

**MINUTES
LESC MEETING
MONDAY, JUNE 13, 2005**

Senator Cynthia Nava, Chair, called the Legislative Education Study Committee (LESC) meeting to order on June 13, 2005, at 9:07 a.m., State Capitol, Room 322, Santa Fe, New Mexico.

The following LESL members were present:

Senators Cynthia Nava, Chair, Gay G. Kernan, Mary Kay Papen, and William E. Sharer; and Representatives Rick Miera, Vice Chair, Joni Marie Gutierrez, Dianne Miller Hamilton, Mimi Stewart, Thomas E. Swisstack, and W.C. "Dub" Williams.

The following LESL advisory members were present:

Senators Dianna J. Duran and Mary Jane M. Garcia; and Representatives Ray Begaye, William "Ed" Boykin, Kandy Cordova, Jimmie C. Hall, and John A. Heaton.

Upon a motion by Representative Stewart, seconded by Senator Kernan, the committee unanimously approved the agenda as presented.

SPECIAL EDUCATION

a. Reauthorization of the Federal Individuals with Disabilities Education Act (IDEA)

Dr. Kathleen Forrer, LESL staff, introduced Ms. Denise Koscielniak, State Director, Special Education, Public Education Department (PED), to provide PED's perspectives on the 2004 amendments to the 1997 *Individuals with Disabilities Education Act (IDEA)*; Mr. James Ball, Assistant Secretary for Educator Quality, PED, to report on the state's implementation of the new IDEA requirement that special education teachers be "highly qualified"; and Ms. Debra Dominguez-Clark, Special Education Director, Bernalillo Public Schools, to discuss the impact of the 2004 amendments at the local district level, particularly in regard to special education teachers. Ms. Koscielniak introduced other PED staff who would be assisting her with her presentation: Mr. Dan Farley, Special Education Assessment Consultant; Mr. Chuck Noland, Office of General Counsel; Mr. Steve Oldroyd, Deputy Director of Special Education; and Ms. Joanne Frey, Special Education Data and Fiscal Manager.

By way of introduction, Dr. Forrer explained that, in 1975, US Congress enacted P.L. 94-142, the *Education of All Handicapped Children Act* (EHA), which guaranteed a free and appropriate public education (FAPE) in the least restrictive environment to every child with a disability and which authorized grants to states for the education of children with disabilities. She noted that FAPE has remained the core concept of every reauthorization bill since 1975, although much more has been added, such as school-to-work programs, the requirement that children with disabilities be included in state- and district-wide assessments, and the guarantee that students with disabilities have access to the general education curriculum. In 1990, Dr. Forrer said, when the bill was reauthorized, it was renamed the *Individuals with Disabilities Education Act* (IDEA); although the latest reauthorization is named the *Individuals with Disabilities Education Improvement Act of 2004*, it is still referred to as IDEA.

To begin, Ms. Koscielniak identified the following differences between IDEA 1997 and IDEA 2004:

IDEA 1997	IDEA 2004
<p>Discipline: Schools could remove special education students for 45 days or longer only if they brought drugs or weapons to school or were harmful to themselves or others.</p>	<p>Discipline: Serious safety issues involving weapons, drugs or inflicting “serious bodily injury” upon another person while at school, on school premises, or at a school function may result in a student’s removal from the classroom for up to 45 school days.</p> <p>Unless a disciplinary infraction is the direct result of a child’s disability, the child will be disciplined in the same manner as a nondisabled child.</p>
<p>IEP: The Individualized Education Program (IEP) was to be comprehensively adjusted on an annual basis. The entire team was required to be present to make a change to an existing IEP.</p>	<p>IEP: Parents and districts can agree to change an IEP without holding a formal IEP meeting.</p>
<p>Early Intervening: Not mentioned</p>	<p>Early Intervening: Districts can use up to 15 percent of their IDEA funds for early intervening services.</p>
<p>Private Schools: When parents did not dispute a district’s program, a privately placed child had no individual right to receive special education and related services.</p>	<p>Private Schools: Consultation between districts and private schools is required to determine proportionate funding and to ensure equitable participation in special education and related services for students with disabilities.</p>
<p>Conflict Resolution: Permitted mediation</p>	<p>Conflict Resolution:</p> <ul style="list-style-type: none"> • Creates the opportunity for a resolution session within 30 days of a complaint being filed. • Encourages the use of mediation as early as possible. • Establishes a two-year statute of limitations from the date of the alleged violation to file a complaint.

IDEA 1997	IDEA 2004
Transition: Required schools to start transition planning for students with disabilities at age 14.	Transition: Requires formulation of measurable postsecondary goals and necessary transition services beginning not later than the first IEP in effect when the child is 16 and updated annually thereafter. According to Ms. Koscielniak, New Mexico will continue to require transition planning at age 14.

After providing the committee with a handout entitled “RESPONSE to INTERVENTION (RtI): The New Mexico Model,” Mr. Farley discussed the following three changes to IDEA 1997:

- IDEA 1997 defined a learning disability (LD) as the presence of “a severe discrepancy between aptitude and achievement.” In contrast, IDEA 2004 defines an LD as a severe discrepancy between achievement and intellectual ability in speaking, comprehension, writing, reading, and mathematics.
- Although IDEA 1997 made no mention of over identification, IDEA 2004 requires districts with significant over identification of minority students to operate early intervening programs that work to reduce over identification. Mr. Farley stated that PED uses focused monitoring to identify and assist districts that appear to be over identifying students.
- Unlike IDEA 1997, IDEA 2004 incorporates references to the use of “scientifically based instructional practices,” “scientifically based research” and “scientifically based early reading programs”; and it allows districts to choose between the severe discrepancy model and the RtI model for specific learning disability (SLD) eligibility determinations. Mr. Farley explained that the discrepancy model is based upon identification of a severe discrepancy between achievement and intellectual ability in speaking, comprehension, writing, reading, and mathematics. According to Mr. Farley, this approach means that intervention often takes place only after a student has “failed.” On the other hand, he noted, the RtI model determines learning disability by measuring learning itself, both in terms of quality and fluency, and provides scientifically based early intervention in both reading and mathematics.

Mr. Noland then identified two additional differences between IDEA 2004 and IDEA 1997:

- IDEA 1997 allowed parents to recover reasonable attorneys’ fees if they were the prevailing party in a due process hearing; however, the 2004 amendments also allow a state or school district to recover reasonable attorneys’ fees if the parents’ complaint is deemed frivolous, unreasonable, or without foundation or if the parents’ attorney continues to litigate after the litigation clearly becomes frivolous, unreasonable, or without foundation.
- IDEA 1997 required districts to provide a copy of procedural safeguards to parents when their child was initially referred for evaluation, each time an IEP meeting was held, whenever the child was reevaluated, and when a request for a due process hearing was filed. In contrast, IDEA 2004 requires that a copy of the procedural safeguards be given to the parents only one time a year with the following exceptions: an additional copy

must be provided whenever the parents request a copy, upon initial referral of the child for evaluation, upon the parents' request that their child be evaluated, and/or upon the first occurrence of the filing of a complaint.

Continuing the presentation, Mr. Oldroyd discussed the issue of parental consent:

- Under IDEA 1997, if the parents of a child with a disability refused to consent to an initial evaluation or a reevaluation, the district could continue to pursue those evaluations by using due process or mediation if appropriate; once consent for an evaluation had been granted, the evaluation had to be conducted within a "reasonable" time period. If the parents refused special education services, the state was required to ensure that a parent's refusal to consent did not result in a failure to provide the child with FAPE.
- Under IDEA 2004, if the parent of a child with a disability does not provide consent for an initial evaluation or the parent fails to respond to a request to provide the consent, a district may pursue the initial evaluation of the child by due process or mediation to the extent allowed by state law if such exists (otherwise, the federal law prevails). Once consent has been granted, the evaluation must be conducted within 60 days. However, if the parent refuses to consent to the initial provision of services, the district cannot use due process or mediation as a way of obtaining permission to provide those services and will not be considered in violation of the FAPE requirement as a consequence.

To conclude the initial part of the presentation, Ms. Frey explained the concept of full funding as it applies to IDEA. Referring to the LESC staff brief, she pointed out that IDEA Part B funding for New Mexico for federal fiscal year 2005 is estimated to be \$84.1 million; however, she said, the state will not know the actual amount until July 2005. Ms. Frey stated that, although the original 1975 federal goal was to fund 40 percent of the national average per-pupil expenditure (APPE), the actual appropriations over the years have averaged approximately 17 percent of APPE. Nevertheless, she said, IDEA 2004 retains the goal of full funding and establishes a six-year path to reach the 40 percent.

