

MINUTES
of the
SIXTY-FIRST MEETING
of the
PUBLIC SCHOOL CAPITAL OUTLAY OVERSIGHT TASK FORCE

August 14, 2017
State Capitol, Room 307
Santa Fe

The sixty-first meeting of the Public School Capital Outlay Oversight Task Force (PSCOOTF) was called to order by Representative Stephanie Garcia Richard, chair, on August 14, 2017 at 9:04 a.m. in Room 307 of the State Capitol in Santa Fe.

Present

Rep. Stephanie Garcia Richard, Chair
Deputy Secretary Paul Aguilar, Public
Education Department
Sen. Craig W. Brandt
Dr. Carl Foster
Kirk Hartom
Sen. Stuart Ingle
Rep. Patricia A. Lundstrom
Sen. Mary Kay Papen
T.J. Parks
Richard A. Perea
Mike Phipps
Debbie Romero for Secretary Duffy
Rodriguez, Department of Finance and
Administration
Stan Rounds
Sen. Benny Shendo, Jr.
Rep. James E. Smith
Sen. John Arthur Smith
Xochitl Torres Small
Alan Webber

Advisory Members

Rep. Eliseo Lee Alcon
Sen. Daniel A. Ivey-Soto
Sen. Howie C. Morales
Sen. Mimi Stewart

Absent

Sen. William P. Soules, Vice Chair
Rep. Brian Egolf
Greg Ewing
Rep. Dennis J. Roch
Rep. G. Andrés Romero
Eugene Schmidt
Sen. Bill Tallman

Rep. Harry Garcia
Rep. D. Wonda Johnson
Sen. Gay G. Kernan
Sen. Cliff R. Pirtle
Sen. Sander Rue
Sen. Pat Woods

Staff

Sharon Ball, Researcher, Legislative Council Service (LCS)
Jeff Eaton, Legislative Fiscal Analyst, LCS
Rebecca Griego, Staff, LCS

Guests

The guest list is in the meeting file.

Handouts

Copies of all handouts are in the meeting file.

Monday, August 14**Call to Order and Introductions**

Representative Garcia Richard called the meeting to order and welcomed task force members, guests and staff. She requested that task force members introduce themselves.

Approval of June 13, 2017 Minutes

The chair requested that members take a few minutes to review the June 13, 2017 meeting minutes. Upon a motion by Representative Smith, duly seconded by Senator Smith, the minutes were approved without objection.

Public School Capital Outlay Council (PSCOC) Financial Plan

Denise Irion, chief financial officer, Public School Facilities Authority (PSFA), and David Abbey, director, Legislative Finance Committee, and chair, PSCOC, presented the PSCOC financial plan. Ms. Irion reported that the State Board of Finance recently sold approximately \$26.5 million in supplemental severance tax bond (SSTB) notes and approximately \$81.4 million in long-term SSTBs.

Ms. Irion reported that, to date, the PSCOC has made no awards for fiscal year (FY) 2018. She noted that the financial plan has \$44.3 million in awards planned for the first quarter of calendar year 2017 and another \$37.6 million planned for awards in "out years", for a total FY 2018 award amount of \$81.9 million. The statewide measure of overall facility condition is the Facility Condition Index (FCI). Mr. Abbey reported that the FCI is up from 32 percent to 34 percent in the most recent estimate, which is a substantial improvement over the initial reported FCI of 70 percent in FY 2004.

Mr. Abbey pointed out that the plan now includes \$25 million for instructional materials and school transportation. Mr. Abbey also pointed out that the financial plan has \$12 million for lease payment assistance awards. At its most recent meeting, the PSCOC considered possible modification of the amount of funding allocated for lease assistance, but after hearing public comment from charter school representatives, the council proposed consideration of the issue at a future meeting.

As of July 14, 2017, the Public School Capital Outlay Fund balance was \$242.8 million, an amount that did not include a pending draw request of \$26.8 million (submitted in June 2017). Mr. Abbey reported that on August 8, 2017, the State Board of Finance approved the sale of \$81.4 million in long-term bonds for the Public School Capital Outlay Fund. Combined, these transactions would amount to a net Public School Capital Outlay Fund balance of approximately \$296 million. This balance is an improvement over prior year balances that were in the \$500 million range.

Zuni Lawsuit Update

Timothy Williams, Esq., assistant attorney general, Office of the Attorney General (OAG), and Joshua Granata, Esq., assistant attorney general, OAG, presented on the current status of the *Zuni* lawsuit. Mr. Williams presented a summary of the current iteration of the amended complaint of the original complaint filed more than 17 years ago. The state filed a motion to dismiss the current amended complaints and was granted a partial dismissal based on a "lack of standing by two plaintiffs, Zuni Public School District and Gallup-McKinley County Public School District". The only remaining plaintiffs in the current lawsuit are four students named in the amended complaint. Mr. Williams does not believe that the remaining plaintiffs will proceed with further litigation. A copy of the "Order Partially Dismissing Complaint" was provided to the task force members and is in the meeting file.

