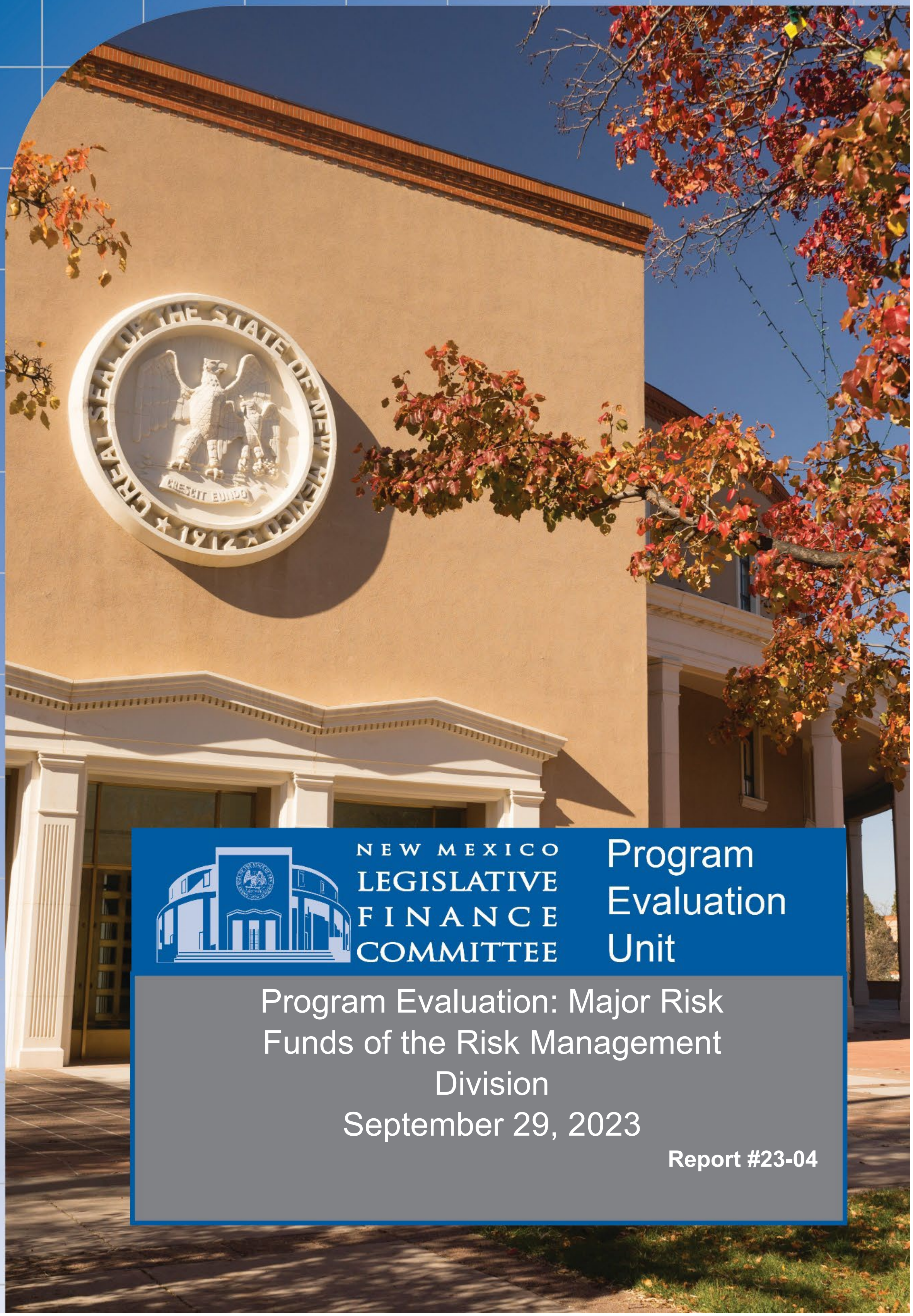

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LEGISLATIVE
FINANCE
COMMITTEE

Program Evaluation Unit

Program Evaluation: Major Risk Funds of the Risk Management Division

September 29, 2023

Report #23-04

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Charles Sallee
Director

September 29, 2023

Robert E. Doucette, Jr., Cabinet Secretary
General Services Department
Joseph M. Montoya Building
1100 S St Francis Dr. Room 1004
Santa Fe, NM 87505

Dear Secretary Doucette:

The Legislative Finance Committee (LFC) is pleased to transmit the evaluation, *Major Risk Funds of the Risk Management Division*. The program evaluation examined the operations and effectiveness of RMD in managing costs for self-funded insurance coverage, determined best practices in managing self-insured funds for public liability, property, and workers' compensation, and analyzed the impacts of recent statutory changes to the state's liability. An exit conference was held with you and your staff on September 21, 2023, to discuss the report's contents.

The report will be presented to the LFC on September 29, 2023. LFC would like plans to address the recommendations within this report from the General Services Department within 30 days of the hearing.

I believe this report addresses issues the LFC asked us to review, and hope the department will benefit from our efforts. We very much appreciate the cooperation and assistance we received from you and your staff.

Sincerely,

Charles Sallee, Director

Cc: Senator George K. Muñoz, Chair, Legislative Finance Committee
Representative Nathan Small, Vice-Chair, Legislative Finance Committee
Daniel Schlegel, Chief of Staff, Office of the Governor
Teresa Casados, Chief Operations Officer, Office of the Governor
Wayne Probst, Cabinet Secretary, Department of Finance and Administration
Joseph M. Maestas, State Auditor

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Risk Fund Management, Transparency, and Loss Prevention Could be Improved

Since the late 1970's New Mexico's Risk Management Division (RMD) within the General Services Department (GSD) has provided self-funded and private insurance coverage, loss prevention, dispute resolution services, and legal defense for state agencies and public bodies.

Today, however, the state's risk laws and policies are not optimized to cover or prevent escalating settlement costs. In recent years, certain changes in the laws defining the state's liability have impacted the predictability and regularity of both the number and severity of claims RMD is tasked with settling. Further, the escalating cost of property insurance and policies that RMD uses to collect revenues from agencies and other governmental entities have made the division's revenue collection mismatched to changing settlement needs.

Further, the state is not doing enough to help keep large settlements and other claims costs from occurring. The state (1) has no cap on liability coverage, which could otherwise help leverage smaller settlements; (2) is paying for increasingly costly property insurance while making relatively few claims against it; (3) has no formal or centralized loss prevention activity occurring; and, (4) has no outlined steps for remediating nor preventing future losses after a claim or settlement has been made.

The state also lacks adequate transparency measures to inform the Legislature and public when major losses occur. Because of a lack of statutorily required reporting and the limited information required by statute in that reporting, the Legislature and the public are left without a complete picture of the financial and legal consequences of state settlements. This lack of knowledge hamstrings the ability of the Legislature to hold agencies and other state entities accountable for losses.

Key Findings

State risk policies are not optimized to cover nor prevent escalating settlement costs.

The Risk Management Division has broad authority to approve high-dollar settlements, some of which are never reported.

Loss prevention activities, including mediation, are largely left to agencies.

Evaluation Objectives:

Examine the operations and effectiveness of RMD in managing costs for self-funded insurance coverage.

Determine best practices in managing self-insured funds for public liability, property, and workers' compensation funds.

Analyze the impacts of recent statutory changes to the state's liability.

Key Recommendations

The Risk Management Division should:

- Follow the rules in the New Mexico Administrative Code and only use a one-year delay in calculating incurred losses;
- Consider adjusting its rules to increase the cap for the loss development factor;
- Develop criteria for when special assessments will be made to preserve fairness and regularity;
- Consider the merits of ceasing to procure excess property insurance, given its escalating cost;
- Report to the Department of Finance and Administration and LFC quarterly payments on all claims over $25 thousand, including settlements and judgments from all risk funds by agency;
- Monitor and report on agency loss control efforts in its annual report; and
- Analyze mediation and claims data to target preventive training to departments and topics at higher risk for employee claims.

The Legislature should consider:

- Capping the maximum amount RMD can offer for settlements or adverse judgments;
- Clarifying statute with requirements for claims paydown before higher education institutions leave RMD coverage;
- Updating the risk management statute in Section 15-7 NMSA 1978 to require legislative, Attorney General, or Department of Finance and Administration approval of settlements over $500 thousand from the public property fund or the amounts specified in the Tort Claims Act and New Mexico Civil Rights Act from the public liability fund; and
- Updating the risk management statute in Section 15-7 NMSA 1978 to mirror Washington state's requirement that agencies investigate and report significant losses.

Background

The Risk Management Division (RMD) of the General Services Department (GSD) provides self-funded insurance coverage, loss prevention and control initiatives, dispute prevention and resolution services, and legal defense for state agencies and other covered public bodies such as the University of New Mexico health system. Rather than purchasing commercial insurance, New Mexico, like many state governments, sets aside resources to "self-insure" against liability suits, property damage, workers' compensation claims, and other potential losses. In running these self-insurance pools, RMD has the task of annually adapting the amount of premiums it collects from state agencies and other participating entities so it has enough money to cover any claims, settlements, or judgments it must pay. RMD must constantly balance the need to cover these costs with the potential of collecting too much in premiums—the result of which would be public funds sitting unspent in a risk fund when they could be put to otherwise beneficial use.

RMD's Bureaus
Finance
Workers' Compensation
Loss Control and Prevention
Property and Casualty
Alternative Dispute Resolution
Legal

New Mexico's RMD comprises 58 employees overseeing over $100 million in risk funds.

RMD is home to 58 of GSD's 256 employees. Thirteen of the 58 positions are vacant, resulting in a 22 percent vacancy rate. While this is near the state average, as of August 2023, two of the vacant positions are exempt leadership positions, including the division director (vacant since August 2021) and the Loss Prevention Bureau chief. As of the date of this publication, RMD reports it has hired a new division director who will begin work in October.

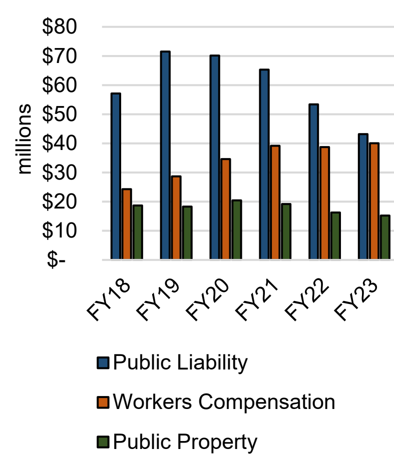
RMD also has a statutorily created advisory board (the Risk Management Advisory Board) charged with reviewing (but not approving) purchased insurance policies, services contracts, RMD rules, certificates of coverage, and investments made by RMD. The board has nine members, four appointed by the governor, and one named by the president of the New Mexico State Bar. A listing of current Risk Management Advisory Board members is in Appendix C.