To begin the next part of the presentation, Mr. Ball explained that, in order to continue to receive federal special education funding, states now must ensure that their special education teachers are "highly qualified." He stated that under IDEA 2004 all special education teachers must hold at least a bachelor's degree, must obtain full state special education certification or equivalent licensure, and cannot be on a waiver. In addition, he said, special education teachers that teach a core subject must also meet the requirements in the federal *No Child Left Behind Act of 2001* (NCLB): new special education teachers teaching multiple subjects must meet the NCLB highly qualified standard in at least one core subject area (language arts, math or science) within two years from the date of employment; veteran special education teachers must qualify by June 30, 2006, the NCLB deadline. He noted that teachers in New Mexico's 44 rural districts will have until June 30, 2007 to meet both the IDEA and NCLB requirements.

Mr. Ball stated that PED's special education licensure standards, which were developed in 1987, are "silent" on the issue of core subjects and, as a consequence, more and more special education teachers may be teaching core subjects for which they are not academically prepared. However, he continued, New Mexico's special education licensure requirements do qualify teachers as highly qualified so long as they assume a supportive role in regard to the classroom teacher and/or do not teach core subjects. Explaining that the federal government requires states to

report the number of classes taught by highly qualified teachers and not the number of highly qualified teachers themselves, Mr. Ball stated that in New Mexico during school year 2004-2005, 77.5 percent of the 66,610 classes offered at all school levels were taught by highly qualified teachers, both general and special education. Noting that the overall percentage masks a problem at the middle school level, he provided the following breakdown for school year 2004-2005: 83.4 percent of the core classes in elementary school, 68 percent of the core classes in middle school, and 80.4 percent of the core classes in high school were taught by highly qualified teachers. In conclusion, he stressed that PED periodically provides technical assistance to school districts so that they can maintain a highly qualified teaching staff.

Ms. Dominguez-Clark then spoke of the requirement that special education teachers be highly qualified from the perspective of a school district. Noting that the Bernalillo Public Schools primarily uses the inclusion model to provide special education services, she estimated that more than 85 percent of the district's special education teachers are already highly qualified by IDEA 2004 standards. She stated that one difficulty the district has had is that of persuading teachers to review their transcripts to ensure that they meet the IDEA 2004 requirements, adding that some teachers are offended at being asked. In conclusion, she said that the recruitment of new special education teachers might become more difficult as a result of the requirement that they be highly qualified.

Committee Discussion:

In response to a committee member's question regarding what percent of special education costs in New Mexico is provided by the state and what percent is provided by the federal government, Mr. Noland said that he did not know what the respective percentages are but that the amount of state money distributed through the State Equalization Guarantee is approximately \$300.0 million. The committee member then asked Dr. Peter Winograd, Director, Office of Education Accountability (OEA), if he knew how much it costs in New Mexico to educate a special education student. Dr. Winograd replied that he did not. Ms. Koscielniak said that her staff would prepare a chart showing the amount of both state and federal special education funding available by school district.

In response to a committee member's question regarding whether IDEA 2004 provides funds to assist special education teachers to become highly qualified, Mr. Ball stated that he is not aware of any such funds but that districts can use their NCLB money to assist all teachers, including special education teachers.

In response to a committee member's question regarding the process for designating up to 15 percent of a school district's IDEA funds for early intervening services, Ms. Koscielniak explained that, when districts submit their applications for IDEA funding to PED, they include information regarding the amount of funding they wish to use for early intervention, as well as a description of the services they plan to provide. Ms. Dominguez-Clark stated that Bernalillo Public Schools used its early intervening set-aside for school year 2004-2005 to enable its student assistance teams to make appropriate pre-referrals for intervening services. Ms. Debra Hines, Special Education Director, Albuquerque Public Schools (APS), also was asked to comment. Ms. Hines explained that, prior to the enactment of IDEA 2004, APS had budgeted all of its IDEA funding to support existing special education services to students; however, the district has since provided carryover funds to individual schools for pre-referral services.

Noting that in the past school districts have been accused of “formula chasing” by over-identifying students in order to generate more funds through the special education portion of the Public School Funding Formula, a committee member asked if all of the new requirements imposed by IDEA 2004 actually provided a disincentive for such behavior. Both Ms. Koscielniak and Ms. Dominguez-Clark stressed that, notwithstanding the complexities of the law, access to special education services is an entitlement and school districts are legally bound to provide whatever services are required by a child’s IEP.

A committee member expressed concern that the requirement in IDEA 2004 that local school districts spend a proportionate share of their IDEA funds on students in private schools could be construed as establishing vouchers. In response, Ms. Koscielniak explained that IDEA 2004 requires school districts to provide a proportionate share of funding to pay for special education services for students parentally placed in a private school situated within the district’s boundaries; as in the public schools, an IEP determines the extent of the services that must be provided. However, she said, the requirement does not establish vouchers because the IDEA funds are to be used only for the required special education services. Another committee member noted that school districts do not receive special education funds through the Public School Funding Formula for private school students.

In response to a committee member’s question whether PED provides guidance for teachers regarding the special education referral process, Mr. Farley stated that PED publishes a student assistance team manual but that a school district’s procedures may vary from those suggested in the manual as long as the district’s procedures meet all state and federal requirements.

In response to a committee member’s question regarding the effectiveness of the inclusion model for special education students, Ms. Dominguez-Clark stated that the model, although not perfect, does help to create a level playing field for special education students by providing them with the least restrictive environment. She explained that the model works best when the regular classroom teacher is given appropriate professional development and the amount and type of support necessary in the classroom to help all students succeed. In addition, Ms. Dominguez-Clark said, pullout programs for special education students must be carefully scheduled so that students are not absent when the classroom teacher presents the core academic subjects.

In response to a committee member’s question regarding what type of license the teacher of a state-funded preschool program that includes developmentally disabled (DD) four-year-old children must have and whether that teacher must also be highly qualified, Mr. Ball stated that the teacher could hold any one of three state teaching licenses: an early childhood license, an elementary teaching license, or a special education license. He added that preschool teachers are required to be highly qualified by the state. However, Dr. Rindone reminded the committee that because preschool teachers do not teach core academic subjects, NCLB does not require that they be highly qualified.

In response to a committee member’s question regarding the difference between the IDEA 2004 and the NCLB requirements that teachers be highly qualified, Mr. Ball explained that special education teachers who provide only special education services must meet only the IDEA requirements, i.e., they must hold at least a bachelor’s degree, must obtain full state special education certification or equivalent licensure, and cannot be on a waiver. However, Mr. Ball noted, if a special education teacher teaches core academic subjects to special education students, he or she must also meet the additional NCLB requirements.

In response to a committee member's question whether teachers in juvenile justice facilities also are subject to the IDEA 2004/NCLB requirements to be highly qualified, Mr. Ball said that the draft IDEA regulations recently released by the US Department of Education (USDE) seem to imply that these requirements apply only to teachers in public schools. He stated that, he was not sure if juvenile facilities are classified by USDE as public schools but indicated that in New Mexico, teachers in juvenile facilities must be licensed. Noting that students in juvenile facilities who have an IEP must receive special education services, Ms. Koscielniak said that she would seek clarification from USDE on whether the teachers in such facilities must be highly qualified.

Expressing concern that students who drop out of school are more likely than high school graduates to end up in juvenile and adult correction facilities, a committee member asked how many students drop out of school each year in New Mexico. Dr. Winograd stated that he did not have the latest data with him but that he believed that approximately 75,000 students had dropped out of school over the last 10 years.

In response to a committee member's question regarding whether school districts are consistent in the manner in which they discipline special education students, Ms. Koscielniak stated that IDEA 2004 is very specific in terms of disciplinary procedures and procedural safeguards. To her knowledge, she said, school districts are being consistent but noted that PED will be better able to answer the question in the future because of the more stringent requirements in IDEA 2004 regarding data collection.

Noting that a high percentage of youths in juvenile detention facilities have mental health issues, a committee member asked if school districts have the right to expel such students. Mr. Noland explained that, if a student's behavioral problems are attributable to the student's disabilities, the school district is legally obligated first to attempt an educational response that helps the child redirect his or her behavior into more acceptable channels. If there are serious safety issues involving weapons, drugs, or inflicting "serious bodily injury" on another person, Mr. Noland continued, the student may be removed from the classroom for up to 45 school days and placed in an alternative setting. Mr. Noland added that, if circumstances require that a special education student be sent to a juvenile justice facility, the school district is required to provide the facility with the child's records and the facility is required to provide special education services.

