking at the language of the statute.⁸ It is only appropriate to look beyond the words of

⁴ S.B. 2003, 2013 N.D. Leg.

⁵ *Hearing on H.B. 1151 Before the House Comm. on Approp.*, 2015 N.D. Leg. (Feb. 12).

⁶ *Hearing on H.B. 1151 Before the House Comm. on Approp.*, 2015 N.D. Leg. (Feb. 16); *Hearing on H.B. 1151 Before the House Comm. on Approp.*, 2015 N.D. Leg. (Feb. 20).

⁷ N.D.C.C. § 15-10-53.

⁸ *Nesdahl Survey'g & Eng'g v. Ackerland Corp.*, 507 N.W.2d 686, 688 (N.D. 1993) (citing, e.g., *Kim-Go v. J.P. Furlong Enters., Inc.*, 460 N.W.2d 694, 696 (N.D. 1990)).

the statute where the language is ambiguous.⁹ When interpreting a statute, the words are to be understood according to their ordinary meaning,¹⁰ based on their context.¹¹ Statutes must be interpreted “to give meaning and effect to every word, phrase, and sentence,” thus avoiding “constructions which would render part of the statute mere surplusage.”¹²

“Generally, the law is what the Legislature says, not what is unsaid.”¹³ “It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. . . . that it made no mistake in expressing its purpose and intent.”¹⁴ It is therefore inappropriate to “indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.”¹⁵

In N.D.C.C. § 15-10-53, the Legislature has created a distinction between scholarships which “advance[] . . . academics” and those which “solely . . . benefit . . . athletics.”¹⁶ A literal reading of this language would imply that, so long as academics receives any benefit from a scholarship program, it is eligible for state matching funds. However, in context, that reading is not sensible, as scholarships go to “pay[] tuition regardless of who the student is, if they are a student athlete or not.”¹⁷ All athletes at North Dakota’s institutions of higher education are both students and athletes.¹⁸ As a result, every scholarship includes an academic benefit, so a literal construction would render the language at issue surplusage.

In the absence of a literal construction, there are multiple plausible readings of the statutory language, as your question indicates. The statute could be read to restrict the state match from: 1) all scholarships which would be provided to student athletes;

⁹ *Nesdahl*, 507 N.W.2d at 689; N.D.C.C. § 1-02-39; see also N.D.C.C. § 1-02-05. (“When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”).

¹⁰ *Kim-Go*, 460 N.W.2d at 696 (citing N.D.C.C. §§ 01-02-02, 01-02-03).

¹¹ N.D.C.C. § 01-02-03.

¹² *Sorenson v. Felton*, 793 N.W.2d 799, 803 (N.D. 2011) (quoting *State v. Laib*, 644 N.W.2d 878, 882 (N.D. 2002)).

¹³ *Little v. Tracy*, 497 N.W.2d 700, 705 (N.D. 1993).

¹⁴ *Little*, 497 N.W.2d at 705 (citing *City of Dickinson v. Thress*, 290 N.W. 653, 657 (1940)).

¹⁵ *Dickinson*, 290 N.W. at 657.

¹⁶ N.D.C.C. § 15-10-53.

¹⁷ *Hearing on H.B. 1151 Before the Comm. on Approp.*, 2015 N.D. Leg. (Feb. 16) (Statement of Brady Larson).

¹⁸ *Hearing on H.B. 1151 Before the Comm. on Approp.*, 2015 N.D. Leg. (Mar. 10) (Statement of Lt. Gov. Drew Wrigley). (“A student athlete must be two things: a student and an athlete. Someone must pay and the scholarships go to pay solely for the academic component . . . those dollars are going completely to education, which every student athlete has to have. It has to be paid for like any other student.”).

2) scholarships that require athletic participation to be eligible; 3) scholarships where athletic participation is preferred; or 4) scholarships where the department recommending the scholarship is the athletics department. “When a statute’s language is ambiguous because it is susceptible to differing but rational meanings,” interpretation may be guided by “extrinsic aids, including legislative history, along with the language of the statute, to ascertain the Legislature’s intent.”¹⁹

Here, the legislative history of N.D.C.C. § 15-10-53 is illuminating. The first discussion of the athletics exclusion appeared during the February 16, 2015, hearing of the Education and Environment Division of the House Appropriations Committee. During that hearing, legislators discussed how to best address scholarships for athletes.²⁰

The athletics exclusion was proposed by Representative Mark Dosch as part of H.B. 1151, who served on the Challenge Grant Fund Committee during the previous biennium.²¹ Representative Dosch was concerned that NDUS institutions had submitted athletics-based scholarships, and expressed his belief that the Challenge Grant should not be used for athletics.²² Representative Bob Martinson, who also served on the Challenge Grant Fund Committee during the prior biennium, explained that the point of the athletics exclusion was to make clear that scholarships must be academically-based to be eligible for the match, though student athletes may receive an eligible scholarship.²³ The point of the Challenge Grant Fund was not to offer scholarships to entice athletes to attend an institution to play sports, according to Representative Martinson, but that there was no reason to bar a student athlete from receiving an otherwise-eligible scholarship.²⁴ Chairman Monson made the point that many athletics departments have their own foundation to fund scholarships.²⁵ After some debate about how to achieve this goal through legislative language, the athletics exclusion was approved by voice vote, in its current form, which was also approved by the full Appropriations Committee.²⁶

After H.B. 1151 was passed to the Senate, it was assigned to the Senate Education Committee, which held a first hearing on the bill on March 10, 2015. The bill was introduced by its primary sponsor, Representative Nathe, who agreed that students who

¹⁹ *State v. Laib*, 644 N.W.2d 878, 882 (N.D. 2002) (citing *State v. Rambousek*, 479 N.W.2d 832, 834 (N.D. 1992)).