RMD's three major self-insurance funds cover 10 major lines of coverage. RMD's largest fund, the public liability fund, covers tort liability insurance for state agencies and their employees. RMD subdivides liability coverage and premium setting into different coverage lines, such as civil rights, medical malpractice, and law enforcement liability (see Table 1.) RMD does the same for public property, wherein the public property reserve fund covers four separate lines of coverage, including automotive physical damage and blanket property coverage. Finally, the workers' compensation retention fund, provides only one line of coverage—workers' compensation for employees of state agencies or employees of covered educational entities.

Table 1. RMD's Major Risk Management Funds and Lines of Coverage

FUND	COVERAGE LINES
Public Liability Fund	General Liability
	Law Enforcement Liability
	Medical Malpractice
	Civil Rights
	Auto Liability
Public Property Reserve Fund	Auto Physical Damage
	Blanket Property
	Fine Arts
	Boiler
Workers' Compensation Retention Fund	Workers' Compensation

Chart 1. End of Year Fund Balance for RMD's Major Risk Funds



Source: SHARE

Table 2. Annual Losses and Premiums for RMD's Major Risk Funds

Fund	Coverage	Average Annual Incurred Losses	FY 24 Premiums
Public Liability Fund	General Liability	$3,363,704	$9,010,246
	Law Enforcement	$514,911	$920,040
	Medical Malpractice	$5,811,488	$10,383,933
	Civil Rights	$9,651,510	$17,245,261
	Auto Liability	$1,406,402	$2,235,978
Public Property Reserve Fund	Auto Physical Damage	$1,254,925	$1,645,098
	Blanket Property	$3,655,108	$11,445,230
	Fine Arts	$0	$220,300
	Boiler	$0	$243,606
Workers' Compensation Retention Fund	Workers Compensation	$12,673,921	$24,142,346
	Total	**$38,331,969**	**$77,492,038**

Source: RMD FY24 Allocation Tables

Note: The difference between losses and premiums includes approximately $26 million to account for loss trends and inflationary adjustments, $8 million for RMD and GSD operational expenses, and $5 million for excess insurance (primarily property).

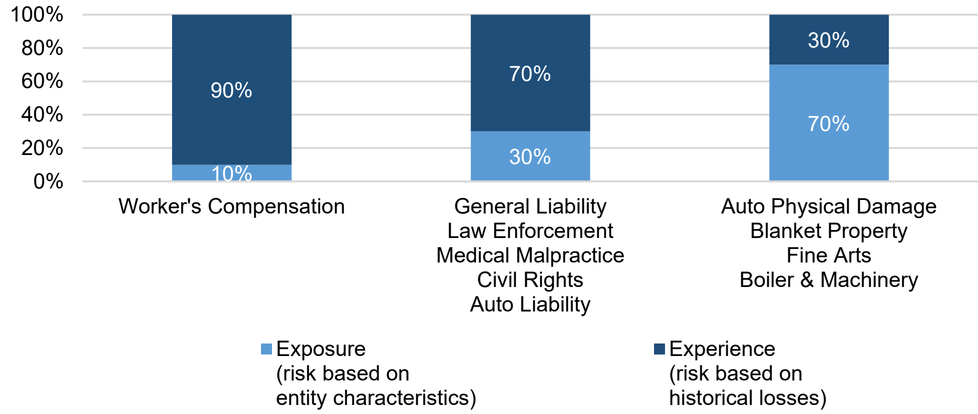
RMD sets agency insurance premium rates for the different lines of coverage to reflect respective risks. Premiums are the amount of money agencies and other covered entities pay into the risk funds annually to cover the costs of losses out of the fund. RMD's primary goal in setting premiums is to determine rates that will provide sufficient funds to pay expected losses and expenses. State statute grants this responsibility to RMD in Section 15-7-2 NMSA 1978. To predict the risk of insuring an entity, RMD considers both an agency's characteristics (exposure) and an entity's historical losses (experience). Exposure represents similar predicted risks across ensured entities. For example, an agency's auto liability and physical damage exposure levels are derived from the number of vehicles it owns and leases. Experience units represent an entity's variation from these predicted risk levels and incentivize entities to improve loss control activities to lower their premiums by reducing the likelihood of claims being filed. RMD calculates experience units from an agency's paid and outstanding losses from five prior consecutive fiscal years. Agencies with fewer than three years of experience have premiums based solely on exposure units.

Figure 1.

$$\text{Entity premium} = \overbrace{\text{Risk group exposure premium} \times \frac{\text{\# Entity exposure units}}{\text{\# Risk group exposure units}}}^{\text{Exposure: Risk based on characteristics}} + \overbrace{\text{Risk group experience premium} \times \frac{\text{\# Entity experience units}}{\text{\# Risk group experience units}}}^{\text{Experience: Risk based on historical losses}}$$

RMD weighs predicted risks for each line of insurance differently. The RMD director determines how to weigh exposure and experience units in calculating premiums for each insurance line. For lines of insurance coverage with losses driven by the liability of the insured or on-the-job accidents, experience (risk based on historical losses) is weighted more heavily. Agencies have more control over these risks, and weighing historical losses heavily incentivizes mitigating losses. For lines of coverage with losses driven by damage to the insured party themselves, exposure (entity characteristics) is weighted more heavily. These losses are further outside the control of an agency, so expected risk based on an entity's characteristics may be a more appropriate prediction of risk than historical losses.

Chart 2. The weight of an agency's characteristics and historical losses varies among lines of insurance.



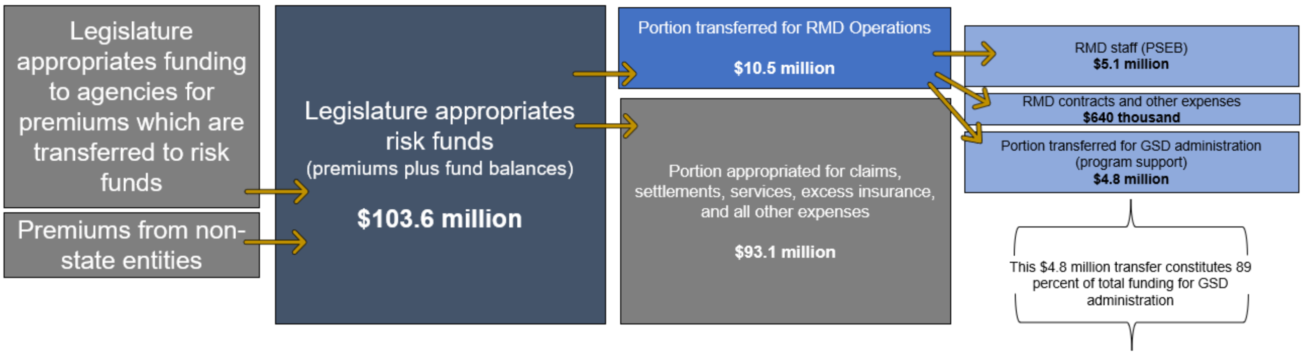
Source: NMAC 1.6.2.10

In addition to providing self-insured coverage, RMD also buys commercial insurance policies for the state or specific agencies in instances where it is cost-beneficial. RMD supports and manages 62 "excess insurance" policies, costing $10.4 million in premiums in FY23. Over half of that cost is for property coverage for the state for losses over $500 thousand, but less than $550 million. RMD uses self-insurance to cover losses up to $500 thousand and over $550 million. Other smaller lines of excess insurance that RMD procures for the whole state include coverage for boiler and equipment breakdown, fine arts, and liability coverage for vehicles going to Mexico. All other lines, costing a total of approximately $4.4 million, are relatively niche and procured by RMD for specific agencies, which then pass through the premium costs back to RMD. These lines of coverage include rail property and liability for the Rail Runner, cybersecurity, financial fraud, and storage tanks for other entities that need and elect to pay for such coverage.

The agency premiums that provide revenue to the risk funds also fund the operations of RMD and much of GSD's administration.

RMD is authorized in law to charge agencies and other participating entities for insurance costs to reflect each agency's risks. For state entities, the Legislature appropriates funds to the agencies to cover RMD's charges. Functionally, this means RMD's operations and the division's risk management funds are appropriated through a series of transfers in the General Appropriation Act.

Figure 2. Risk Management Funds and RMD Operations Transfers in House Bill 2 (FY24)



FY	Risk Management Funds Total	Risk Management Operations Total*	RMD Staff (PSEB)	Contracts and Other Expenses	GSD Administration (Program Support)	*Portion of Total GSD Administration*
2020	$78,776.7	$8,323.0	$4,149.0	$501.5	$3,673.0	*85%*
2021	$83,354.0	$8,876.1	$4,142.4	$807.6	$3,926.1	*86%*
2022	$56,801.3	$9,341.3	$4,323.7	$580.3	$3,857.0	*84%*
2023	$102,007.0	$9,847.6	$4,692.2	$539.7	$4,076.0	*85%*
2024	$103,563.5	$10,526.7	$5,066.0	$639.5	$4,821.2	*89%*

Source: LFC Files

The state's financial liability for lawsuits is defined in state and federal law, and state law has changed significantly in the last few years.

Lawsuits and claims against New Mexico's governments are limited in both scope and amount of damages that any plaintiff may be awarded under state law, though the details of each are determined by the specifics of the claim and under what part of state statute or U.S. law they fall. The two primary pieces of New Mexico statute related to claims against the government are the **New Mexico Tort Claims Act** and the **New Mexico Civil Rights Act.**

In addition to state law, individuals could bring cases against the state claiming deprivation of federal civil rights as granted under the Bill of Rights of the U.S. Constitution, which contains many of the same provisions as the New Mexico Bill of Rights. In this case, the federal law governing violations of U.S. Constitutional rights by state governments (42 U.S.C. § 1983) does not cap the amount of damages a plaintiff might be awarded, nor does it limit the use of punitive damages.

The New Mexico Tort Claims Act covers the state's "sovereign immunity," which prevents anyone from bringing lawsuits against the state unless they fall under specific exceptions. The exceptions are bodily injury, wrongful death, or property damage caused by the negligence of any public employees while acting within the scope of their duties in

- Operation or maintenance of a motor vehicle, aircraft, or watercraft;
- Operation or maintenance of a building, public park, machinery, equipment, or furnishings;
- Operation of an airport;
- Operation of public utilities and services, including ground transportation;
- Operation of a hospital or medical facility;
- Providing healthcare services; and
- Construction or maintenance of a bridge, culvert, highway, roadway, street, alley, sidewalk, or parking area.