In response to a committee member's question regarding the possible overidentification of minority students in regard to behavioral disorders, Mr. Noland stated that IDEA 2004 now requires the state to examine disciplinary data by ethnicity, type of disability, etc., and to determine whether there are valid reasons for any apparent overrepresentation. He explained that, if there are no valid reasons, the state must require the district to change its practices.

While some committee members expressed concern about the possible overidentification of minority students, another committee member suggested that some school districts may be underidentifying students in need of services and asked if the state is monitoring districts to ensure that they are properly identifying students in need of special education services. Ms. Koscielniak stated that PED uses focused monitoring based on demographic and other data to determine if an on-site visit by PED staff is warranted but that PED does not review all IEPs in every district. Mr. Farley explained that, in determining which districts will be subject to closer scrutiny, focused monitoring uses information from the state Accountability Data System (ADS) to select districts and charter schools with wide variances from the state averages on key indicators for students with disabilities. If the results of a monitoring visit indicate that the district is out of compliance with federal or state regulations, he said, the district is asked to develop an improvement plan to address the specific findings in the report; the plan is monitored by the Special Education Bureau until the specific areas of non-compliance are corrected.

In response to a committee member's questions whether there is a shortage of highly qualified special education teachers in New Mexico and whether special education teachers receive higher salaries than other teachers, Mr. Ball stated that although the magnitude of the teacher shortage in the state has decreased substantially in most areas, special education is an exception to the trend. Both Ms. Dominguez-Clark and Ms. Hines noted that, in their respective school districts, special education teachers are on the same salary schedule as every other teacher.

In response to a committee member's question regarding the use of the RtI model to identify learning disabilities, Mr. Farley explained that currently both IDEA 2004 and the state allow school districts to choose between the severe discrepancy model and the RtI model for identifying SLDs but that PED has established July 1, 2007 as the deadline by which all school districts must transition to the RtI model. Mr. Farley also said that in states that have already adopted RtI as the sole model for identifying SLDs, referrals of children to special education have dropped by as much as 20 percent.

Noting that children may be mistakenly diagnosed as having a learning disability because of an inability to read, a committee member asked if the Special Education Bureau was working with the PED staff who oversee the Reading First Program. Mr. Farley responded that the use of RtI encourages the placement of children into scientifically based reading programs, such as Reading First. The committee member then asked if PED is monitoring the state's colleges of education to ensure that they are providing the mandated scientifically based reading courses to prospective teachers. Ms. Koscielniak stated that PED is in the process of gathering the data to determine the status of such courses.

Representative Miera asked OEA to determine by the end of the summer how much it costs to educate a special education student in New Mexico.

Representative Swisstack asked OEA to provide the number of public school dropouts in New Mexico for each of the last five years.

Representative Miera asked OEA to provide information regarding the number of teachers who are highly qualified and the number of teachers who are not highly qualified.

b. Due Process Hearings for IDEA

Dr. David Harrell, LESC staff, introduced the three presenters: Mr. Chuck Noland, Assistant General Counsel, PED; Ms. Christy Edwards, Deputy Director, New Mexico Public Schools Insurance Authority (NMPSIA); and Ms. Brenda Vigil, Superintendent, Tularosa Municipal Schools. These presenters, Dr. Harrell said, would provide, respectively, PED's perspective on the issue and additional information about the nature and costs of due process hearings, including commentary on a special education rule that PED is amending; an explanation of NMPSIA's process and policies regarding reimbursement of school district expenses related to due process hearings; and a school district's perspective on due process hearings and their effects upon school district operations. Dr. Harrell added that Ms. Edwards was accompanied by Mr. Kevin Sovereign, Carl Warren & Associates (NMPSIA's Property/Liability Claims Payor); and Mr. Frank Coppler, NMPSIA's attorney. In addition, Mr. Harrell noted the presence in the audience of several interested parties who, at the pleasure of the committee, would be available to offer comments or respond to questions:

- Mr. David Stevens, Assistant Attorney General;
- Ms. Barbara Albin and Ms. Jane Bloom Yohalem (due process hearing officers);
- Ms. Jacquelyn Archuleta-Staehlin, Ms. Kay Bratton, and Mr. Michael Carrico (attorneys who often represent school districts in due process hearings);
- Ms. Debra Poulin (an attorney who often represents parents in due process hearings); and
- Ms. Sandra Gomez (an attorney with New Mexico Protection and Advocacy System, Inc.).

As his final point in the introductions, Dr. Harrell called the committee's attention to the staff brief and several attachments included in the members' notebooks.

Dr. Harrell explained that the framework for this presentation was two measures related to hearings pursuant to the federal *Individuals with Disabilities Education Act* (IDEA) that the 2005 Legislature had considered but did not pass. One was Senate Bill 854, which would have required PED to pay hearing officers no more than \$5,000 per case and to provide these hearing officers with yearly training and support on case and time management. The other was Senate Joint Memorial 96, which would have requested that the LESC, in collaboration with PED and with school districts, study methods of streamlining due process hearings to make them more efficient and less costly. The joint memorial would also have requested that PED implement the strategies resulting from the study.

In large part, Dr. Harrell continued, these measures were introduced to address the growing concern among school districts – Gadsden, Hobbs, and Tularosa, among others – and state agencies such as NMPSIA over the escalating costs of IDEA hearings, some of which are now paid by school districts and reimbursed, at least partially, by NMPSIA. Although neither measure passed, legislative interest in the issue persists.

Dr. Harrell emphasized that, while the due process hearings and their costs are the focus of the two legislative measures from 2005, it is important for the committee to realize three fundamental factors at the outset:

1. Due process hearings are only one step in the overall process of IDEA-based complaints and appeals, which typically begins with parental dissatisfaction over the services provided – or not provided – to a special needs child and which may not end until a hearing in federal appeals court. Dr. Harrell also noted that PED defines a due process hearing as a legal action in which a hearing officer makes a decision based on the facts and evidence presented. The hearing is conducted by a hearing officer appointed by PED from a pool of attorneys in private practice trained in due process procedures and unaffiliated with PED or the parties in the dispute.
2. Just as the due process hearing is only one step in the overall sequence of events, the fees charged by hearing officers are only one of several costs incurred. Other costs include each party's attorney fees, the fee for the court reporter, released time for school personnel to testify, salaries of substitute teachers, and any court-ordered remedies.
3. Regardless of the two legislative measures, certain cost-saving features were and are already underway. Dr. Harrell reminded the committee, for example, of the changes in due process provisions of IDEA that the preceding presentation had outlined and that the staff brief explained in somewhat more detail. He also noted that the amended PED rule

will eliminate the second-tier administrative hearings (which two hearing officers expect to reduce the cost by half) and remove the authority of hearing officers to hear issues raised under Section 504 of the federal *Rehabilitation Act*.

Mr. Noland began his presentation by describing IDEA as a complex federal law that creates an elaborate set of procedural rights of students with disabilities to a free and appropriate public education (FAPE). Through this law, he continued, Congress has also granted parents the right to an administrative procedure and court review to determine whether the school district has done what it should in providing FAPE and whether the hearing officer properly reviewed the case.

Federal law, Mr. Noland continued, requires PED to establish a structure for appointing impartial hearing officers to hear allegations related to complaints under IDEA. Among other duties, these hearing officers review evidence and hear testimony and then take all the material under deliberation to render a decision. From a pool of five attorneys in private practice who have received IDEA training, PED selects a hearing officer for each case filed on a rotating basis. At the same time, PED selects a mediator from a pool of eight to 10 trained mediators. While the hearing officer schedules a pre-conference hearing to establish the facts and legal issues of the case, the mediator is working with the two parties to try to reach a resolution before the case actually proceeds to a due process hearing. Mr. Noland continued to say that, under current PED rule (which is being amended), any decision that a hearing officer renders is subject to a second-tier administrative review, if so requested by either party, and then to appeals to state or federal district court.

As he reviewed the table of cases filed, Mr. Noland noted that only about one-third of the complaints actually result in a due process hearing; most are either settled or withdrawn prior to that point. Furthermore, citing a letter from one of the hearing officers, Mr. Noland added that, from approximately 45,000 special education students in New Mexico, only 30 to 40 requests for due process hearings are filed each year. Most of those that proceed to hearings, he said, involve high-need, low-incidence disabilities such as autism, severe mental retardation, and profound deafness/cochlear implants.