A member asked what "injury" was claimed in the original or amended complaint. Mr. Williams responded that the injury claimed was underfunding for school-related facilities and that the redress was a new system of funding with a new source of funding. A member commented that the language in the general appropriation act forbids public schools from using state equalization guarantee (SEG) funds to sue the state. A plaintiff who prevails, however, may be reimbursed.

A member asked staff to investigate how much money is currently budgeted and expended by school districts for legal services and the sources of those funds. Another member noted that this request may be difficult to fulfill because some expenditures categorized as "legal fees" may also reflect normal expenditures, such as defense in lawsuits filed against the school district.

A member asked if the *Zuni* lawsuit is now finished. Mr. Williams indicated that the plaintiffs can appeal the latest order to a higher court. The original lawsuit does not include criteria for the state to meet in order to end the court's jurisdiction over the current public school capital outlay system. Another member asked if Senate Bill (SB) 147 from the 2017 regular session, sponsored by Senator Stewart, which was passed by the legislature but vetoed by the governor, was discussed in the case proceedings. Mr. Williams replied that the bill was discussed tangentially but that the discussions were not substantive.

Consideration of Possible PSCOOTF-Endorsed Legislation for the 2018 Session

Senator Stewart, chair, Legislative Education Study Committee, Katie McEuen, research and policy analyst, PSFA, and Mr. Eaton presented on SB 147, which included amendments to

the public school capital outlay funding formula. Senator Stewart introduced the item, explaining that the task force in the 2016 interim convened a funding formula subcommittee that reviewed "white papers" prepared by PSFA staff on the topic of the funding formula and contracted with the University of New Mexico Bureau of Business and Economic Research (BBER) to do a formal study of the funding formula and report to the task force. SB 147 incorporated several changes recommended in the BBER study, as well as the PSFA white papers. Due to time constraints, SB 147 was not reviewed in time before the 2017 regular session and so it was not endorsed as a PSCOOTF bill. The bill made several changes to the existing funding formula and passed both the senate and the house of representatives but was vetoed by the governor.

Ms. McEuen provided step-by-step details of the current standards-based state-local match formula and the new formula proposed by SB 147. The new formula adds a new variable to account for higher costs incurred in more rural and remote school districts. Ms. McEuen also explained that a school district's existing enrollment and costs for bringing the existing facility spaces up to adequacy were factored into facility and funding needs. Higher facility space needs, lower property valuations and the level of "ruralness" increased a school district's state match funding over the current formula. Ms. McEuen explained that volatility in the property valuations and switching from the existing formula to a new formula were addressed by a gradual five-year smoothing of property valuations and a five-year phase-in period from the old state-local match calculation to the proposed calculation.

A member commented that he supported the legislation, which he felt was an improvement on the current formula because it increased the level of local participation overall and was a prudent move back to the way schools were traditionally funded. The member also said that this change was a good one because of the existing uncertainty about the level of financial support from the federal government and state-issued bonds.

A member commented that, prior to the current funding formula and establishment of a permanent funding stream in FY 2004, state funding for school capital outlay (called critical capital outlay) varied widely depending on the amount of funding available from available sources. These funds were appropriated each year by the legislature.

Another member commented that construction costs of \$320 per square foot seem to be rather high and asked the source of the data. Rocky Kearney, deputy director, PSFA, said that the data come from PSFA data files and indicated that the \$320 per square foot includes designing costs, demolition and furniture, fixtures and equipment, in addition to actual construction costs. He added that, in certain cases, a school site has conditions requiring extensive regrading and soil amendment where site soils are very loamy, have high clay content or require rock removal. He added that a specific building type (such as a gymnasium) also can vary in cost per square foot. He said that other issues, such as distances from area utilities and installation of on-site fire suppression systems and septic systems, must also be included in the overall project cost.

Mr. Kearney also said that the distance of the project from labor and material supply centers can raise the cost per square foot because the contractors factor in the cost of transporting materials and mobilizing labor. Additionally, school construction projects are public projects and have certain requirements and schedules that must be complied with regarding prevailing wage rates for similar public projects per the "little Davis Bacon Act". He concluded that these factors can combine to increase the cost per square foot.

A member commented that another reason the cost was higher was because there was a large number of projects coming online in a short period of time that, with a constrained demand for materials and labor, might have contributed to driving up the bids on public projects.