There is a final exception for personal injury, death, or other wrongs committed specifically by law enforcement officers.

Section 41-4-19 NMSA 1978 of the Tort Claims Act sets out the maximum liability for damages in any single action against a government or public employee, including medical malpractice, as

- $200 thousand for real property damage or destruction;
- $300 thousand for all past and future medical and medically related expenses; and
- $400 thousand for all other damages other than real property and medical or medically related expenses as permitted under the Tort Claims Act.

Total liability for expenses other than medical expenses for any single occurrence cannot exceed $750 thousand, and there is no provision for attorney's fees. The act also prohibits explicitly (1) exemplary damages, (2) punitive damages, and (3) interest on damages before judgment.

New Mexico's 2021 Civil Rights Act more than doubled the damages that the state could be liable for under state civil rights claims. In contrast to the Tort Claims Act, 2021's enacted **New Mexico Civil Rights Act** capped damages for civil rights cases where a person claims that any public body deprived them of any "rights, privileges or immunities" secured by the Bill of Rights of the New Mexico Constitution. Before the enactment of the New Mexico Civil Rights Act in 2021, individuals could only sue for deprivation of rights under the New Mexico Constitution if it related to law enforcement activities. Damages under the Civil Rights Act were capped at $2 million per claimant, which, unlike the Tort Claims Act, includes recovering attorney fees. The $2 million cap is also to be statutorily adjusted upward for inflation each year. GSD reported the cap level for FY24 is $2.29 million.

The remedies prescribed in the Civil Rights Act and Tort Claims Act are separate, and monetary damages provided for in the New Mexico Civil Rights Act can be in addition to others awarded under other parts of the law. This means that individuals may bring claims under both the Tort Claims and New Mexico Civil Rights Acts and that total damages for a single occurrence could be over $3 million.

The impacts of the New Mexico Civil Rights Act have yet to be measured. In the 2020 first special session, a bill created the Civil Rights Commission (CRC) to evaluate and make recommendations to create a right of recovery for victims of state constitutional violations by a public body. CRC recommended establishing a state Civil Rights Act that would allow victims to collect compensatory damages and attorney fees in court and would specify that qualified immunity would no longer be a defense to such claims. The result of the recommendations were enacted in the New Mexico Civil Rights Act adopted during the 2021 regular session.

CRC's final report noted costs to state agencies might increase by enacting the Civil Rights Act, though there was disagreement on the extent of the additional liability. In the act's fiscal impact report, GSD estimated it would increase claims costs to the public liability fund by $4.5 million annually through:

- Increasing the number of civil rights cases by 35 percent, from 284 cases per year to 384;

- Increasing the annual total cost of civil rights case settlements and judgments from $3.6 million to $6.6 million to reflect the increase in cases and a projected 35 percent increase in the average settlement or judgement amount;
- Increasing the cost of defense of civil rights claims by 35 percent from $3 million to $4 million per year; and
- Increasing plaintiff attorney's fees to at least $500 thousand per year.

Due to the cost uncertainty of the act, CRC also recommended establishing "a monitoring mechanism for studying the fiscal impact and effectiveness of loss prevention measures related to the New Mexico Civil Rights Act over three years. Such a lookback would ensure the Legislature determines whether to change the act based on actual data." However, no impact assessment has occurred in the two years since the Civil Rights Act was enacted. At the October 2022 Risk Management Advisory Board meeting, a board member inquired if there was a way to track the case impact of the Civil Rights Act. In response, the RMD director stated they were not tracking it and that their claims software did not have that capability. The GSD Secretary stated the department did need to plan for future lawsuits, though. At a subsequent April 2023 board meeting, RMD staff reported that over one-third of the active open claim files at the agency were civil rights claims (1,021 of the 2,866 claims).

Claims, settlements, and spending from property and liability funds have increased in recent years, while premiums have decreased.

See Appendix D. for five-year liability and property losses for the largest agencies.

In FY23, the projected financial position of the public liability fund did not meet performance targets, and two of RMD's three major funds experienced losses that exceeded premium revenues. RMD determines the soundness of the funds by dividing projected assets by outstanding liabilities. However, projected assets need not exceed outstanding liabilities because liabilities are paid out over time and GSD's Risk Management Advisory Board recommends projected assets are at least 50 percent of outstanding liabilities. Only the workers' compensation fund balance has remained steady over the past five years, with its projected financial position consistently meeting performance targets, and it has earned premiums exceeding outstanding liabilities.

Claims against the public liability fund are both numerous and large, driving overall claims costs across the state. Claims out of the public liability fund drive the overall costs out of the three RMD risk funds. Within RMD's public liability coverage, civil rights and medical malpractice are the costliest type of claims. While the increasing number of medical malpractice claims is of concern, the overall losses per medical malpractice claim are capped at $1.05 million each under the Tort Claims Act, and the average cost per claim at the University of New Mexico (UNM) hospital (the largest source of malpractice claims) is less severe than national benchmarks ($219 thousand each nationally compared to $178 thousand each at UNM Hospital over the FY18 to FY22 span). In contrast, civil rights claims can potentially have unlimited losses as long as they could be tried as federal civil rights violations. That makes the growth in civil rights claims after FY19 particularly concerning.

Table 3. Number of Claims, Average Cost Per Claim, and Total Costs for Selected Lines of Coverage

		Public Liability Fund					Public Property Fund		Workers' Comp Fund
		General Liability	Auto Liability	Civil Rights	Medical Malpractice	Law Enforcement	Blanket Property	Auto Property	
Number of Claims	FY18	588	81	222	46	22	100	170	1,107
	FY19	604	93	221	43	33	123	142	1,090
	FY20	680	54	295	46	50	79	138	959
	FY21	415	32	256	125	41	99	156	670
	FY22	411	18	262	110	24	98	135	708
AVERAGE COST PER CLAIM FY22		*$12,556*	*$30,238*	*$46,089*	*$130,250*	*$31,172*	*$50,639*	*$7,664*	*$21,848*
TOTAL PAID OUT in CLAIMS AND OTHER EXPENSES FY18 to FY22		**$175,668,444**					**$47,626,799**		**$64,055,734**

Source: FY22 Actuary Report and Audits

RMD's actuary estimates potential outstanding liabilities for FY23 of over $47 million in civil rights claims, which aligns with past claim payout levels. More than most other types of claims against the state, civil rights claims can result in exorbitant costs due to the multi-million-dollar payouts allowed under the New Mexico Civil Rights Act and potentially unlimited awards if the case is tried as a violation of federal civil rights. As such, some of the biggest cases against the state have resulted in large settlements that include not only payouts to the plaintiffs but also settlement terms that significantly dictate state government operations. These include the 1977 *Duran* prison conditions case against the Corrections Department ($13.8 million), the 1989 settlement of the *Jackson* lawsuit against the Department of Health ($11.3 million) over treatment of the developmentally disabled, and the 2018 settlement of the *Kevin S.* foster care lawsuit against the Children, Youth and Families Department ($7.3 million.)

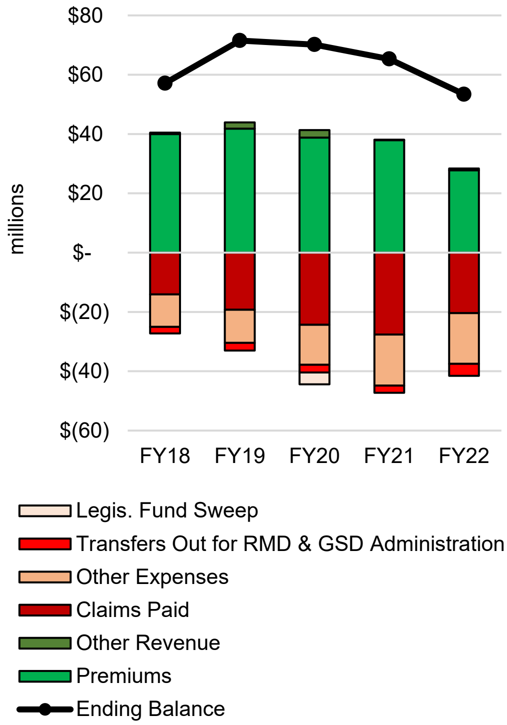
Between 2018 and May 2023, the state paid out on 849 civil rights claims totaling $46.6 million. Another 321 claims were closed with no payouts occurring. In addition to *Kevin S.,* four other civil rights claims totaled more than a million each over that time, another five had payouts between $500 thousand and $1 million, and the average claim was $54,832. As of May 2023, there were 672 civil rights claims open against the state. Over a third of those cases (225) are against the Department of Corrections, and another 71 are against CYFD.

Table 4. Civil Rights Claims with Payments over $500 Thousand, January 2018 to June 2023

Date Claim Opened	Agency	Claimant(s)	Case Name / Subject	Total Costs
4/19/2023	NMSU	Willian Benjamin, Willian Benjamin, Jr., & Shakiru Odunewu	Alleged sexual assault by basketball teammates	$8,000,000
10/9/2018	Children, Youth and Families	Kevin S.	Due process violations	$7,301,684
3/5/2020	Corrections	Lisa Curry	Alleged rape committed by correctional officer	$2,232,753
5/7/2020	Children, Youth and Families	I.G.B. (minor)	Alleged sexual abuse of children in foster care	$1,165,982
12/13/2018	Corrections	Keith Richard Kosirog (estate)	Alleged failure to address mental health after inmate committed suicide while a pretrial detainee at the CNM Correctional Facility	$1,161,304
1/23/2018	Public Safety	Monica Martinez Jones	Former employee alleging discriminatory and retaliatory behavior	$1,104,681
8/25/2020	Public Safety	Leanne Gomez	Former employee alleging discrimination and harassment	$712,153
6/29/2018	Public Defender	Heather LeBlanc	Former employee alleging gender pay discrimination	$611,841
10/29/2020	Corrections	Britney Encinias	Alleged rape committed by correctional officer	$597,632
2/4/2019	Corrections	Adonus R. Encinias (estate)	Alleged failure to address mental health needs after inmate committed suicide while at the CNM Correctional Facility	$515,422
5/8/2019	3rd District Attorney	Rebecca Duffin, Kelly Rossi, & Cassandra Brulotte	Alleged gender discrimination, disparate pay, and workplace retaliation	$513,795