Mr. Noland also reviewed his table illustrating the fees charged by due process hearing officers case by case, listed in descending order, with the most costly at \$31,600 and the least costly at \$1,500. Also illustrated in this table were the administrative officer fees, which ranged from a high of \$24,750 to a low of \$250. Mr. Noland added that the fees charged by hearing officers, administrative officers, and mediators are the only cost figures that PED routinely collects. Another significant cost factor, however, is the expense of remedies requested by the parents, which have included expensive equipment or accommodations for their special needs children and tuition at private schools.

Mr. Noland agreed that the costs of due process hearings merit attention, but he cautioned the committee that setting caps on hearing officers' fees, as SB 854 proposed to do, would have no effect on the other costs of due process hearings; and it may have other, unintended consequences. Noting the years that hearing officers have spent developing the expertise to handle the caseload, Mr. Noland suggested that few hearing officers would be willing to continue serving under a \$5,000 cap and that PED would therefore be forced to recruit inexperienced hearing officers whose decisions would be more open to attack in federal court. Mr. Noland also cited a letter from one of the hearing officers: "any attempts to artificially manipulate the length of hearings either in terms of time (by placing a cap on hours and fees) or in terms of substituting

unqualified, inexperienced (and thus cheaper) hearing officers . . . is not what is intended under IDEA and would certainly be subject to legal challenge on grounds of preemption and separation of powers.”

Mr. Noland concluded his presentation by noting that PED has received extensive comments on the proposed amendments to the special education rule and that the department hopes to have the final version of the rule adopted by the beginning of school year 2005-2006.

Ms. Edwards explained that NMPSIA’s risk program requires the authority to provide property and casualty, general liability, auto and fleet, and worker’s compensation coverage but that state law does not require IDEA coverage. Rather, NMPSIA began offering it as a courtesy to members in 1997, when surpluses existed in the risk program. Today, NMPSIA remains one of the few insurance authorities in the country to offer such coverage.

Under a memorandum of coverage, Ms. Edwards said, NMPSIA will reimburse a school district for “reasonable” expenses and fees for attorneys and hearing officers up to \$100 per hour. In addition, for cases filed after July 1, 2004, NMPSIA has reduced its per-occurrence coverage to \$20,000 (down from \$40,000) and established an aggregate per school district of \$80,000. To obtain this reimbursement, Ms. Edwards continued, a school district must present proof of loss and “good faith” efforts to negotiate an IEP, to follow the IEP, to participate in mediation, and to comply with any mediated plan or settlement. In addition, a district must “properly and timely [appeal] any adverse administrative decision.”

Ms. Edwards also provided information about the number of claims and the amount of money that NMPSIA has incurred since FY 98. The least costly year was FY 99, when four claims resulted in a total cost of less than \$100,000; the most costly were FY 03 and FY 04, when more than 25 claims resulted in more than \$700,000 in total costs reimbursed.

In her presentation, Ms. Vigil focused on the cost of due process hearings to Tularosa Municipal Schools and the insufficient insurance coverage through NMPSIA, together with inadequate notification of changes in the coverage. Her district, she said, has been involved in either mediation or due process hearings for the past three years, with fees in excess of \$110,000. Compounding this problem is that her district, like certain others, did not receive the notice that NMPSIA sent to its members regarding the changes that Ms. Edwards had explained in her testimony to the committee. Ms. Vigil eventually obtained a copy of the notice from another school district but noted that the notice was dated January 31, 2005 for a meeting on February 3, 2005.

Another issue that Ms. Vigil identified was the concept of an adverse decision. She referred to Ms. Edwards’ point that, under the revised provisions in the memorandum of coverage, a district must properly and timely appeal any adverse administrative decision in order to obtain reimbursement of expenses. In a recent case, however, the district did not consider the hearing officer’s decision to be adverse as it required the district to do what it had already offered to do through mediation. Therefore, the district did not appeal the hearing officer’s decision and, consequently, NMPSIA denied the district’s claim for reimbursement of fees incurred. Ms. Vigil said that she is appealing this NMPSIA decision, as Mr. Coppler had noted she had a right to do, but that action requires additional attorney’s fees.

Finally, Ms. Vigil suggested that one solution may be to have the school districts pay for sufficient IDEA coverage rather than continue to rely upon insufficient coverage with no premium cost, as NMPSIA is providing now. Under the current arrangement, Ms. Vigil said, districts must pay legal fees from their administrative line items. Doing so, she added, not only places an unsupportable strain on district budgets but also misrepresents the cost of public school administration. Ms. Vigil also suggested that, in the future, NMPSIA send any notices directly to school district superintendents, not just to the business officers or whoever is designated as the official NMPSIA member.

Committee Discussion:

Before taking questions from the committee, the Chair invited members of the audience to offer comments on the issue.

In response to Ms. Vigil's concerns, Mr. Coppler said that the NMPSIA board has been debating the IDEA coverage. One possibility was to eliminate it altogether, but doing so would have put some districts in crisis. The exclusion about timely filing an appeal of an adverse decision was one attempt to control costs without dropping coverage altogether. Mr. Coppler also noted that, current insurance coverage notwithstanding, any costs associated with compensatory education awards, which federal courts are providing more often lately, would come from school district budgets. Noting that these items are all insurable, Mr. Coppler suggested that NMPSIA could provide some cost data.

In response to a question from the Chair, Mr. Coppler suggested that, based on Ms. Edwards' figures, broader IDEA coverage would require an additional \$750,000 in the NMPSIA risk budget that would be built into the insurance costs in public school support. Ms. Edwards pointed out, however, that this figure would not include the cost of coverage for Albuquerque Public Schools, which is not a member of NMPSIA.

Mr. Bud Mulcock, a lobbyist representing school administrators, recommended a good actuarial study to determine the cost of IDEA coverage if it were mandated. He also offered to assist NMPSIA in disseminating its notices through the School Boards Association, the Coalition of School Administrators, and the Association of School Business Officials. Mr. Coppler said that he would gladly accept that offer.

Several attorneys in the audience offered their comments and suggestions:

- Mr. Mike Carrico said that federal law gives states wide latitude in designing the due process procedure. He agreed that the cost to districts can be quite high, so high, in fact, that they often settle cases to avoid further legal and administrative expenses. Compounding the problem is the enormous volume of documents filed, most of which are never referenced during the hearing, as well as additional costs such as time for school personnel to testify, salaries for substitute teachers, and fees of court reporters. To reduce costs, Mr. Carrico suggesting capping hearing officers' fees, as is done in worker's compensation hearings; using full-time hearing officers rather than part-time officers paid by the hour; and using educational experts, rather than attorneys, as hearing officers, as some other states do.

- Citing one case in which a hearing officer insisted on a due process hearing despite a district's willingness to settle, Ms. Jacqueline Archuleta-Staehlin said that the real issue is not the fees charged by hearing officers but the quality of the hearing officers themselves. She also noted that school districts have no opportunity to reject a particular hearing officer. Another cost factor, she said, is the transcript of the hearing, which in one case was \$46,000.
- Ms. Bratton said that the cost of due process hearings is not the problem, merely the symptom. The real problem, she said, is that the process is out of control, that it has become the opposite of what it was intended to be: a simple, efficient recourse for parents to pursue. In contrast to some due process hearings that last a week or more, Ms. Bratton continued, the average criminal trial in federal court lasts only three days. One factor, she said, is that hearing officers allow issues to be defined and even introduced during the hearing, rather than beforehand; another is that hearing officers sometimes lend assistance to the parents. Requiring the parents to present their case first, she suggested, would make the process more efficient. Ms. Bratton also asserted that, Mr. Noland's reservations notwithstanding, it is common judicial and administrative practice to limit the duration of a hearing. Ms. Bratton also contended that the issues involved, both medical and legal, are not complex but essentially quite simple. Finally, Ms. Bratton said that both she and Mr. Carrico were familiar with more efficient models used in other states.
- Ms. Gomez countered that the issues that reach the hearing stage are complicated and that parents are unfairly expected to be experts in an increasingly complex and adversarial setting. Like others involved, Ms. Gomez said that she supports informal resolutions but that parents are often forced to file formal complaints merely to obtain necessary information and access to their children's records. It is not unusual, she added, for a school district to fail to abide by an IEP. She also noted that parents, like school employees, must take time off from work to attend due process hearings.
- Ms. Poulin agreed with Ms. Gomez that the issues are complicated and with Ms. Archuleta-Staehlin that some hearing officers need more training. She also described a "disconnect" between NMPSIA and the school districts over terms of IDEA coverage; and she observed that in some cases school districts themselves are reluctant to agree to informal resolutions. She cited as one example a case in which the district, had it agreed to settle, would have been liable for only a small percentage of the final ruling; the district, however, remained recalcitrant.
- Ms. Barbara Albin said that she shares some of the concerns already expressed about hearing officers' controlling the due process hearings. She added, however, that anecdotal examples can be raised in any field of law, noting her own experience with one case in which both parties' attorneys asked her, as the hearing officer, to prepare documents for a hearing even though the parties had settled. Ms. Albin also advised the committee to remain mindful of the legal foundation and purpose for the due process hearing. Congress intended this system, she said, to bring relief to a child whose needs are not being addressed in a timely fashion. If the parties could agree on addressing the child's needs, they would not appear before a hearing officer in the first place. Ms. Albin also said that she is open to any measure that would enhance the quality or efficiency of due process hearings but that she would be concerned about any attempt to curb the rule of law.

