

**MINUTES  
of the  
FIFTY-NINTH MEETING  
of the  
PUBLIC SCHOOL CAPITAL OUTLAY OVERSIGHT TASK FORCE**

**December 1, 2016  
Room 317, State Capitol  
Santa Fe**

The fifty-ninth meeting of the Public School Capital Outlay Oversight Task Force was called to order by Senator John M. Sapien, chair, on December 1, 2016 at 10:14 a.m. in Room 317 at the State Capitol in Santa Fe.

**Present**

Sen. John M. Sapien, Chair  
Rep. Dennis J. Roch, Vice Chair  
Deputy Secretary Paul Aguilar, Public Education Department (PED)  
Randall Earwood  
Dr. Carl Foster  
Rep. Harry Garcia  
Reinaldo Garcia  
Kirk Hartom  
Rep. Larry A. Larrañaga  
Rep. James Roger Madalena  
Mike Phipps  
Acting Secretary Duffy Rodriguez,  
Department of Finance and Administration  
Sen. Benny Shendo, Jr.  
Sen. John Arthur Smith  
Sen. Mimi Stewart, designee for  
Sen. Mary Kay Papen  
Glenn Walters, designee for  
Rep. Don L. Tripp

**Absent**

Rep. Sharon Clahchischilliage  
Rep. Yvette Herrell  
Sen. Stuart Ingle  
T.J. Parks  
Stan Rounds  
Sen. Sander Rue

**Advisory Members**

Rep. Patricio Ruiloba  
Rep. James E. Smith  
Sen. Pat Woods

Rep. Eliseo Lee Alcon  
Sen. Daniel A. Ivey-Soto  
Rep. D. Wonda Johnson  
Sen. Howie C. Morales  
Sen. Cliff R. Pirtle  
Rep. Patricia Roybal Caballero  
Sen. William E. Sharer  
Sen. William P. Soules

## **Minutes Approved**

Because the task force will not meet again this year, the minutes for this meeting have not been officially approved by the task force.

## **Staff**

Raúl E. Burciaga, Director, Legislative Council Service (LCS)  
Sharon Ball, Researcher, LCS  
Jeff Eaton, Fiscal Analyst, LCS  
Michelle Jaschke, Researcher, LCS

## **Guests**

The guest list is in the meeting file.

## **Handouts**

Copies of all handouts are in the meeting file.

## **Thursday, December 1**

### **Cost of Ownership of New Mexico's Public School Facilities**

Katie McEuen, research and policy analyst, Public School Facilities Authority (PSFA), reported to the task force on costs associated with ownership of public school facilities statewide. In her presentation, she noted that New Mexico has 61 million square feet of public school facilities. Major challenges that the state faces with regard to those facilities include sufficient maintenance funding; rising replacement costs, which currently stand at approximately \$19.5 billion; large inventories of space; and the effectiveness, or lack of effectiveness, of facility maintenance.

Using National Research Council benchmarks, Ms. McEuen noted that the recurring annual cost to maintain a school facility is between one percent and three percent of the total cost of the building, including site costs. The replacement cost is approximately \$320 per square foot. Ms. McEuen reported that if all schools were built to the Public School Capital Outlay Council (PSCOC) adequacy standards, the number of districts having the capacity to meet spending benchmarks would increase from two of the state's 89 school districts to more than 50 districts.

Ms. McEuen presented a chart that showed average annual school district facilities expenditures in 2013 and 2014. The chart indicated that many districts with low assessed property tax valuations have facilities that are in as good, or better, condition than facilities found in school districts with higher assessed valuations. In addition, the chart showed that poverty in a district is not a statistically significant indicator of capital spending on a per-student basis.

### **Charter School Facilities Issues**

Rachel Gudgel, director, Legislative Education Study Committee; Deputy Secretary Aguilar; and Patricia Matthews, attorney with Matthews Fox, PC, gave a presentation on issues with charter school facilities.

Ms. Gudgel summarized the facility lease and ownership options available to charter schools. A charter school can:

- own its facility;
- secure a mortgage with a bank;
- be party to a lease purchase agreement;
- lease from a private party; or
- lease from a charter school foundation established for that purpose.

All of the presenters cited oversight of lease purchase agreements as an important issue. Ms. Matthews, who provides legal counsel to charter schools, stated that prior to January 2015, the PED's lease assistance submittal and approval process was working very smoothly, with approval turn-around times ranging between 30 days and 90 days. Since January 2015, however, requests for lease purchase agreement approvals have been rejected for a variety of reasons that, prior to that time, were considered "non-issues". The review process now takes a very long time, without explanation. The PED has changed the submittal, review and approval process several times in the past two years and this has caused a great deal of confusion and exacerbated the delays. Ms. Matthews said that her charter school clients do not object to the oversight but, rather, to the changing process.