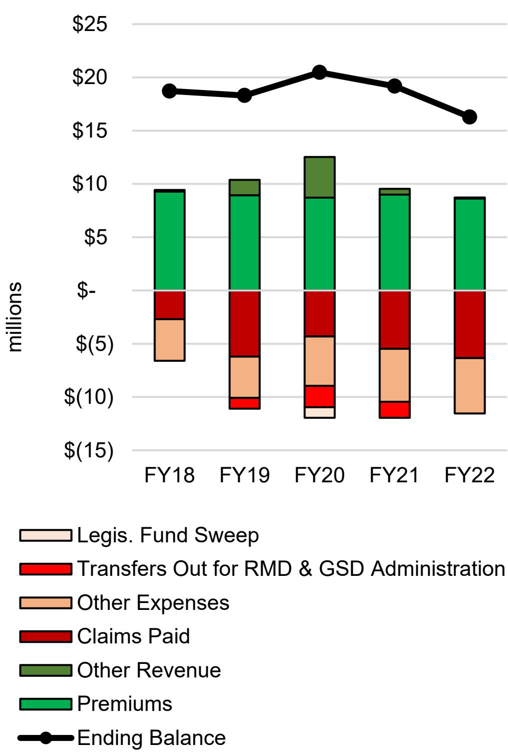
Source: RMD Loss Runs and Sunshine Portal

Chart 3. Major Cash Flows and Fund Balances of the Public Liability Fund



Source: GSD Audits and SHARE

Chart 4. Major Cash Flows and Fund Balances of the Public Property Reserve Fund



Source: GSD Audits and SHARE

The public liability fund has $16.7 million less in cash balances than it did two years ago, and long-term liabilities against the fund left it in a negative $38 million net position at the end of FY22. Recent reporting from GSD indicates this negative net position (the potential outstanding costs of claims on the books versus the cash assets on hand) is worsening. For the fourth quarter of FY23, projected long-term liabilities against the public liability fund were $105 million on assets of $44 million. In essence, a large negative net position means that the fund may experience solvency issues over the next two- to five years unless premiums are increased or the amount of claims paid out decreases.

By the fourth quarter of FY23, projected assets of the public liability fund fell to 42 percent of outstanding losses—below the 50 percent target. Following several years of public liability fund projected assets exceeding outstanding liabilities, the projected financial position of the fund began to fall in FY20. Now, the current ratio of projected assets to outstanding liabilities is below that of years before the Covid-19 pandemic. Unsurprisingly, the fund's loss ratio, or claims divided by premiums, did not meet performance targets in FY22 or FY23, with claims outpacing premium earnings. See GSD's fourth quarter performance report card in Appendix B. for more information.

Although the public property fund's projected financial position continues to meet agency targets, the fund has a significant level of nonclaims expenses. The projected financial position of the public property fund has exceeded 200 percent over the past decade—well above its targets which have ranged from 50 percent to 80 percent. However, since FY20, projected assets dropped from 736 percent of outstanding losses to 227 percent, primarily due to other, nonclaims expenses such as the cost of private excess insurance. From FY21 through the first half of FY23, premiums earned were less than total expenses, resulting in projected loss ratios that did not meet GSD's target of less than 1.0.

In contrast to the public liability or public property funds, the workers' compensation fund balance is at a five-year high.

Since FY18, workers' compensation premiums and service fees collected have exceeded claims paid. Overall, the end-of-year balance for the workers' compensation fund has increased annually since FY18. The end-of-year fund balance in FY23 was approximately $40.1 million. The fund balance has grown as premiums and service fees received have exceeded payments for claims.

State Risk Policies are not Optimized to Cover nor Prevent Escalating Settlement Costs

Though very large settlements, claims payouts, and judgments against the state are relatively rare, they tend to make up the lion's share of expenses, particularly for the public liability fund. Though in different ways for each fund, RMD rules and policies governing premium allocation, loss calculation, and procuring excess insurance have all contributed to the state not being optimally equipped to deal with these infrequent but very large claims.

In conflict with rule, RMD uses a two-year lag in considering past losses to set current premiums, which creates an imbalance between the fund's loss liabilities and the revenue collected to cover those losses.

RMD rules (NMAC 1.6.2.9) state, "the total premiums for a given line of coverage for a particular risk group shall be the annual average total experience for that risk group and line of coverage *for the five most recent consecutive coverage years, disregarding the current year*." However, in practice, RMD disregards the two most current years—so the FY24 premiums were calculated based on losses that occurred from FY17 to FY21.

The public liability fund paid out $8 million for a New Mexico State University (NMSU) settlement in FY24, but NMSU will not be repaying that loss in the form of increased premiums until FY26.

In June 2023, New Mexico State University settled two large civil rights claims for a total of $8 million—almost as much as the five-year average of civil rights losses for the entire state ($9.7 million). That loss was paid out of the public liability fund at the beginning of FY24, but because of RMD's premium calculation methodology, the loss will not be able to begin to be recouped in the form of increased premiums until FY26.

For most claims, using a two-year lag to incorporate losses into premiums is not an issue because reporting from RMD's actuary reveals that only a little over half of civil rights and general liability losses are even incurred by the two-year mark. However, if a large settlement occurs the year a claim is made, the risk fund would be hit with a major expense that it could not fill with increased premiums until two years later. See the sidebar of a recent large settlement from NMSU as an example.

Accelerated civil rights settlements like NMSUs are not an uncommon strategy for governments to take in particularly charged cases, as they avoid potentially uncapped damages that could be awarded in court and tend to keep the focus of the remedy on a single incident instead of changing an agency or government practices.

RMD rules capping a loss development factor further limit the division's ability to raise premiums based on actuarily determined future claims. The difference between actual past and projected future losses is used to create a "loss development factor," which is worked into RMD's premium formula. RMD in rule (1.6.2.9. B. NMAC) caps that loss development factor such that premiums may only be increased up to 40 percent in a year, even if forthcoming losses indicate more premiums are necessary. This cap may need to be increased to account for potentially large settlements identified by the actuary (for example, in FY24, without the cap, the increase in premiums would not be 40 percent more, but instead 70 percent more.)

Defendants can use insurance to gain leverage in settlement negotiations with overreaching plaintiffs.

"Imagine that Plaintiff is suing Defendant for $100 million, and Defendant has an adverse judgment policy of $90 million in limits above a $10 million retention. […]

If Plaintiff comes to Defendant and offers to settle for, say, $50 million, Defendant can tell Plaintiff, "Thanks for your offer, but we have an insurance policy in place that will pay out the full amount of any judgment up to $100 million, and we would only be on the hook for $10 million of any amount that is awarded to you, so while we are open to talking about a reasonable settlement, any offer above $10 million plus our anticipated legal costs is a non-starter for us." In this way, adverse judgment insurance can be a powerful tool in calling a Plaintiff's bluff as to whether it is willing to actually take a case all the way through to trial (which few overreaching plaintiffs are willing to do) and can be extremely useful in effectuating settlements within a policy's retention.

Source: Aon Litigation Risk Insurance: A Tool That Should Be in Every Lawyer's Toolkit

Table 5. Examples of Per-Claim Liability Limits Covered by Self-Insurance

State	Limit
New Mexico	**Unlimited**
Washington	$10 million
Ohio	$2 million
Maine	$400 thousand
Oklahoma	$125 thousand

Source: Ohio Dept. of Administrative Services, Washington State Dept. of Enterprise Services, Oklahoma Statute 260:70-5-1 (7), and Maine Office of the State Controller

RMD's provision of unlimited liability coverage diffuses the impact of settlements and disincentivizes the prevention of similar future losses.

Unlike most private insurance, statute requires RMD to provide coverage for "any risk not insured," meaning for unlimited amounts of damages for workers' compensation, law enforcement liability, civil rights, auto physical damage, and other property. This provides comprehensive coverage for state agencies and other entities, even in the face of catastrophic property loss or "nuclear" civil rights payouts stemming from federal civil rights violations.

However, providing unlimited coverage also has several downsides for the state's risk funds. For one, the absence of coverage limits can introduce a level of morale hazard, encouraging less careful behavior by the insured agency, which feels little to no penalty for its risky actions.[1] This is especially true when agencies do not feel the impact of losses in the form of increased premiums until two years after the loss occurred, and often, the increased premiums are covered in the normal budget-making process. The hazard is further amplified when, as discussed later, large settlements and losses are not made public and when there are little to no after-loss prevention activities occurring as a result.

Additionally, where there is no coverage limit, plaintiffs suing the state might be less willing to settle for reasonable amounts when they know RMD will cover any judgment quickly, potentially leading to higher settlement demands and even more protracted and expensive litigation. On the other hand, if the Legislature established limits to coverage for these lines of insurance, RMD's attorneys would have leverage in settling for amounts at or under the limit (see sidebar from the insurance company Aon on the leverage that can be gained from insurance limits). Establishing insurance limits would not eliminate the risk of judgments or settlements at prices beyond the limit, but it would require an additional appropriation by the Legislature to the agency to cover the difference, which would, at a minimum, slow the availability of damages payments to the plaintiffs and their attorneys, making pursuing them likely less attractive. Some other states, including Washington, Ohio, Maine, and Oklahoma, have taken this approach, providing liability coverage for civil rights settlements only up to a certain limit, such as those delineated in the state's Tort Claims Act.

The RMD director has the authority to make special assessments that could be used in lieu of an umbrella cap on coverage. The risk management statute (Section 15-7-2 NMSA 1978) and RMD rules (1.6.2.11 NMAC) give the RMD director broad authority to set premiums at any level and to augment any entity's premium to bring it to meet the level of risk covered. The division already uses this authority to incorporate RMD and GSD's operational costs into the premium calculations. As an alternative to a statutory liability cap, RMD could exercise its authority to make special assessments, or an out-of-cycle premium levy, to agencies to cover claims over certain levels. If RMD chose this, the division may want to consider promulgating formal rules to set the level beyond which it would make such a

[1] "Morale hazard" and "moral hazard" both describe a change in behavior related to risk, where moral hazard implies certain malice and intent, while morale hazard is the result of a subconscious indifference to risk.

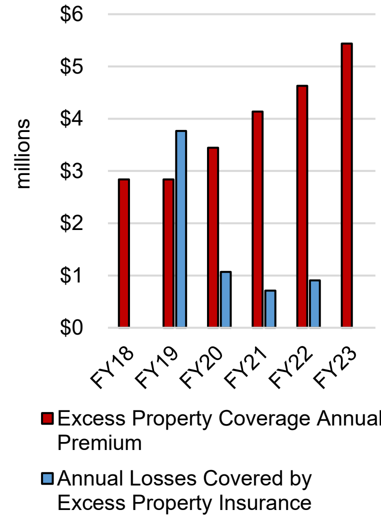
special assessment to create a common understanding and a level of fairness among insured entities.