- Ms. Yohalem said that the changes in IDEA and the PED special education rule will help reduce costs of due process hearings overall. Particularly helpful, she said, is the removal of the hearing officer’s authority to hear cases involving section 504 of the *Rehabilitation Act*, which requires a higher standard of evidence than due process hearings under IDEA.

In addition to these comments from attorneys, the committee heard from representatives of other school districts that had been involved in due process hearings:

- Ms. Mary Chavez, Director of Special Education, Belen Consolidated Schools, cited one due process hearing that cost the district over \$100,000, including fees for a reading teacher and professional development for other staff members. The child, Ms. Chavez added, sometimes gets lost under the files and briefs.
- Ms. Debi Hines, Special Education Director, Albuquerque Public Schools (APS) said that through her work with 18,000 families she has found that their cases are not complicated; rather, parents file complaints because they have found an attorney “who has an agenda.” If the cases become complex, she added, it is only because they are not focused – largely because the hearing officers allow anything to be presented, despite the objections on the basis of relevance raised by the school district’s attorneys.

After hearing these comments, the Chair invited questions from committee members.

In response to a committee member’s question, Mr. Noland said that PED had begun revising its special education rule about the time the legislative session began, starting with an information-gathering session to which all the parties involved were invited.

In response to a committee member’s question, Ms. Edwards said that NMPSIA’s notices are mailed to designated members, who are sometimes school business officials and sometimes school district superintendents. She also said that the notice that Ms. Vigil had cited had informed recipients that the issue would be discussed at the February meeting of the NMPSIA board but that the board would also take public comment for 30 days before making a decision in March. Mr. Coppler added that the board has debated whether to send notices to superintendents in addition to the 148 designated members but decided not to after several superintendents complained that they receive too much mail.

In response to a committee member’s question whether the board had considered sending these notices by registered mail return receipt requested, Mr. Coppler said that the board had considered such a practice but decided against it because of the cost.

In response to a committee member’s question about the nature of cases filed recently, Ms. Bratton said that they have begun focusing more attention on educational methodology; and Ms. Yohalem said that several of the cases she has reviewed as an administrative hearing officer have involved children with severe disabilities attending schools in rural districts that cannot provide the needed services. Ms. Yohalem added that these cases are typically quite complex, often involving multiple issues and parents seeking private placements for their children even when the district is able to provide appropriate services.

In response to a committee member's question whether school districts can immunize or protect themselves against due process complaints, Ms. Chavez said that, with a recent case in Belen Consolidated Schools, the district was backed into a corner because a private school had convinced the parents that only that private school could serve their child. Ms. Bratton suggested that the school district advise parents to request a facilitated IEP before requesting a due process hearing. The facilitated IEP, she said, is a new provision in the amended PED rule.

During the discussion, committee members raised a number of other points, among them: that some attorneys have been overly aggressive in recruiting parents as clients; that parents in rural areas are less likely than others to be familiar with their rights under IDEA; and that the discussion had raised a number of promising suggestions for curbing the costs of due process hearings. The Chair suggested that school districts should pay for sufficient IDEA coverage and that the LESC staff might work with PED and other parties to address that matter and to enhance the procedures related to due process hearings.

Senator Duran requested that PED provide a table itemizing the various due-process related costs to school districts from 2002 to 2005 and indicating how much of each cost NMPSIA reimbursed.

Representative Begaye requested that PED provide a list of recent due process hearings conducted through BIA schools.

Senator Nava requested that PED provide a list of hearing officers' decisions that had been overturned, either by an administrative officer or by the courts, since school year 1995-1996.

Representative Stewart requested that PED compile a list of model processes used in other states, particularly those that impose limits on the duration of due process hearings.

c. Residential Treatment Centers

Ms. Frances Maestas, LESC staff, introduced Mr. Charles D. Noland, Assistant General Counsel, PED, and Ms. Denise Koscielniak, State Director, Special Education, PED, for a discussion of PED issues relating to services being provided by a school district for students with disabilities that have been placed in a residential treatment center (RTC) within a district's boundaries.

According to PED, Ms. Maestas explained, for several years the department has been requested to provide guidance to a school district with an RTC located within its boundaries on two key issues:

1. Whether a school district is responsible for providing services to a student with disabilities that has been placed in the RTC but is counted and funded in another district; and whether the receiving school district with the RTC can receive state funding or be reimbursed by the home district of the student; and
2. Whether a district is responsible for providing services to an out-of-state student with disabilities and if the receiving district has the authority to charge tuition or request reimbursement from the home state of the student.

However, Ms. Maestas noted, PED reports that inconsistencies in federal and state law do not allow the department to provide clear direction to school districts with RTCs not only for providing services to out-of-district or out-of-state students but also for receiving additional funding.

According to PED, Ms. Maestas stated, federal law requires each state to ensure that a free and appropriate education is available to all children with disabilities who reside within the state. However, some sections of state law conflict with the residency requirement. Referring to attachments included in the committee notebooks, Ms. Maestas pointed out that one section of current state law requires that a free public education be available to any school-age person who is a resident of the state; another section law provides a student with a right to attend public school within the school districts in which the student resides or is present; and yet another section requires school districts to provide special education and related services appropriate to meet the needs of all children requiring such services. Quoting from a PED memorandum dated September 24, 2003, Ms. Maestas stated that "... statute makes is clear that there are two possible ways – residence or presence – for a student to be entitled to attend public school within a given district ... the statute makes it clear that physical presence alone is enough." To further complicate the situation, Ms. Maestas added, another section of state law allows, but does not require, a local school board to charge out-of-state students tuition. According to PED, she noted, the permissive language does not grant the department the authority to require parents or the home state to reimburse a school district for the services it is providing.

With regard to guidance provided by PED to school districts providing services for students with disabilities placed in an RTC, Ms. Maestas noted that the current Special Education Program link on the PED website includes two memoranda, dated September 24, 2003, that outline options that a school may consider as a result of inconsistencies in different sections of state law. In one of the memoranda, Ms. Maestas added, PED also recognizes that greater statutory clarity would be helpful to the department for providing clear direction. However, Ms. Maestas emphasized, the LESC had not been made aware of these problems until this presentation.

To conclude, Ms. Maestas stated that the staff brief included a recommendation that the LESC request PED to conduct a review of current law to address the inconsistencies reported by PED and to provide recommendations for possible legislation, if necessary.

Mr. Noland reported that PED had not previously apprised the Legislature of the issues surrounding the responsibility of a school district for providing services and receiving funding for RTC students primarily because of the willingness of school districts to provide the services through an offsite center concept. He explained that since the mid 1990s, the department has recognized the provision of educational services by a district for RTC students as an "offsite center." He explained that if a school district is willing to assign special education teachers from the district to provide services to RTC students, the district is allowed to include the offsite center as a regular school district program and to include the students, if present on a specified count date, in the district's membership count for funding purposes. However, Mr. Noland indicated that after considering the matter again, he recommended, and Dr. Veronica C. García, Secretary of Public Education, approved in concept, that PED propose a study of the matter to examine current law and to gather data from school districts serving RTC students.

Committee Discussion:

In response to a committee member's question relating to the location and total number of RTCs statewide, Ms. Koscielniak indicated that she had begun discussions with special education directors in school districts to gather the information. Ms. Nancy Jo Archer, Chief Executive Officer for Hogares, an RTC within the boundaries of Albuquerque Public Schools (APS), indicated that the information should be available from the Children, Youth and Families Department, the agency responsible for certifying every RTC in New Mexico.

In response to a committee member's question relating to the educational needs of students placed in an RTC, Ms. Archer noted that most of the students placed in Hogares have behavioral disorders and require extensive support for depression and suicidal tendencies. From her experience, she noted, the average stay for a student placed in an RTC is approximately two months. She emphasized, however, that educational services by a local school district through an offsite center are not available in all of the RTCs in the state. Ms. Susan Albright, educational consultant for Desert Hills, another RTC in the APS boundaries, supported Ms. Archer's testimony and stated that while APS oversees the provision of special education services to students placed at Desert Hills, the district does not currently provide education services and special education teachers as an offsite center.