Deputy Secretary Aguilar acknowledged that there has been a lack of predictability in the lease purchase review and approval process and that the PED is working to address the issue and make improvements. In response to a concern raised by task force members and PSFA director Robert Gorrell, Deputy Secretary Aguilar explained that the predictability, or lack thereof, in the review process is an indication that the PED opposes a standardized lease. The department prefers that a lease be modifiable to meet the particular needs and circumstances of each school. Deputy Secretary Aguilar indicated that the lease purchase agreement used by the Taos Academy Charter School, with minor changes, is the template that the PED would like charter schools to use going forward.

One of the concerns that the PED has with some leases submitted by charter schools is the "pledge and covenant agreement". Under the agreement, a charter school's lease payments are automatically withdrawn from the bank account that receives all of the school's state and local resources. The lease payments are withdrawn on a regular basis prior to a school's meeting its other budget needs. Deputy Secretary Aguilar stated that Ms. Matthews and PED staff are currently working together on resolving this issue. He hopes that within the next 30 days, the PED will have a template developed through a redline review process, which had not been done in previous collaborative attempts.

Deputy Secretary Aguilar noted that the PSCOC and PSFA require that a charter school facility, leased or otherwise, be at or better than the average weighted New Mexico Condition Index level, a standard that can be hard to achieve. He suggested that the task force consider easing this requirement. He also reported that the PSCOC has met and discussed the issue of charter schools meeting the deadline for moving into public facilities, but that the PSCOC is not ready at this time to bring a recommendation.

In discussion among the presenters and task force members, a member asked the panel to comment on former Senator Sue Wilson Beffort's bill (Senate Bill 333, 2013 regular session) that, had it not been pocket-vetoed, would have required the use of standardized leases by charter schools. Ms. Gudgel recalled that the bill had provisions addressing conflicts of interest between charter school lessees and charter school foundations (lessors) in addition to requiring the use of a standardized lease. Ms. Gudgel offered that standardized language would be helpful and should be given consideration. She commented that there are some unknowns that would need to be considered and defined and enforcement questions that would need to be clarified. Deputy Secretary Aguilar commented that the state should be cautious not to become too prescriptive in this area, as it may impinge on local control and possibly make lease terms difficult for property owners/lessors. A task force member commented that the bill may be revived, as these issues have not gone away.

A member asked the panel if the state would retain ownership of a facility if one of the 14 charter schools that is leasing from its foundations ends its operations. Deputy Secretary Aguilar replied that the state would not retain ownership and that ownership of the leased facility would not pass to the leasing charter school until the final lease payment is made. Ms. Matthews clarified that a charter school foundation is a private, tax-exempt entity created for the purpose of leasing to a charter school; it would be unconstitutional for the state to take possession of the property. A discussion ensued about the nature of ownership in regard to lease purchase agreements and using state revenue to make lease payments. Ms. Matthews said that it appears that the equity going into the property is the central issue. Ms. Gudgel offered that the panel members could work to propose changes to the relevant statutes to address the task force's concerns.

A member inquired about lease purchase agreements still awaiting approval at the PED and how long it would take to clear the backlog. Deputy Secretary Aguilar replied that he expects the backlog to be cleared in 45 days.

In response to a member's question on how many charter schools have closed, Deputy Secretary Aguilar said that five have closed recently but that he is not certain of the total number of closures over the years. The member inquired about the status of the International School at Mesa del Sol charter school whose campus property is under foreclosure. Ms. Matthews replied that the school operated in a portable building and that the school's lease with the property owner is a straight lease. The school hopes that the foreclosing developer will let the school remain at that location, but, if not, Ms. Matthews said the school would have to move the portable building off the site. Deputy Secretary Aguilar added that if the building is owned by the developer, the school might be evicted from the building as well.

A member asked about schools located on tribal land. Deputy Secretary Aguilar said that a common practice agreeable to developers, charter schools and tribal entities has been to enter into long-term leases of 45 years or more.

The chair thanked the panel and noted that, when the Charter Schools Act was passed, the issues surrounding facilities were not fully contemplated and that this discussion will continue. Ms. Gudgel said that the panel would come back with recommendations from the PSCOC.

## **Zuni Lawsuit Update**

Timothy Williams and Joshua Granata, assistant attorneys general, both from the Office of the Attorney General (OAG), gave an update on developments in the *Zuni* lawsuit.

Mr. Williams reported that there was a hearing held in Gallup, November 7 through 11, 2016, and that another hearing is scheduled for January 30 through February 3, 2017, with a possible additional week of hearings following that. He said the OAG requested a briefing upon conclusion of the final hearings and the case. He does not expect a judgment in the case for at least a couple of months, but when it is issued, it may offer guidance to the legislature on what to do, if anything.