The cost of RMD's excess property insurance nearly doubled over the last five years and it now costs three times as much as the average annual claims against it.

RMD charges state agencies and other participating entities annual property insurance premiums, including for automotive physical damage. RMD then covers claims up to $500 thousand and over $550 million. RMD procures excess insurance to cover claims between $500 thousand and $550 million. The cost of that excess property insurance more than doubled from $2.8 million to $5.4 million in the five years between FY18 and FY23. Over the same time, payments from the excess insurance policy never exceeded $3.7 million in a single year and have averaged $1.4 million per year. At the end of FY23, GSD reported only $987.2 thousand in total excess property insurance recoveries.

Nationally, the commercial property insurance market has had increasing rates for the past five years due to several factors, including the growing frequency and intensity of natural disasters and the increased cost of property replacement and repairs. As such, the cost of commercial property insurance for the state is likely to continue to climb.

Chart 5. Annual Premiums and Losses for RMD's Excess Property Insurance



Note: Losses for FY23 are yet to be determined.
Source: RMD

Higher education institutions can easily leave RMD coverage for the state's Public School Insurance Authority and, in doing so, leave RMD and the state with uncompensated losses.

The New Mexico Tort Claims Act requires RMD to insure governmental entities and restricts entities from purchasing alternative insurance (41-4-20 NMSA 1978). However, in 2015, the New Mexico Attorney General's Office issued public opinion stating this statute's more general nature is superseded by the more specific New Mexico Public School Insurance Act, which allows higher education institutions to purchase liability insurance from the Public School Insurance Authority (NMPSIA).

While higher education institutions wishing to leave NMPSIA have requirements to pay back any excess losses as a term of their exit, no such requirement exists of institutions leaving RMD. Under the administrative code, higher education institutions that wish to join NMPSIA must submit an application, including an employee census and at least three years of loss reports and claims. Institutions must pay an excess premium deposit equal to 10 percent of the total annual first-year premiums upon acceptance. The institution may only exit the authority on expiration of the carrier agreement and in no circumstances with less than three years of membership. If these terms are broken, the institution forfeits any return premiums or reserves and must pay the authority any incurred claims or administrative expenses in excess of premiums paid. In addition, the institution shall pay any sum determined necessary by the authority to hold safe and harmless all other members of the authority. When terms are followed, the authority's board votes to accept the institution's resignation.

The administrative code provides similar requirements regarding the participation of higher education institutions in GSD's unemployment compensation reserve fund, including an application with unemployment claims data for the previous five years and an agreement to remain in the fund for the subsequent five years. However, penalties for breaking this requirement are not enumerated.

Since FY19, three higher education institutions opted to move from RMD to NMPSIA, leaving RMD with over $3.1 million in losses. Eastern New Mexico University and Western New Mexico University both left GSD's risk management pool in FY19 and joined NMPSIA the following year. New Mexico Highlands University did the same in FY20. In the last two years of participation at GSD, Eastern had $1.2 million worth of liability and property losses, Western had $1 million, and Highlands had $930.4 thousand. Since GSD does not incorporate losses into its premium calculations until two years after they occur, none of these losses were offset by premium payments to GSD before the institutions left for NMPSIA.

Recommendations

The Risk Management Division should follow the rules in the New Mexico Administrative Code (NMAC) and only use a one-year delay in calculating incurred losses.

The Risk Management Division should consider adjusting its rules to increase the cap for the loss development factor.

The Risk Management Division should develop criteria for when special assessments will be made to preserve fairness and regularity.

The Risk Management Division should consider the merits of ceasing to procure excess property insurance, given its escalating cost.

The Legislature should consider capping the maximum amount RMD can offer for settlements or adverse judgments.

The Legislature should consider clarifying statute with requirements for claims paydown before higher education institutions leave either RMD coverage.

RMD has Broad Authority to Approve High-Dollar Settlements, Some of Which are Never Reported

Transparency is crucial in settlements against the government for reasons of accountability and deterrence because the knowledge that settlements will be scrutinized and made public encourages government entities to act in accordance with the law and regulations. But because of the lack of statutorily required reporting, the limited information required by statute in that reporting, and voluntary omissions of publicly posted data, the Legislature and the public are left without a complete picture of the financial and legal consequences from state settlements.

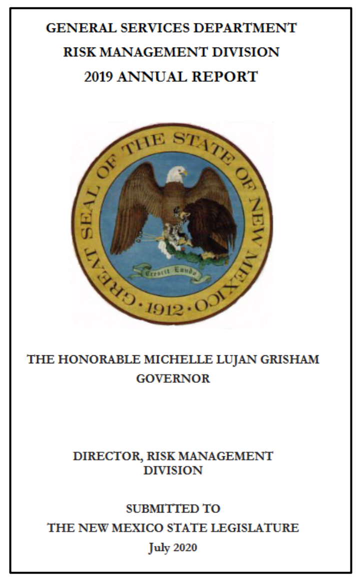
Section 15-7-3 C. NMSA 1978

"The [RMD] director shall report findings and recommendations, if any, for the consideration of each legislature. The report shall include the amount and name of any person receiving payment from the public liability fund of any claim paid during the previous fiscal year exceeding one thousand dollars ($1,000). The report shall be made available to the legislature on or before December 15 preceding each regular legislative session."

RMD has not completed statutorily required annual reporting to the Legislature since 2020.

RMD has long been required in Section 15-7-3.C NMSA 1978 to annually report to the Legislature the name of any person receiving payment from the public liability fund from any claim during the previous fiscal year exceeding $1,000. Yet RMD has not released an annual report containing this information since July 2020. Even when RMD was doing this reporting, the legal requirements in Section 15-7-3.C are general and do not require that RMD report which agencies the claim was made against nor the nature of the claim. As such, while the Legislature is statutorily entitled to basic information on annual liability settlements, RMD has not reported it in the last four fiscal years. Even if they did, the information would not contain important details necessary to make it traceable to increases in premiums, nor to any agency loss prevention activities that should be occurring because of the settlements.

Figure 3. RMD's Most Recent (FY19) Report to the Legislature


GENERAL SERVICES DEPARTMENT
RISK MANAGEMENT DIVISION
2019 ANNUAL REPORT

THE HONORABLE MICHELLE LUJAN GRISHAM
GOVERNOR

DIRECTOR, RISK MANAGEMENT DIVISION

SUBMITTED TO
THE NEW MEXICO STATE LEGISLATURE
July 2020

While statutory changes and voluntary actions have increased accessibility to information on some settlements, details on a few of the highest profile and most expensive settlements go unreported.

Section 15-7-9 NMSA 1978 states that records on claims for damages or other relief against any governmental entity or public officer or employee are to remain confidential until final judgment or settlement. However, some efforts have been made to improve transparency in the last few years. Senate Bill 64, passed in the 2020 session, newly allowed legislative staff and state employees to inspect records maintained by RMD, which can include open claims. Senate Bill 64 also eliminated a prior statutory 180-day confidentiality period on those records. Further back, in the 2019 session, legislation was introduced to require posting information specific to Equal Employment Opportunity settlements to which state agencies were parties, including the nature of the claim, the name of the state agency, and the total amount of the settlement. That legislation failed to pass, but by August 2019, GSD began voluntarily posting limited information about legal settlements to the Sunshine Portal. The information usually includes the name of the claimant, state agency, settlement amount, date, and general documentation of each party's agreement to the terms of the settlement. Other details about the nature of the claim, however, are not generally included.

Examples of settlements not on the Sunshine Portal:

A 2022 settlement for $1.5 million for a case of severe abuse experienced by a brother and sister while in foster care

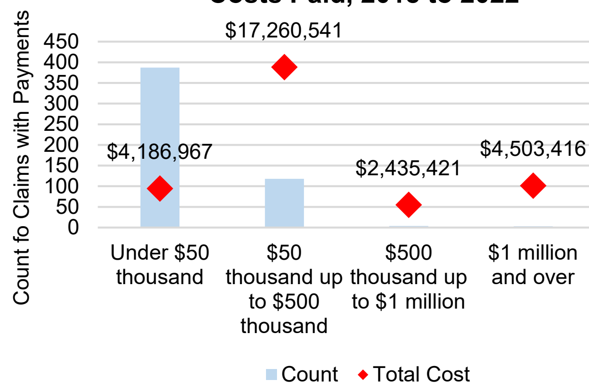
A 2022 settlement for $985 thousand for a case on behalf of two brothers who claimed they were sexually abused in their Bernalillo County foster home in 2020

A 2022 settlement for $400 thousand to the estate of a 2-year-old foster child was returned to his mother and died a few months later from abuse-related injuries

RMD routinely omits information from the Sunshine Portal about settlements involving minors or disabled adults. Between this omission and the lack of required reporting to the Legislature, some of the highest cost settlements involving, for instance, those around child death or abuse at the Children, Youth and Families Department (CYFD) never reach the Legislature. The consequence of this non-reporting is that the Legislature is ill-equipped to ask even basic information of the settling agency about what processes or operations led to the settlement and what the agency plans are to mitigate similar settlements in the future.

Civil rights liability claims over $1 million account for only a few claims but represent a sizable portion of incurred losses. From 2018 to 2022, these large claims comprised less than 1 percent of civil rights claims but accounted for nearly 16 percent ($4.5 million) of total claims paid out.

Chart 6. Civil Rights Claims by Count and Total Costs Paid, 2018 to 2022



Source: RMD Loss Run

In the few cases where settlements have ongoing costs, the costs are paid out of RMD's risk funds, obscuring the full and ongoing costs of the case. Though infrequent, settlement cases against the state can have ongoing costs, and without more transparent reporting, the full view of these costs is lost. The most visible example: Ongoing costs to implement the terms of the *Kevin S.* settlement are borne by the state's liability fund, instead of directly by CYFD. Even though the settlement agreement only included $2.4 million for plaintiffs' attorneys' fees and costs, the total cost of the settlement over time has grown to a total of $7.3 million. The additional costs have primarily been the result of payment to the three "co-neutrals," Kevin Ryan, Pam Hyde, and Judy Meltzer, who were appointed to evaluate the state's progress toward the targets in the settlement agreement. As part of the settlement, these co-neutrals are allowed to hire staff and engage consultants as they deem necessary, and the state is responsible for paying those costs.