In response to a committee member's question relating to the number of students currently placed in RTCs statewide, Ms. Maestas stated that PED staff had provided a summary of data from the department's Accountability Data System (ADS) indicating that 178 students were housed in RTCs in 11 school districts statewide. However, Ms. Maestas stated that LESC questioned the validity of the data since APS was not among the districts listed. Ms. Koscielniak added that PED staff was examining the inconsistencies of the ADS data in preparation for a study of the matter.

In response to a committee member's question as to the use of Medicaid dollars for providing educational services for RTC students, Ms. Joanne Frey, Staff Manager, Special Education Bureau, PED, stated that Medicaid funds cannot be used for educational purposes.

With reference to the number of RTCs statewide, Ms. Archer stated that PED would be able to determine the location and number of RTCs statewide by contacting the Children, Youth and Families Department since the agency certifies every RTC in the state.

Upon a motion by Senator Papen, seconded by Representative Hamilton, the committee unanimously agreed to request PED to conduct a review of current law and RTC data to address the inconsistencies reported by PED and to provide recommendations to the LESC by November 2005.

DIRECTOR'S REPORT

a. Approval of LESC Minutes for May 2005

Upon a motion by Representative Stewart, seconded by Senator Kernan, the LESC minutes for May 2005 were unanimously approved.

b. Approval of LESC Financial Report for May 2005

Upon a motion by Representative Stewart, seconded by Representative Williams, the LESC financial report for May 2005 was unanimously approved.

c. Approval of LESC Budget for FY 06

Upon a motion by Representative Stewart, seconded by Representative Williams, the committee unanimously approved the LESC budget for FY 06, including a 3.0 percent salary increase for the LESC staff and director effective July 1, 2005, or first full pay period of FY 06.

d. Correspondence

Dr. Rindone reviewed several items of correspondence. One of them was a summary of committee members' responses to a survey regarding paperless meetings. She noted that for this meeting, materials for agenda item 7, *NCLB Update and the Council on Excellence & Equity*, had been placed on a CD-ROM to provide committee members an opportunity to practice accessing material on a laptop computer. Dr. Rindone emphasized that hard copies of committee meeting materials would continue to be provided for out-of-town interim meetings. However, committee members will have another opportunity to access material via CD-ROM during the November and December interim meetings in Santa Fe. Dr. Rindone also informed the committee that beginning with the minutes of this meeting, the copy for review by the committee will be sent electronically, with the exception of those members who have indicated otherwise.

Dr. Rindone stated that an informational copy of the LESC 2005 Interim Workplan that reflected changes made during the June meeting was included in the committee notebooks.

Dr. Rindone noted that all of the items are also included in the permanent file in the LESC office.

REAUTHORIZATION OF THE FEDERAL *HIGHER EDUCATION ACT*

Dr. Kathleen Forrer, LESC staff, introduced Ms. Katherine B. Cantrell, Interim Secretary for Higher Education, Higher Education Department (HED), to provide a status report on the reauthorization of the federal *Higher Education Act* (HEA), to review the major components of the current HEA, and to assess the impact of the proposed changes to the act on access to postsecondary education in New Mexico. Ms. Cantrell stated that Ms. Maria Emilia Martinez, Director of Financial Aid, HED, was also available to answer questions.

As background, Dr. Forrer noted that HEA is the federal legislation that authorizes the major federal student financial aid programs, including the Federal Family Education Loan Program; the Federal Perkins Loans; the Federal Pell Grant program, which currently has a deficit of approximately \$4.3 billion; Federal Supplemental Educational Opportunity Grants; and Federal Work-Study Programs. In addition, she briefly discussed four other major programs authorized by HEA:

- TRIO, which consists of six outreach and support programs “targeted to serve and assist low-income, first-generation college students, and students with disabilities to progress through the academic pipeline from middle school to postbaccalaureate programs”;

- GEAR UP (Gaining Early Awareness and Readiness for Undergraduate Programs), which provides both college scholarships for low-income students and five-year grants to states and partnerships for services at high-poverty middle and high schools intended to increase the number of low-income students who are prepared to enter and succeed in postsecondary education;
- Title III, which authorizes financial assistance to select groups of institutions, including tribal colleges, Alaska Native- and Native Hawaiian-Serving institutions, and historically black colleges and universities; and
- Title V, which authorizes grants to eligible Hispanic-Serving Institutions (HSIs) to help them expand their capacity to serve Hispanic and low-income students.

Dr. Forrer explained that HEA, which was first signed into law in 1965, was scheduled for reauthorization in 2004. She stated that, although Congress and the administration failed to reauthorize HEA as scheduled, in October 2004 Congress passed H.R. 5185, which extended the HEA programs through federal fiscal year 2005.

Beginning with the second session of the 108th Congress (2003-2004), Dr. Forrer said, a grand total of 105 reauthorization bills have been introduced, 49 during the 108th Congress and another 56 during the first session of the 109th Congress. Some of the bills, she said, would reauthorize the entire act and others only a particular program or type of program. She noted that as of June 2005, two bills were pending in Congress that would reauthorize HEA as a whole (numerous other bills have been introduced to reauthorize individual HEA programs):

- H.R. 609, *College Access and Opportunity Act*, introduced by Representative John A. Boehner of Ohio; and
- S. 371, *College Quality, Affordability, and Diversity Improvement Act of 2005*, introduced by Senator Edward M. Kennedy of Massachusetts.

Dr. Forrer then summarized the major debating points in Congress regarding the reauthorization of HEA: (1) proposed changes to the formula for awarding student financial aid; (2) a reduction in government subsidies for lenders participating in the guaranteed student-loan program; (3) a possible increase in the current maximum Pell Grant award of \$4,050; and (4) possible requirements that institutions of higher education accept transfer credits from other institutions based on criteria specified in proposed legislation to reauthorize or amend HEA.

Ms. Cantrell directed the committee members' attention to a handout in their notebooks entitled "Reauthorization of the Federal Higher Education Act: Impact on New Mexico Students and Institutions." Stating that the first few slides in the presentation illustrate the fact that New Mexico has an undereducated adult population, she identified the following as the key HEA issues facing higher education in New Mexico: student financial aid, particularly the proposed changes to the Pell Grants and to the student loan programs; outreach initiatives, such as GEAR UP; and transfer and articulation of course credits among various types of postsecondary institutions.

In order to receive federal financial assistance, Ms. Cantrell explained, a student must first complete a Free Application for Federal Student Aid (FAFSA), part of which includes calculation of the Expected Family Contribution (EFC), i.e., the amount a family can be expected to contribute toward a student's college costs. She noted that eligibility for federal Pell Grants is calculated by subtracting the expected family contribution, plus a certain portion of what the family pays in state and local taxes, from the maximum award. In December 2004, she said, USDE announced that it had updated the amount families are allowed to deduct for state and other tax payments, a change that will adversely affect students in New Mexico beginning with

school year 2005-2006. Ms. Cantrell indicated that in school year 2002-2003 close to 39,000 students in New Mexico's postsecondary institutions were awarded Pell Grants totaling \$91.8 million. However, she said, in school year 2005-2006, New Mexico could see a decrease in Pell Grant funds of almost \$3.0 million and a decrease in the number of recipients of approximately 900.

In addition to the problems associated with the Pell Grant formula change, Ms. Cantrell stated, the "buying power" of the Pell Grant has also decreased in that any increases in the amount of individual awards has not kept pace with increases in tuition costs. She noted that, in the 1970s and 1980s, Pell Grants covered close to 70 percent of the cost of tuition at a public four-year college but that the grants now cover only about 40 percent of the cost.

Ms. Cantrell informed the committee that HED is working with the state's postsecondary institutions to make the FAFSA mandatory for all New Mexico financial aid; by doing so, she said, more students are likely to discover that they are also eligible for federal financial aid. Noting that sometimes parents and students fail to complete the FAFSA because of privacy concerns, she stated that the new policy will allow families to "opt out" of the proposed requirement.