Mr. Williams enumerated the principal complaints brought by the Gallup-McKinley County School District (GMCS), the current litigant, including that:

- rural areas are disadvantaged because of their smaller tax bases, especially when they include untaxable federal lands;
- the Albuquerque Public School District has a large enough tax base and can achieve certain economies of scale to be able to build amenity-filled school facilities that are far above adequacy;
- the GMCS is one of the few districts with schools located in isolated, rural areas that require teacherages to house school staff;
- the GMCS needs additional funds to bring utilities to isolated, rural school sites;
- the GMCS faces higher taxes because the Navajo Nation requires the district to pay a business activity tax for schools built on tribal lands;
- state funding is not being made available for some site security features;
- funding is limited for furniture, fixtures and equipment; and
- state funding is not available for computer equipment.

In response to a member's question, Mr. Williams reported that the school district called witnesses during the first hearing, including PSCOC members, current and former PSFA staff members and Ron Triplehorn, GMCS facilities director. The member asked if Mr. Williams has any experience in education, and he replied that he does not. The member commented that she was surprised that the state has assigned attorneys to argue cases when they have no experience in the field and that this was also true in two other state cases. The member asked if there could be a mixed judgment in the case, and Mr. Williams replied that it is a possibility. He said that in 1999, the judge in the *Zuni* lawsuit ordered a partial summary judgment; that is, some findings favored the litigants, while other items included in the complaint were not addressed. Mr. Williams said the court could either make a "global" ruling — such as one that declares something to be unconstitutional — or make a very narrow ruling. He said that it is his understanding that what the school district wants is complete uniformity in funding across all school districts or more uniformity in funding with the exception of teacherages. A member asked if during the proceedings a definition of "adequacy" had been agreed upon, and Mr. Williams replied that it had not.

Ms. Gudgel noted that, in the hopes of reaching a settlement, some PSCOC members and GMCS staff agreed to talk to the school district staff informally in the afternoon after the meeting.

A member asked if, in the event a negotiation is reached, there is any power vested in the attorney general to agree to a financial settlement with the school district or whether legislative approval would be required. Mr. Williams replied that, to the extent legislative staff have conversations with the school district staff, the discussions or agreements are not binding. He said that there may be administrative rule changes that can be done by the PSCOC, and local match waivers granted under certain circumstances, but that he believes a substantive solution will require legislative action.

A member expressed concern that the *Zuni* case has been going on for years, like the behavioral health lawsuit. Mr. Williams agreed and added that micro-managing by the court is also a concern, as is the level of "finality", if any, of any settlement that may be reached. Ms. Gudgel commented that, currently, there are two district lawsuits concerning operational funding and one lawsuit concerning capital funding and she does not want to characterize this afternoon's meeting as a settlement negotiation.

### **Proposed Legislation for Task Force Endorsement Consideration**

In a joint presentation by members and staff, the task force considered legislation for possible endorsement in the upcoming 2017 legislative session.

The first proposed bill (.204819.2) was presented by Antonio Ortiz, director, capital outlay and transportation bureaus, PED. Mr Ortiz explained that the bill changes the current Public School Capital Improvements Act calculations and distributions to allow allocations to be made in February — in the budget cycle, like other school budget funds — and changes the calculated distribution based on a school district's prior-year enrollment. He explained that current law uses same-year enrollment estimates to calculate the distribution and that this has caused unused funds to accumulate over an extended period — an inefficient use of state funds that would be corrected by using prior-year actual enrollment figures.

A member asked that a technical language change be made, changing "fortieth day" to "first reporting day" wherever the term appears in the section being amended so as to be consistent. A motion to approve the bill as amended was duly made and seconded, and the measure passed without objection.

Mr. Ortiz also presented the next proposed bill (.204821.3), which would require school districts to distribute certain shares of oil and gas tax revenues to charter schools. A motion duly made to adopt the same amendment suggested on the previous bill (change "fortieth day" to "first reporting day" wherever the term appears in the section being amended) was seconded, and the motion passed without objection.

Mr. Ortiz's third and final bill (.204820.1) would repeal a statute that requires districts to submit to the PED a list of proposed expenditures for an opinion of appropriateness. Mr. Ortiz explained that the funds used for those expenditures are local funds, and because the PED has no

authority to make an opinion of district-funded expenditures, the department recommends that the language be repealed. Several members expressed concern about repealing a statute without sufficient time to review. The task force took no action on the proposed bill.

There being no further business to come before the task force, the meeting adjourned at 12:24 p.m.