The work of the co-neutrals will continue until they certify the state has reached each of the targets in the settlement agreement for a continuous 24 months. To date, the cost of the co-neutrals has reached $4.5 million, all of which has been paid out of the public liability fund. These costs are eventually (after a two-year lag) incorporated as losses that factor into the amount of premium CYFD must pay to RMD, but CYFD is essentially buffered from experiencing those costs, so long as the Legislature appropriates enough funding to cover the rate increases.

Table 6. Payments to *Kevin S.* Co-Neutrals

	FY20	FY21	FY22	FY23	Grand Total
Meltzer		$617,116	$810,385	$1,116,370	**$2,543,871**
Hyde	$18,895	$259,300	$246,506	$140,858	**$665,559**
Ryan		$247,258	$339,366	$752,235	**$1,338,860**
Total	**$18,895**	**$1,123,674**	**$1,396,256**	**$2,009,463**	**$4,548,289**

Source: SHARE

In contrast to some other states, the RMD director has unlimited authority to approve large settlements without notifying or seeking approval from other governmental entities.

Beyond non-reporting, large claims may be settled with little notice because in New Mexico the RMD director has full discretion to approve settlements at unlimited amounts. Such authority is not granted unilaterally in other states; in some instances, legislative approval is needed. For example, in Utah, the risk manager (equivalent to New Mexico's RMD director) may settle any claim of $500 thousand or less on the manager's authority but has a series of notifications and other approvals that need to occur for larger settlements.

Table 7. Approvals and Transparency Measures for Risk Settlements in Utah Statute

Settlement amount	Additional Approvals	Additional Notifications
More than $250 thousand		The risk manager must send notice of all settlement agreements greater than $250 thousand but less than $1.5 million to the Legislative Management Committee within three days of executing the agreement.
More than $500 thousand but not more than $1 million	Attorney General and Executive Director (the equivalent of GSD secretary)	
More than $1 million but not more than $1.5 million	Governor	
More than $1.5 million but not more than $2 million	Legislative Management Committee	The risk manager must notify the Legislature's general council and permit them to participate in negotiations that the risk manager reasonably believes have the potential to lead to settlements over $1.5 million.
More than $2 million	Full Legislature	

Source: Utah State Settlement Agreements Act 63G-10-503

In Louisiana, all settlements over $25 thousand must be approved by the Attorney General, settlements over $250 thousand need additional approval from the Commissioner of Administration (the equivalent of New Mexico's Department of Finance and Administration secretary), and settlements of $500 thousand and above require additional approval from the Joint Legislative Subcommittee on the Budget. In Colorado, settlements over $50 thousand and up to $100 thousand need the approval of the state Department of Administration, and settlements over $100 thousand require the approval of the claims board. In Wyoming, the state risk manager is authorized to settle claims up to $50 thousand and up to $100 thousand on consultation with the Attorney General, and the governor is responsible for approving all other non-federal claims up to the state's Tort Claims Act limits.

Recommendations

The Risk Management Division should begin publishing required annual reports to the Legislature again, beginning winter 2023.

The Risk Management Division should report to the Department of Finance and Administration and LFC quarterly payments on all claims over $25 thousand, including settlements and judgments from all risk funds by agency.

The Risk Management Division should collaborate with the Children, Youth and Families Department (CYFD) to present the ongoing annual costs of the *Kevin S.* settlement at GSD's and CYFD's budget hearings in fall 2023.

The Legislature should consider updating the risk management statute in Section 15-7 NMSA 1978 to require legislative, Attorney General, or Department of Finance and Administration approval of settlements over $500 thousand from the public property fund or the amounts specified in the Tort Claims Act and New Mexico Civil Rights Act from the public liability fund.

Loss Prevention Activities, Including Mediation, are Largely Left to Agencies

Loss prevention is an integral part of any risk management program. Loss prevention activities help the state mitigate risks of losses from accidents, property damage, lawsuits, or other actions for which the state is liable. These activities might include employee training, loss prevention plans, and investigation of and response to claims. Alternative dispute response processes between the state and any aggrieved employees are also a key part of loss prevention because, when conducted effectively, they can cost significantly less than traditional courtroom proceedings.

RMD dedicates a whole section of rule to the state loss prevention and control program, with the objectives to integrate loss prevention and control activities into state agency operations and culture and establish systematic safety and loss prevention and control mechanisms within state agencies. However, functionally, loss prevention activities have not been prioritized by the division, as demonstrated by low levels of staffing, many of which remain vacant, and are left primarily to insured entities to take on themselves.

Loss prevention activities in New Mexico are largely left to individual agencies, and RMD is not staffed to conduct proactive loss prevention.

Statute empowers RMD's Loss Prevention Bureau to oversee and undertake a large swath of loss-prevention activities across state government. However, RMD currently has only one staff person dedicated to loss prevention work. Another staff position and the Loss Prevention Bureau chief position are both vacant. In rule, the work of these loss prevention staff is somewhat limited, primarily directing RMD to

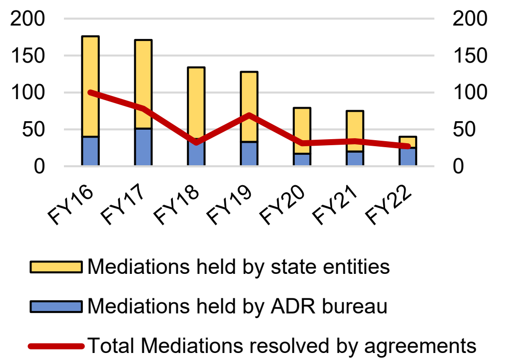
- Receive annual loss prevention and control plans from all state agencies, branches, boards, instrumentalities, and institutions,
- Report any agency that fails to adopt an agency loss prevention and control plan to the agency head and GSD secretary, and
- If an agency fails to make a loss control and prevention plan, raise that agency's premiums.

Beyond those provisions, loss prevention and control is largely left to individual agencies, including training on occupational health and safety. Furthermore, each agency is responsible for appointing a loss prevention and control coordinator to liaise with RMD, as well as a loss prevention and control committee. However, with no loss prevention leadership in RMD, how much loss prevention work is occurring across the state is unclear, and RMD staff could not provide examples of agency loss control plans or a list of loss prevention coordinators.

New Mexico's RMD does not have the authority to ensure agency compliance in evaluating losses, and no state policy exists to require reporting after substantial claims or losses. Formal reviews are often necessary to identify the cause of large claims, settlements, judgments, or other losses and to identify the steps necessary to prevent similar future losses. Under rule, New Mexico agencies are required to establish and implement procedures for the investigation, analysis, and evaluation of incidents and losses, but there is no requirement for agencies to document that they actually perform these post-hoc evaluations; and, no authority is given to RMD to ensure that agencies are performing these reviews. In contrast, Washington state statute directs all state agencies to appoint a loss prevention review team when a death, serious injury, or other substantial loss is alleged or suspected to be caused at least in part by the actions of a state agency. That loss prevention team is also directed in statute to submit a report in writing to the risk director and the head of the state agency involved in the loss or risk of loss. In Arizona, the state's RMD equivalent is required to charge agencies a deductible of up to $10 thousand for settlements and payments over $150 thousand. However, the deductible can be waived so long as the agency provides an action plan to eliminate or limit similar future risks to the state.

RMD and state agencies are conducting less mediation.

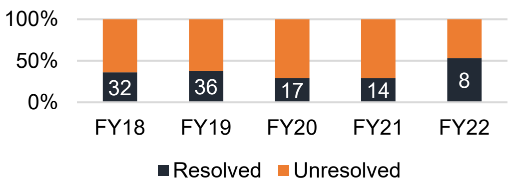
Chart 7. Mediations have Decreased Since FY16



Source: ADR Annual Reports

Successful resolution of employment issues before litigation saves the state money in claims and settlements. RMD's Alternative Dispute Resolution (ADR) Bureau coordinates voluntary mediation services for RMD-insured entities to enable such pre-litigation agreements. The bureau was established by statute in 2007 (Section 12-8A-1 NMSA 1978) and trains ADR coordinators in state agencies to act as volunteer mediators and report quarterly levels of mediation activities to the ADR. ADR is also the formal liaison between the state and the U.S. Equal Employment Opportunity Commission's (EEOC) mediation program. Under a *2008 Regional Universal Agreement to Mediate* with the state, the EEOC refers all eligible discrimination charges against RMD-insured state employers to its mediation program and provides notice to the ADR Bureau.

Chart 8. From FY18 to FY22, the percentage of successful mediations varied from 29 to 53 percent



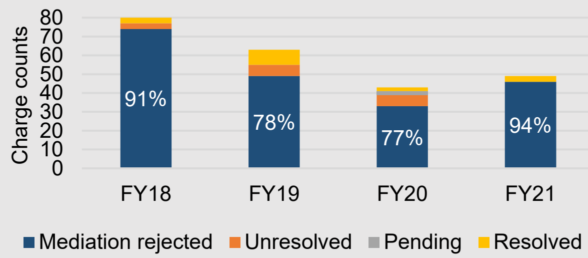
Source: LFC analysis of RMD files

Mediation referrals to ADR have declined since FY16, potentially resulting in an extra $7.5 million in losses. Despite increasing claims and liabilities against the public liability fund, the number of mediations conducted by the ADR Bureau and state entities has fallen in the last five years. Likewise, the number of mediations that resulted in pre-litigation agreements has fallen from a high of 100 in FY16 to a low of 27 in FY22. In FY18, ADR reported an estimated $3.3 million in cost avoidance through successful mediations (based on an industry average of employment claims settled out of court), which fell to an estimated $2 million in FY22. Had ADR maintained the number of successfully resolved mediations in FY22, cost avoidance could have amounted to an estimated $7.5 million.

ADR relies on agency alternative dispute resolution coordinators to refer employees or supervisors for mediation. However, while state statute allows agency heads to designate an alternative dispute resolution coordinator, it is not required (Section 12-8A-3 NMSA 1978). ADR reports that following the 2017 consolidation of agency human resource officers, the number of alternative resolution dispute coordinators decreased by more than half, from 120 in 2017 to 57 in 2022. Agencies often designate human resource officers as coordinators, and these relationships, disrupted by the consolidation, have not recovered. A 2004 report by the U.S. Equal Employment Opportunity Commission emphasizes the importance of support from senior management officials at partnering agencies for successful mediation programs and recommends agencies institute policies encouraging maximum use of the alternative dispute resolution program. This communication sets the expectation that managers are expected to utilize the ADR process and employees may be more likely to believe management will consider their concerns.