Ms. Cantrell stated that, in addition to making completion of the FAFSA mandatory, HED is taking other steps to ensure that students and their families are aware of all financial aid sources available to them, including the following activities:

- HED has applied for a grant from the Lumina Foundation for Education to conduct "College Goal Sunday." Timed to coincide with Super Bowl Sunday, College Goal Sunday is a program designed to assist families in applying for financial aid. Having been involved with the program for several years, New Mexico's neighboring state of Arizona has seen a dramatic increase in the number of Navajo students and their families participating in the event.
- HED is working with the New Mexico Lottery Authority and the Board of Directors of the Education Trust to improve its marketing efforts across the state in regard to the availability of various types of postsecondary education and financial assistance opportunities in New Mexico.
- HED is trying to identify funding sources for the College Affordability Endowment Fund. The 2005 Legislature passed the *College Affordability Act*, which creates the College Affordability Endowment Fund, in order "to encourage New Mexico students with financial need to attend and complete educational programs at public post-secondary educational institutions in New Mexico"; however, no money was appropriated to the fund for FY 06.

Referring to the many HEA reauthorization bills introduced to date, Ms. Cantrell stressed that one of the HEA programs important to New Mexico that is hanging in the balance is GEAR UP. She explained that the state received a \$2.5 million statewide GEAR UP grant for FY 05 and has submitted a renewal application for a total of \$21.0 million in GEAR UP grants over the next six years.

After mentioning the difficulties postsecondary institutions in New Mexico are having trying to develop a common course numbering system and transfer policies, Ms. Cantrell noted that the proposals being discussed at the national level would require public institutions to accept credits from private accredited institutions. The problem, she said, arises with private for-profit institutions because many of their courses are proprietary. Explaining that a sound system of

articulation and transfer requires institutions to share course content with each other, she expressed doubt that for-profit institutions will be willing to provide such information to the extent required.

In conclusion, Ms. Cantrell discussed one additional federal program of concern to the state: Adult Basic Education (ABE). She noted that New Mexico receives approximately \$3.5 million per year in federal funds for ABE. Although there are an estimated 400,000 adults in the state who need ABE, she said, the available funding limits the number served to 22,000 each year. She informed the committee that the progress of ABE funding through Congress must be closely watched because there have been several proposals to cut or eliminate the funding altogether. For next fiscal year, she said, Congress has authorized flat funding.

Committee Discussion:

A committee member expressed concern that many types of financial aid have limited years of eligibility even though the average student takes six years to complete a bachelor's degree. The committee member then asked about the specific eligibility requirements for Pell Grants and for the New Mexico lottery scholarships. In reply, Ms. Cantrell noted that a student may qualify for Pell Grants for more than four years but that the lottery scholarships are available for a total of eight semesters. However, she said, the interim Lottery Tuition Scholarship Study Subcommittee is charged with examining the lottery tuition scholarship program as a whole and making recommendations to the Legislative Council by December 15, 2005. Among the issues the subcommittee is expected to consider, Ms. Cantrell reported, are the extension of eligibility to more students, the expansion of the program to tribal colleges, and an increase in the number of semesters for which a student may remain eligible for the lottery scholarship.

In response to a committee member's question whether if there is a large amount of private financial assistance that is never awarded, Ms. Martinez stated that, although the amount of money "left on the table" is not excessive, some universities in the state are working to establish a clearinghouse to let students and their parents know what is available. She cautioned that many of the private scholarships available are merit-based and/or based on unusual criteria, such as the occupation of a parent or a specific last name.

In response to a committee member's question regarding how much funding is required to establish the College Affordability Endowment Fund, Ms. Cantrell responded that even \$1.0 million would be a start. She added that HED is trying to attract private funds.

In response to a committee member's question regarding the status of New Mexico's efforts to develop an articulation system for all public postsecondary institutions in the state, Ms. Cantrell stated that Dr. Steven Gamble, President of Eastern New Mexico University, is leading the effort to complete the task.

In response to a committee member's concern that, in the past, students attending one postsecondary institution who were required as part of their degree program to take courses at another institution could lose their lottery scholarships, Ms. Martinez stated that changes to the state regulation to permit students to retain their lottery scholarships under the circumstances described are under consideration and have been distributed for public comment.

In response to a committee member's question regarding the status of the search for a secretary of higher education, Ms. Cantrell stated that the search committee has received approximately 12 applications and nominations for the position and plans to provide three to five names to Governor Richardson by the end of July.

Senator Tsosie requested that HED provide a list of the financial aid programs available for students in New Mexico, including the number of years of eligibility and the number of students being served by each program.

Senator Papen requested that HED provide a list of the private scholarship programs available through the postsecondary institutions in New Mexico and, in terms of the total funding available, the percent attributable to private scholarships and the percent attributable to federal and state aid.

Senator Nava thanked the presenters and, with the consensus of the committee, recessed the LESC meeting at 5:10 p.m.

**MINUTES
LESC MEETING
TUESDAY, JUNE 14, 2005**

Senator Cynthia Nava, Chair, called the Legislative Education Study Committee (LESC) meeting to order on June 14, 2005, at 9:10 a.m., State Capitol, Room 322, Santa Fe, New Mexico.

The following LESL members were present:

Senators Cynthia Nava, Chair, Gay G. Kernan, Mary Kay Papen, and William E. Sharer; and Representatives Rick Miera, Vice Chair, Joni Marie Gutierrez, Dianne Miller Hamilton, Mimi Stewart, Thomas E. Swisstack, and W.C. "Dub" Williams.

The following LESL advisory members were present:

Senators Mark Boitano, Dianna J. Duran, Mary Jane M. Garcia, and Leonard Tsosie; and Representatives Ray Begaye, William "Ed" Boykin, Kandy Cordova, Jimmie C. Hall, John A. Heaton, and Sheryl Williams Stapleton.

**NCLB: NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL)
TASK FORCE REPORT**

Ms. Pamela Herman, LESL staff, introduced Mr. David Shreve, Senior Committee Director, Education Standing Committee, NCSL, to present a summary of the *Final Report of the NCSL Task Force on No Child Left Behind*.

Ms. Herman directed the attention of the committee to the Task Force report, which was provided to each committee member, and to a one-page summary of task force recommendations attached to the staff brief in committee notebooks. As of introduction to the report, Ms. Herman stated that the federal *No Child Left Behind Act of 2001* (NCLB) was an outgrowth at the federal level of school reform initiatives undertaken by states such as New Mexico over recent decades. She referred to the work of the New Mexico Education Initiatives and Accountability Task Force, appointed jointly by the Speaker of the House, the President Pro Tempore of the Senate, and the Executive, which resulted in the 2003 passage by the Legislature of a comprehensive rewriting of the *Public School Code* to address key reform issues such as assessment and accountability, teacher qualifications and compensation, and governance of state and local educational agencies, in order to align with NCLB. She indicated that, although the reforms imposed by NCLB grew out of earlier initiatives in the states, the costs and difficulties of complying with the specific, rigid requirements of the act have caused concern in New Mexico and many other states. In 2005, the New Mexico Legislature passed HM 2, *No New Mexico Students Left Behind*, urging Congress to fund "the lofty mandates" of NCLB or to accept responsibility for New Mexico's failure to achieve them and advising the state's congressional delegation that taxpayers expect their support for full funding or relaxed standards. Ms. Herman cited legislative and legal challenges to provisions of NCLB in a number of other states including Utah, Connecticut, Maine, Michigan, Pennsylvania, Illinois, Nevada, Texas, and California.

Mr. Shreve provided a PowerPoint presentation to the committee and gave a brief history of the NCSL task force, formed in March 2004 when the organization's leadership realized that its efforts dating from before the final passage of NCLB to resolve flaws in the act and its implementation were not succeeding. Mr. Shreve said that the bipartisan task force held eight meetings in seven cities across the nation and took more than 1,000 hours of testimony from 60 witnesses including legislators, academics, state chief school officers and board members, local superintendents and school administrators, federal officials, and other experts. He said that based on this testimony, the task force identified over 80 concerns, which the task force prioritized and summarized into 25 conclusions and 43 recommendations in six major categories, each covered in a separate chapter of the report. The final consensus document, with no minority report, was released on February 23, 2005 to the biggest public response, according to Mr. Shreve, of any NCSL document in the history of the organization.

Mr. Shreve then outlined the conclusions and recommendations in each chapter in the task force report.