²⁰ *Hearing on H.B. 1151 Before the House Comm. on Approp.*, 2015 N.D. Leg. (Feb. 16).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

are athletes should not be barred from receiving a matched scholarship.²⁷ Chairman Flakoll emphasized, based on contemporary consultation with Legislative Council, that scholarships based on academics would be eligible for the match, even if the student was also an athlete.²⁸

Lieutenant Governor Drew Wrigley, the chair of the Challenge Grant Committee, testified that the athletics exclusion would “discriminate against student athletes.”²⁹ When Senator Oban stated her reading of the language was that it did not bar student athletes from receiving eligible scholarships, Lieutenant Governor Wrigley agreed.³⁰ The written testimony of Lloyd Halvorson, Vice President of Academic and Student Affairs at Lake Region State College made a similar point.³¹ The Senate Education Committee later approved a “Do Pass” recommendation on H.B. 1151, with one unrelated amendment.³²

Later, when H.B. 1151 came before the Senate Appropriations Committee on March 27, 2015, Lieutenant Governor Wrigley responded to questions about the functioning of the athletics exclusion from Senator Heckaman, one of the Senators on the Challenge Grant Committee:

It’s a good question; I don’t know whether they would have to go through and call that out. I think the house languages said to exclude scholarships exclusively intended to promote athletics. It’s clear what the House was trying to do; I don’t think they accomplished it with their language but [our] committee has never sought to split hairs, it’s clear they don’t want athletic scholarships themselves named to go to the students. When you say exclusively for the promotion of athletics, that’s not what the scholarships are for so we could parse that. But we aren’t going to; if the legislative judgment is to extract those, we won’t be sponsoring programs through the athletic program.³³

Later, North Dakota State University President Dean Bresciani emphasized, similar to Lieutenant Governor Wrigley’s testimony before the Senate Education Committee, that making matched scholarships based on academics unavailable to students who happen to

²⁷ *Hearing on H.B. 1151 Before the Senate Comm. on Educ.*, 2015 N.D. Leg. (Mar. 10) (Statement of Rep. Nathe).

²⁸ *Hearing on H.B. 1151 Before the Senate Comm. on Educ.*, 2015 N.D. Leg. (Mar. 10).

²⁹ *Hearing on H.B. 1151 Before the Senate Comm. on Educ.*, 2015 N.D. Leg. (Mar. 10) (Statement of Lt. Gov. Wrigley).

³⁰ *Id.*

³¹ *Hearing on H.B. 1151 Before the Senate Comm. on Educ.*, 2015 N.D. Leg. (Mar. 10) (Written Statement of Lloyd Halvorson).

³² *Hearing on H.B. 1151 Before the Senate Comm. on Educ.*, 2015 N.D. Leg. (Mar. 11).

³³ *Hearing on H.B. 1151 Before the Senate Comm. on Approp.*, 2015 N.D. Leg. (Mar. 27) (Statement of Lt. Gov. Wrigley).

be in athletics would be “ironic,” as student athletes are some of the highest-performing students on campus.³⁴ House Bill 1151 received a “Do Pass” recommendation on April 10, 2015³⁵, with the athletics exclusion’s current language included. It then went into effect after passing the House and Senate on April 21, 2015, and was signed by the Governor on April 23, 2015.

Based on the foregoing, it is my opinion that the athletics exclusion was intended by the Legislative Assembly to prohibit the promotion of athletics programs to prospective athletes using Challenge Grant matching funds, but that scholarships which indirectly benefit athletics remain eligible for the state match. As a result, any scholarships which require participation in athletics or which are otherwise intended to entice athletes to attend an institution to play sports are not eligible for the state match under N.D.C.C. § 15-10-53.

It is my further opinion that the statute does not disqualify student athletes from receiving a matched scholarship based on that student athlete’s academic merits; nor does it bar the state match for a scholarship which is administered by the athletics department, provided that the scholarship is based on the student’s academics, rather than athletic participation.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.³⁶

³⁴ *Hearing on H.B. 1151 Before the Senate Comm. on Approp.*, 2015 N.D. Leg. (Mar. 27) (Statement of Dean Bresciani).

³⁵ *Hearing on H.B. 1151 Before the Senate Comm. on Approp.*, 2015 N.D. Leg. (Apr. 10).

³⁶ *See State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).