To be most effective, mediation activities need to be deployed before EEOC discrimination charges are filed. When EEOC charges are filed by state employees, few parties agree to mediation, with 77 to 94 percent of parties rejecting mediation from FY18 to FY21. RMD reports that by the time parties have engaged with EEOC, they often already have attorneys and are uninterested in mediation. Many immediately request a letter of non-determination from the EEOC, which allows them to proceed with litigation—and the possibility of recovering attorney fees. From FY18 to FY21, of the 34 charges whose parties did agree to mediation, 17 were successfully resolved. The most common issues in New Mexico EEOC charges include employment terms and conditions, discharge, and harassment.

Chart 9. One or both parties refused mediation in the majority of EEOC charges offered mediation by the ADR Bureau from FY18 to FY21



Source: LFC analysis of RMD files

ADR does not analyze claims and mediation data to target prevention. Referrals and mediations have decreased over the past five years, indicating a need for more targeted outreach. While ADR collects data on mediations, it does not use this information to the full extent possible to target its preventative trainings or to prioritize outreach to ADR coordinators. Similarly, while RMD holds detailed claims data, ADR coordinators do not use this data to prioritize their activities. ADR should use this information to set internal performance measures and publish them in their annual reports.

Recommendations

The Risk Management Division should monitor and report on agency loss control efforts in its annual report.

The Risk Management Division should keep and post an updated list of agency loss prevention coordinators.

The Risk Management Division should analyze mediation and claims data to target preventive training to departments and topics at higher risk for employee claims.

The Risk Management Division should lead an outreach campaign to encourage agency leadership to establish alternative dispute resolution coordinators and to institute policies promoting the use of mediation.

The Legislature should consider updating the risk management statute in Section 15-7 NMSA 1978 to mirror Washington state's requirement that agencies to investigate and report on significant losses.

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GSD Response Letter

Key Recommendations

The Risk Management Division should follow the rules in NMAC and only use a one-year delay in calculating incurred losses.

- RMD will consider the merits of this recommendation.

The Risk Management Division should consider adjusting its rules to increase the cap for the loss development factor.

- RMD agrees with this recommendation and is in the process of adjusting its rules.

The Risk Management Division should consider capping the maximum liability coverage it offers.

- Statutes that prescribe the extent of coverage bind RMD.

The Risk Management Division should develop criteria for when special assessments will be made to preserve fairness and regularity.

- RMD agrees with this recommendation and is in the process of developing such criteria.

The Risk Management Division should consider the merits of ceasing to procure excess property insurance, given its escalating cost.

- RMD will consider the merits of this recommendation.

The Legislature should consider clarifying statute with requirements for claims paydown before higher education institutions leave either RMD coverage.

- RMD is considering what rules could be leveraged to ensure the fiscal security of the Public Liability Fund.

The Risk Management Division should begin publishing required annual reports to the Legislature again, beginning winter 2023.

- RMD agrees with this recommendation.

The Risk Management Division should report to DFA and LFC quarterly payments on all claims over $25 thousand, including settlements and judgments from all risk funds by agency.

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- RMD will follow the direction of any legislative action with regard to this recommendation.

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Appendix A: Evaluation Scope and Methodology

Evaluation Objectives.

- Examine the operations and effectiveness of RMD in managing costs for self-funded insurance coverage.
- Determine best practices in managing self-insured funds for public liability, property, and workers' compensation funds.
- Analyze the impacts of recent statutory changes to the state's liability.

Scope and Methodology.

- Reviewed policy and academic research on self-insured risk funds, including analysis of other state and pooled government risk fund management, and other sources referenced in this report.
- Analyzed trends in private insurance markets and government liabilities nationwide.
- Analyzed claims, premium calculation worksheets, excess insurance policies actuarial reports, and risk fund financial information.
- Interviewed RMD staff—including claims, finance, legal, and alternative dispute resolution staff—and insurance policy experts at the New Mexico Municipal League, Central New Mexico University, and the University of New Mexico.
- Examined applicable laws, administrative rules, policies, and Risk Management Advisory Board meeting materials;

Evaluation Team.

Micaela Fischer, Project Lead, Program Evaluator
Annie Armatage, Program Evaluator

Authority for Evaluation. LFC is authorized under the provisions of Section 2-5-3 NMSA 1978 to examine laws governing the finances and operations of departments, agencies, and institutions of New Mexico and all of its political subdivisions; the effects of laws on the proper functioning of these governmental units; and the policies and costs. LFC is also authorized to make recommendations for change to the Legislature. In furtherance of its statutory responsibility, LFC may conduct inquiries into specific transactions affecting the operating policies and cost of governmental units and their compliance with state laws.

Exit Conferences. The contents of this report were discussed with Robert E. Doucette, Jr., GSD Cabinet Secretary, and his staff on September 21, 2023.

Report Distribution. This report is intended for the information of the Office of the Governor, Department of Finance and Administration, Office of the State Auditor, and the Legislative Finance Committee. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

Jon Courtney, Ph.D.
Deputy Director for Program Evaluation

Appendix B: General Services Department FY23 Q4 Report Card

NEW MEXICO LEGISLATIVE FINANCE COMMITTEE

PERFORMANCE REPORT CARD: Fourth Quarter, FY23

General Services Department

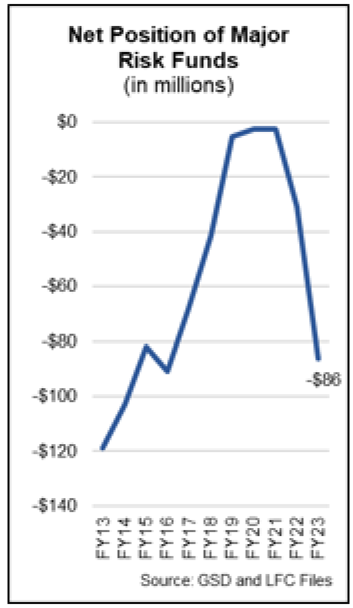
The General Services Department (GSD) continues to report a deficit in the agency's largest program, employee group health benefits, despite sizeable one-time transfers to stabilize the fund. Performance data indicate medical expenses are increasing while premiums have not increased to match expenses to revenues. For FY25, group health benefits will transfer to the newly created Health Care Authority Department, which will need to address continued deficits in the program.

ACTION PLAN

Submitted by agency?	Yes
Timeline assigned?	Yes
Responsibility assigned?	Yes

Risk Management Funds

The department's Risk Management Division oversees the state's shared risk pools, including the public property fund, the workers compensation fund, and the public liability fund. Overall, the financial position of the three funds, determined by dividing the current assets by the current liabilities, is 54 percent, down from 78 percent at the end of FY22. Projected assets are short of projected liabilities by $86 million. In FY21, assets were short of liabilities by only $2 million, and in FY22, assets were short of liabilities by $31 million. The public property fund remains well above the 50 percent target, and the workers' compensation fund remains slightly above target. Changes were driven mostly by the public liability fund, with projected liabilities of $105 million on assets of $43.9 million, or only 44 percent.



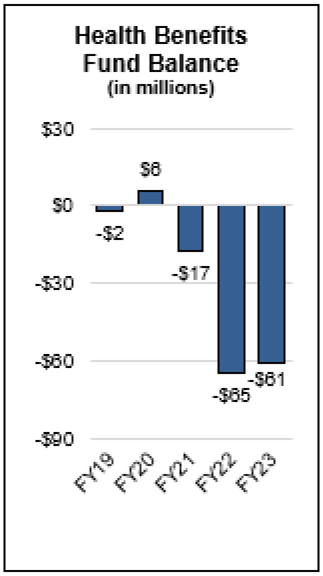
Budget: $102,700.7 **FTE:** 0

	FY21 Actual	FY22 Actual	F23 Target	F23 Actual	Rating
Projected financial position of the public property fund*	523%	443%		215%	G
Projected financial position of the workers compensation fund*	61%	60%		56%	Y
Projected financial position of the public liability fund*	112%	66%		42%	R
Program Rating	G	G			Y

*Measure is classified as explanatory and does not have a target.

Group Health Benefits Fund

The Risk Management Division of GSD operates a self-insured group health benefits pool, providing health coverage to employees of the state, local governments, and some higher education institutions. Despite provisions of state law designed to prevent agencies from spending without available funds (Section 6-5-6 NMSA 1978), the employee group health benefits program has been operating at a deficit since FY21. For several years, the department did not increase health insurance rates for participating employees, resulting in mounting shortfalls. To mitigate these shortfalls, the Legislature allocated $34.5 million from the general fund to cover the costs of general-fund-covered employees, contingent on the department instituting a special assessment to cover for non-general fund-covered employees. In total, GSD collected $57 million to offset the



deficits. For FY24, the Legislature included funding for a 10 percent rate increase, which went into effect in July for state employees and will go into effect in January for local government and higher education employees.

GSD reports per-member-per-month cost increases averaged 3 percent in FY23, lower than national trends and the trends for other public funds, which points to the extent current deficits have been caused by rate decisions rather than increases in costs. A cost-containment strategy alone will not enable the department to close the funding gap in the absence of rate increases that recognize the true costs of the current plan.

Additionally, the percentage of workers purchasing health coverage continues to fall—from 81 percent in FY21 to 79 percent in FY23. Participation could continue to fall as premiums increase to recognize costs, with most of the losses likely to come from relatively healthy and lower cost individuals. The state may need to consider health plan alternatives, such as high deductible plans, which other public employers have used to moderate premium costs.

Budget: $421,493.3 **FTE:** 0

	FY21 Actual	FY22 Actual	FY23 Target	FY23 Actual	Rating
Change in average per-member-per-month total healthcare costs	5.9%	5%	5%	3%	G
Annual loss ratio for the health benefits fund	NEW	118%		118%	R
State group prescriptions filled with generic drugs	86.5%	87%	80%	83.6%	G
Number of visits to the Stay Well Health Center*	6,248	4,540		7,375	
Percent of eligible state employees purchasing state medical insurance*	81%	80%		78.5%	R
Year-end fund balance of the health benefits fund, in millions*	-$17.3	$-65.1	N/A	$-61.2	R
Program Rating	R	R			G

*Measure is classified as explanatory and does not have a target.

Stay Well Health Center

Employees on the group health benefits plan have access to the Stay Well Health Center for some basic healthcare services, including health screenings, physicals, and treatment for minor injuries. GSD currently contracts with Proactive MD to operate the clinic, with total payments in FY23 of $2.2 million, or about $300 per visit. GSD reported an uptick in the number of visits, but the facility continues to be underutilized. The department reports only 22 percent of available appointments were filled in FY23.