Another member asked how the formula treats charter schools. Ms. McEuen responded that charter schools are public schools, and their match requirement is determined by the physical location of the charter school campus. The charter school must use the data from the school district in which the school is geographically located. Ms. McEuen said that both the current formula and the formula proposed in SB 147 treat public schools and charter schools the same. The formula does not change a school's ranking relative to other schools in the PSCOC school ranking of priority facility needs.

A member commented that the issue for charter schools is not the ranking itself but the lack of resources for the required match, since a charter school has no tax base and cannot bond itself to raise capital for the required match. In response, a member asked if charter schools are included in a school district's five-year facility master plan. Martica Casias, planning and design manager, PSFA, responded that charter schools are often included in a school district's five-year facility master plan. The Albuquerque Public School District (APS) is an example in which many charter schools are included in the five-year facility master plan, but inclusion in the plan is contingent on the charter school agreeing to transfer all other state-distributed capital outlay provided by House Bill 33 to APS in exchange for inclusion in the district list of priority capital outlay projects in the five-year facility master plan.

A member asked if some school districts would receive a zero match under the new formula. Ms. McEuen responded that when the proposed formula in SB 147 was fully phased in after five years, several districts would no longer receive a state match. This outcome was due to the new formula determining that the school district would be able on its own to build and maintain its school facilities without assistance from the state based upon its relative ability to raise revenue through bonding and financing the bonds with property taxes allowed to be imposed by referendum by residents of the school district.

A member asked Mr. Eaton about yield control and how some school districts seem to be unable to pass bonds to support their local school facilities. Mr. Eaton replied that yield control was imposed for good reasons in that it allowed long-time residents of a school district with limited income to remain in their homes. Yield control, while distortive in its effects on the local property tax base, has outcomes that policymakers see as being socially beneficial and outweighing the negative tax base distortions. Mr. Eaton explained that another problem entirely

is what is called "the recalcitrant district problem". Mr. Eaton used an example where a number of homes in a school district may be second homes for the residents in the district, and those residents may possibly be only part-time residents in the district and may not have school-age children living in the school district. In that example, a taxpayer may not have enough personal incentive to support a tax increase for school construction. Mr. Eaton related that over the years, there appear to be situations where this occurred. The remedy available to the state is to file a cause of action against a school district and ask a presiding judge to order a school district to impose a tax on itself in order to provide revenue to construct or renovate educational facilities in support of providing an adequate education to the K-12 students in the school district, which is required by the Constitution of New Mexico. Mr. Eaton indicated that the state has not to date exercised this remedy upon any school district to his knowledge.

A member asked what options a school district has if it wants to build or renovate its school facilities but cannot afford the cost. Senator Stewart responded that, under current law, if good effort is made by a school district to raise funds, the state could waive all or part of a local match requirement and could pay the amount needed to make the project proceed to completion.

The chair thanked the presenters and said that the task force would consider a new, similar bill for endorsement for the next legislative session.

Public School Capital Outlay Act Funding: Clarification and Eligibility for Inclusion of Teacherages

Mr. Kearney and Ms. Casias co-presented and explained that teacherages are school buildings, but that there is ongoing debate about how to fund them. Subsection P of Section 22-1-2 NMSA 1978 defines a school building as "a public school, an administration building and related school structures or facilities, including teacher housing, that is owned, acquired or constructed by the school district as necessary to carry out the functions of the school district". Teacherages are built to provide residences for teaching staff, usually in school districts in remote areas of the state. Some school districts have used federal impact aid funding to finance the issuance of bonds to build teacherages in very remote locations. The need to provide teacherages in these remote areas is because school districts have found that it is difficult to attract teachers to work in very remote locations, and providing teacherages is an incentive for potential teachers to locate in these areas. A member commented that in the case of the Santa Fe Public School District, teacherages were discussed because of the high land and housing cost in the Santa Fe area.

A member commented that it is very important to continue having the discussion of teacherages because the "where" and "how" nontaxable severance tax bonds are used have federal restrictions. A member commented that good, well-maintained teacherages are beneficial in attracting high-quality teachers. A member commented that it appears that the PSCOC and the PSFA currently have authority to approve contracts for construction of teacherages, and no change in law appears to be necessary to fund teacherages.

Progress Report: Charter Schools in Public Buildings

Ms. Casias presented on the status of getting charter schools into public facilities. Several handouts were presented to the task force and are included in the meeting file. Ms. Casias presented the relevant statute pertaining to charter schools occupying public facilities (Section 22-8B-4 NMSA 1978). Ms. Casias reported that there are more than 100 charter schools statewide and that the majority of the charter schools are located in the Albuquerque metropolitan area. At the time of the report, Ms. Casias said that there are 35 charter schools that are leasing nonpublic facilities, two that have entered into lease-with-purchase options that were approved by the Public Education Department (PED) and two that are in PED-approved lease-purchase agreements.