Facilities Management

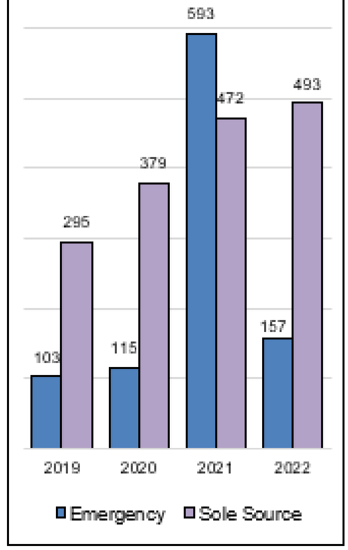
The Facilities Management Division (FMD) is responsible for maintaining 6.8 million square feet of state-owned and leased space. FMD reports only 70 percent of scheduled preventive maintenance activities were completed on time due to a lack of maintenance staff. On-time completion of capital projects also fell short of target. The department reports 100 percent of office leases met adopted space standards; however, the department continues to exclude certain leases from this calculation. For example, in the fourth quarter, the department excluded seven of the 17 leases processed. Routine exclusion of leases from the performance data negates the usefulness of this performance measure.

The state has yet to realize projected cost savings from the green energy initiatives, with the department reporting $85 thousand in energy savings in FY22. In August 2019, FMD began a $32 million project to reduce energy use in state facilities, estimated to save at least $1.4 million per year, with guaranteed savings of $1.1 million. The department reports year-to-date savings of $240 thousand.

Budget: $17,380.9 **FTE:** 148

	FY21 Actual	FY22 Actual	F23 Target	F23 Actual	Rating
Capital projects completed on schedule	88%	93%	90%	87%	Y
Preventive maintenance completed on time	48%	59%	80%	70%	R
New office leases meeting space standards	100%	100%	85%		
Amount of utility savings resulting from green energy initiatives, in thousands*	$281.4	$85		$-38.2	R
Program Rating	Y	R			R

*Measure is classified as explanatory and does not have a target.


Number of Sole Source and Emergency Procurements

State Purchasing

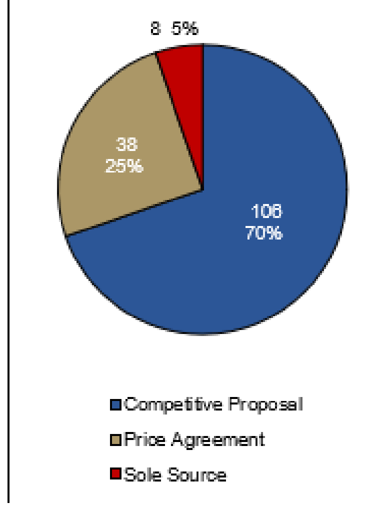
The program reports all 77 executive agencies had designated chief procurement officers, and the agency met targets for procurement completion and timely contract review, sustaining improvement gained in FY22. The department reported an uptick in revenue received from pricelist purchases, rising from $3 million in FY21 to $3.8 million in FY22 and $4.6 million in FY23, pointing to a rise in the number of agencies using price lists for procurement. State agencies have increased their reliance on price agreements for purchasing services: monthly reports from the GSD's Contracts Review Bureau show a quarter of professional services contracts valued at more than $500 thousand were purchased using a price agreement rather than through a competitive proposal.

In the 2023 session, the LFC endorsed Senate Bill 76 and proposed several changes to the Procurement Code as recommended by past LFC evaluations. These included repealing some widely used purchasing exemptions that circumvent competition and adding guardrails to the use of statewide price agreements. The bill received one hearing but no votes, and the recommended Procurement Code changes remain unaddressed.

Budget: $2,692.9 **FTE:** 29

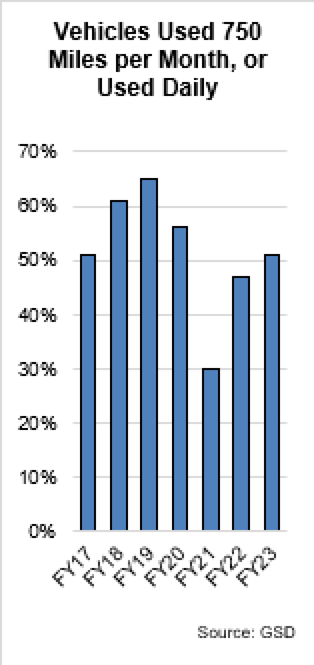
	FY21 Actual	FY22 Actual	F23 Target	F23 Actual	Rating
Agencies with certified procurement officers	95%	100%	100%	96%	Y
Procurements completed within targeted timeframes	NEW	88.5%	80%	87%	G
Revenue generated through pricelist purchases, in thousands*	$2,988	$3,803		$4,641	
Percent of estimated payments from vendor sales	NEW	99%	80%	99%	G
Average number of days for completion of contract review	8.1	4	5	3	G
Program Rating	G	G			G

*Measure is classified as explanatory and does not have a target.


Statewide Professional Services Contracts >$500,000, FY23

Transportation Services

State agencies continue to underutilize vehicles, with only 54 percent of leased vehicles being used daily or for at least 750 miles per month. Although the agency encourages agencies to return leased vehicles that are underutilized, many agencies are reluctant to do so. As an alternative, the department offers agencies short-term (daily) leases to meet their transportation needs.



Budget: $9,874.5 **FTE:** 31

	FY21 Actual	FY22 Actual	F23 Target	F23 Actual	Rating
Percent of leased vehicles used for 750 miles per month or used daily	30%	47%	70%	54%	R
Average vehicle operation costs per mile*	$0.49	$0.55	$0.59	$0.52	G
Program Rating	Y	R			Y

*Measure is classified as explanatory and does not have a target.

State Printing

The State Printing Program reported recovery in sales from the downturn caused by the Covid-19 pandemic, with revenue exceeding expenditures in FY23. Sales typically peak in the second and third quarters because the program completes print jobs related to the legislative session, but the agency has reported an influx of printing jobs late in the fiscal year, suggesting continued sales growth. The division continues to perform well, with all printing jobs delivered on time, even in light of a high division vacancy rate.

Budget: $2,045.4 **FTE:** 9

	FY21 Actual	FY22 Actual	F23 Target	F23 Actual	Rating
Revenue exceeding expenditures	-0.6%	21%	4%	7%	G
Percent of printing jobs delivered on time	100%	100%	99%	100%	G
Sales growth in revenue	-11%	-2%	10%	29%	G
Program Rating	Y	G			G

Appendix C: Risk Management Advisory Board Members

The Risk Management Advisory Board is a statutorily-created entity (Section 15-7-4 NMSA 1978) that is charged with, among other duties, reviewing insurance policies purchased, professional services and consulting contracts and agreements, companies and agents that submit proposals, rules and regulations promulgated, certificates of coverage, and any other investments made by the state's Risk Management Division. The Board has nine members, four of which are appointed by the Governor, and one which is named by the president of the New Mexico state bar. All appointed members serve for a term of four years.

- The Attorney General or designee (Raul Torrez)
- The Superintendent of Insurance (Alice Kane)
- Secretary of the Department of Finance and Administration or designee (Wayne Probst)
- The chief financial officer of a public school district to be appointed by the governor (Albuquerque Public Schools)
- An attorney named by the president of the State Bar of New Mexico (Quinn Lopez)
- The director of the Legislative Council Service or designee (Raul Burciaga)
- The chief financial officer of an institution of higher education to be appointed by the governor (Teresa Ann Costantinidis, University of New Mexico)
- An insurance agent licensed to write property, casualty, and life insurance in this state who shall be appointed by the governor (Michael Byrd)
- The chief financial officer of a local public body or the chief administrator of an entity of a local public body, other than a school district, with a risk covered by the public liability fund, appointed by the governor (Anita Schwing, CFO of the New Mexico Health Insurance Exchange)

Appendix D. Combined FY18 to FY22 Property and Liability Losses for Agencies with over $1 million in Losses

Combined FY18 to FY22 Property and Liability Losses for Agencies with over $1 million in Losses

	Public Liability Fund			Public Property Fund		
	Civil Rights	Automobile Liability	Other Liability including Medical Malpractice and Law Enforcement	Blanket Property	Automobile Property	Total
UNIVERSITY OF NM HOSPITAL (UNMH) *	$715,291	$7,280	$24,005,553	$387,720	$75,043	$25,190,887
DEPT OF CORRECTIONS (DOC)	$12,324,651	$64,829	$2,241,880	$3,230,979	$45,421	$17,907,761
DEPT OF PUBLIC SAFETY (DPS) **	$5,016,118	$2,297,275	$2,345,481	$37,177	$2,857,395	$12,553,445
CHILDREN YOUTH AND FAMILY DEPT (CYFD)	$10,961,690	$640,305	$408,307	$137,475	$1,549	$12,149,325
UNIVERSITY OF NM (UNM)	$2,067,015	$133,107	$1,095,415	$6,263,544	$422,986	$9,982,067
DEPT OF TRANSPORTATION (DOT)	$755,727	$533,071	$6,201,211	$968,996	$723,018	$9,182,278
NM STATE UNIVERSITY (NMSU)	$1,122,720	$283,051	$710,518	$3,528,448	$137,653	$5,782,390
GENERAL SRVCS DEPT (GSD)	$581,004	$141,496	$20,433	$2,659,714	$1,321,184	$4,723,831
DEPT OF HEALTH (DOH) *	$1,591,980	$177,604	$2,501,951	$351,848	$3,004	$4,626,387
NM INSTITUTE OF MINING & TECH (NMIMT)	$336,074	$16,066	$7,735	$1,128,672	$36,524	$1,525,070
PUBLIC DEFENDER DEPT (PDD)	$1,493,745	$1,833	$5,443	$315		$1,501,336
DEPT OF CULTURAL AFFAIRS (DCA)	$196,999	$0	$61,077	$1,062,210		$1,320,286
MINERS' COLFAX MEDICAL CENTER *	$125,523		$1,103,904			$1,229,428
DEPT OF MILITARY AFFAIRS (DMA)	$232,207		$29,110	$755,128		$1,016,446
All Other Agencies	*$9,031,282*	*$1,036,910*	*$2,075,823*	*$2,452,978*	*$744,579*	*$15,341,571*

* Almost all of UNMH, DOH, and Miner's Hospital's "other liability" losses (approximately $24 million, $2.3 million, and $1 million, respectively) are from medical malpractice.
** $1.8 million of DPS's "other liability" losses are from law enforcement

Source: RMD Loss Run