A member asked what remedy the authorizing agency or the state has if a charter school elects to lease a suboptimal facility. Deputy Secretary Aguilar, using the example in the list handed out by the presenters, pointed to a weighted New Mexico Condition Index of 49 percent. He commented that this particular score was due to overcrowding at the school. He noted that a facility with this score could still be in reasonably good shape and suitable for a charter school's needs.

A member asked at what point the PSFA communicates to a charter school that its facility is deemed to be inadequate, thus requiring the charter school to find another facility. Ms. Casias replied that the PSFA inspects a facility when the charter school locates or relocates to a new building and then visits the charter school site and performs an inspection every five years thereafter. The PSFA does not have authority to order a charter school not to locate in a facility or to move out of a school facility currently occupied by the charter school. The PSFA's authority extends only to making a recommendation to the PED. The PED has the authority to approve, renew or revoke a charter school's operating charter. The PSFA may only provide an opinion and communicate that opinion to the PED as to the suitability of the facility the charter school is occupying or intends to occupy.

Several members engaged in a discussion about the difficulty in determining the ownership of the facility being leased and whether the owner or owners are also on a charter school's governing board. The PSFA indicated that the PSCOC application for lease assistance requires a charter school board to certify and disclose some ownership details and potential conflicts of interest.

A member said that lease costs for charter schools in facilities that had renovations made for the tenant school may cause the lease cost per square foot to be high. The member also commented that costs for lease-purchase facilities that were built to suit the charter school tenant may also be high. A possible reason for the high lease costs may be due to the relatively higher risk involved in leasing to a charter school. These lease arrangements are risky for the landowner and building owner because charter schools have a potentially volatile student enrollment year over year, which impacts the amount of operating funds that the charter school receives through the SEG distribution. It is this distribution that supports paying the lease costs of the facilities. The member also added that there may be instances in which charter school foundation members

are involved in the day-to-day operations of the charter school and may not have an optimal level of expertise needed in performing the duties of the position but hold the position because of their status as a member of the charter school foundation.

A member commented that in Wisconsin, an entity similar to the New Mexico Finance Authority (NMFA) is establishing a way to sell bonds to finance charter school facility construction. Another member noted that this practice is occurring across the country in various other states as well.

A member asked staff to describe the process by which a charter school is waived from the requirement to be located in an existing and available public facility. Ms. Irion replied that the applicant for lease assistance from the PSCOC certifies in the application that no facilities exist. She added, however, that there is no validation process to confirm the certification, and neither the PSCOC or PSFA has the authority to do so.

A member raised several concerns, including possible violations of the "Bateman Act" (Section 6-6-11 NMSA 1978), which says that a public body cannot indebt itself beyond its reserve levels. An exception to this restriction includes borrowing from the NMFA. The member commented that it appears that charter schools have a legally questionable loophole around the Bateman Act restrictions. The member said that there is a misconception by some charter schools that they will "own" the facility at the end of the term of the lease when, in the cases of some lease agreements, the ownership is not clear. The member concluded by adding that between 60 percent and 66 percent of funding for traditional public schools comes from the SEG distribution. In the case of charter schools, the member asserted that 90 percent of the operational funding comes from the SEG distribution.

A discussion ensued regarding whether a charter school at its inception is part of the school district's five-year facility master plan. Ms. Casias responded that, at inception, the charter school typically is not part of the plan but that five-year facility master plans are "living" documents and are able to be amended to include charter schools at any time. A member commented that more collaboration between school districts and charter schools has been the norm more recently. One of the issues particular to charter schools and available facility space is that the charter school often serves a population of students grouped in a particular geographic area, and a public space offered by a school district may be geographically distant from the students the charter school serves, which is the reason a charter school may reject a space.

The chair thanked the task force members and staff for an informative discussion and asked staff to invite representatives from APS to a subsequent meeting to continue the discussion on charter schools and public facilities.

PSCOOTF Resource Booklet Overview

Ms. Ball went through the PSCOOTF resource booklet with the task force members and briefly described its contents, which include such items as a graphic illustration of the public school standards-based process and the source of funding from SSTBs, as well as the Severance

Tax Permanent Fund, a summary of task force work during the 2016 interim, various charts and graphs illustrating public school capital outlay issues and the latest edition of the Department of Finance and Administration-published booklet entitled "Property Tax Facts for Tax Year 2016". The chair and task force members thanked Ms. Ball and Michelle Jaschke, researcher, LCS, for their hard work in publishing the resource book and said that it is a welcome resource for new members and veteran members alike.

Adjournment

There being no further business before the task force, the meeting adjourned at 3:28 p.m.