The Role of the Federal Government in Education Reform

Chapter One describes the belief of the task force that the limits of federal power under the Spending Clause of Article I of the US Constitution may be violated by NCLB in greatly expanding congressional power over public education, traditionally a domain of the states. The controlling case on point is the 1987 case of *South Dakota v. Dole*, in which the Supreme Court established specific conditions for the exercise of Spending Clause power. The task force report states that two of those conditions may be violated by NCLB: first, Congress must unambiguously spell out the conditions for receipt of federal funds; and second, these conditions must be an inducement to participate in the federal program, not a coercion. The task force concluded that the federal role in public education ought to be commensurate with the federal contribution, not disproportionate to it, and that a "revitalized" state-federal partnership would respect and honor diverse state systems that meet the spirit if not the letter of federal laws, rather than stifling ongoing innovation. The task force recommends that Congress and the United States Department of Education (USDE):

- create a revitalized state-federal partnership that acknowledges diversity among states and shifts focus from processes and requirements to outcomes and results;
- remove ambiguity regarding the grant conditions in the law;
- request a study by the Government Accountability Office of whether the law is an unfunded mandate; and
- develop a transparent and uniform process for considering waiver applications.

Adequate Yearly Progress

Chapter Two of the report examines flaws in the concept of adequate yearly progress (AYP) as a yardstick for student performance. The report states that AYP does not account for significant growth of individuals or groups, but rather compares different groups of students from year to year, and that it is a pass-fail system with 40 ways to fail and only one way to pass. Mr. Shreve stated that the task force found that the AYP system was designed to identify failure and punish rather than diagnose problems and focus resources to correct them. He also noted that civil rights analyses of the AYP system show that it reflects demographic, rather than academic, diversity. The task force recommends that Congress and USDE:

- provide states much greater flexibility in meeting the objectives of the AYP provisions;
- give states the option of adding or substituting a “student growth” approach to testing and accountability, rather than the “successive group” approach prescribed by NCLB;
- allow states to use multiple measures rather than rely exclusively on standardized tests to evaluate performance;
- reduce the over identification of failure and make the APY provisions less prescriptive, rigid and absolute; and
- allow states to decide the order of interventions when a school is identified as being in need of improvement.

Students with Disabilities and Limited English Proficiency

In Chapter Three, the report concludes that NCLB explicitly conflicts with the *Individuals with Disabilities Act* (IDEA) in requiring students to be tested at grade level, rather than to be taught and assessed at their individual ability level as IDEA requires. Mr. Shreve pointed out that, because IDEA has a basis in civil rights law, it should always trump NCLB in determining the appropriate testing regimen for students with disabilities. Regarding students with limited English proficiency, requiring them to be tested in English within three years of entering the country as NCLB does ignores commonly accepted research regarding the length of time it takes to become proficient in a second language. Mr. Shreve indicated that the concept of proficiency embodied in AYP means that, as students acquire proficiency, they no longer qualify as disabled or limited English proficient; so these groups, by definition, will always contain a preponderance of students who for the most part cannot demonstrate academic proficiency. The task force recommends that Congress and USDE:

- give IDEA primacy over NCLB in cases of conflict;
- give states flexibility to determine the percentage of special education students who can be tested according to their ability, not their grade level;
- allow states to determine the appropriate time to use native-language tests and English-only tests; and
- amend the law so that special education teachers who teach multiple subjects are able to meet the definition of a highly qualified teacher without having to prove content knowledge in each subject.

Flexibility for States to Address Unique Schools and Districts

Chapter Four concludes that NCLB deprives states of the flexibility to deal with unique schools and districts, particularly those in rural and urban areas where all of the problems noted in previous chapters are magnified because of demographic issues such as reduced group sizes or heightened diversity. The task force recommends that Congress and USDE:

- recognize that states are in the best position to identify special circumstances; and
- delegate flexibility authority, through waivers to statutory and regulatory requirements authorized in Section 9401 of NCLB, to allow states to respond to the unique situations of urban and rural communities.

Highly Qualified Teachers and Paraprofessional Requirements

Chapter Five concludes that states are in the best position to determine the qualifications of teachers and paraprofessionals in their schools; and that the federal government has a legitimate role in establishing standards only for teachers paid from federal funds. The task force recommends that Congress and USDE:

- permit states to allow teachers who are teaching multiple subjects to be considered highly qualified based on a single means of evaluation; and
- allow states to establish conditions under which exceptions may be granted to the highly qualified teacher provisions.

The Cost of Closing the Achievement Gap: Compliance vs. Proficiency

Chapter Six, which examines the question of the sufficiency of funding for NCLB, indicates that federal funds account for only approximately 8.0 percent of public education funding, while states are spending between 1.0 and 5.0 percent of their budgets just to comply with the administrative requirements of NCLB. Mr. Shreve stated that, despite claims of “historic” increases in federal funding for education since enactment of NCLB, by any measure actual increases amount to less than 2.0 percent. In order to achieve proficiency of even 70 or 80 percent of students, adequacy studies have shown that states would probably have to increase total education spending by 20 to 40 percent. The task force notes that the cost of opting out of NCLB continues to rise, with threats to states of losing not only Title I money, but all federal funds distributed according to the Title I formula, almost three times as much funding. In addition, the administration has suggested that eligibility for Community Development Block Grants be restricted to communities whose school systems meet AYP. The task force recommends that Congress and USDE:

- substantially increase federal funding for the law;
- request a Government Accountability Office study of the compliance and proficiency costs associated with NCLB;
- reevaluate the 100 percent proficiency goal established in the law; and
- reexamine the financial consequences for states that choose not to participate.

In summary, Mr. Shreve said the task force found that NCLB effectively sharpens the focus of education reform on eliminating the achievement gap, but it does so by stifling innovation, emphasizing achievement in narrow curriculum areas, and focusing on compliance and regulation rather than outcomes. He said that frustration among states over USDE’s lack of flexibility, requiring strict compliance with implementation details rather than progress toward the larger goals of the act has spurred states as disparate as Connecticut, Texas, and Utah to challenge NCLB legislatively, in the courts, or through “civil disobedience” by refusing to comply with specific provisions of the act.

Committee Discussion:

In response to a committee member’s question whether NCSL intends to sue the federal government to address problems with NCLB, Mr. Shreve stated that NCSL does not initiate law suits and probably would not have standing to sue regarding NCLB, but that the organization does file *amicus* briefs where appropriate. Mr. Shreve noted that, because court action is a notoriously slow way to achieve legal reform, the quickest way to remedy the law is through the federal legislative process.

In response to a committee member's question whether NCSL had compiled a catalog of how states have progressed in terms of achieving flexibility from USDE, Mr. Shreve said that USDE is generally reluctant to grant flexibility, with a few notable exceptions such as in Nebraska, which has a long history of locally determined testing. The state's original plan contained no provision for statewide testing and in negotiations with USDE, Nebraska refused to compromise and ultimately received permission to stay with its plan. Generally, Mr. Shreve stated, USDE grants flexibility only when a state "goes to the mat," resulting in a state-by-state menu of provisions, with exceptions granted to one state that may not be allowed for another. According to Mr. Shreve, the task force recommended that any flexibility granted to one state should be available to all states.

In response to a committee member's question whether NCLB contained a "based on availability of funds" clause, Mr. Shreve described two provisions relating to funds availability. Section 1111(b)(3)(D) provides that, if the amounts appropriated in federal fiscal years 2002 through 2007 for grants to develop assessments do not reach certain thresholds, states may delay or suspend administration, but not development, of the assessments. Section 9527(a) prohibits the federal government from mandating, directing, or controlling allocation of state or local resources, or mandating a state or any of its subdivisions to spend any funds or incur any costs not paid for under the act. Several states have pointed to the latter section in contending that federal funds to implement NCLB are insufficient.

Committee members discussed their concerns about provisions of NCLB as it is currently being implemented with potential negative repercussions for New Mexico, which included the following:

- abrogation of the state's authority over public education;
- excessive emphasis on bureaucratic requirements in implementing the act rather than on achieving the goals of the act;
- use of punishment to compel compliance;
- emphasis in the act on groups over individuals;
- the impact of highly qualified teacher and paraprofessional requirements on minority educators, especially in rural areas;
- narrowing of curriculum and possible elimination of subjects like art and physical education in response to the limited focus of NCLB; and
- the prospect of a suit against the state for inadequacy of education funding based on a possible future failure to achieve the proficiency levels required under NCLB.

The members of the committee discussed how best to address their concerns regarding NCLB, and considered the option of sending a letter to the US Secretary of Education stating that the LESC applauds the goals of NCLB but requests a more flexible approach on the part of the federal government to those aspects of the act that most negatively affect New Mexico.

There being no further questions or discussion, Senator Nava thanked the presenter.

READING FIRST PROGRESS REPORT

Ms. Pamela Herman, LESC staff, introduced Dr. Lana Paolillo, Program Manager, Reading First Program, Literacy, Technology and Standards Bureau, Public Education Department (PED) to present a report to the committee on the New Mexico *Reading First* plan, its implementation, and results to date.

As introduction to the presentation, Ms. Herman provided the committee with background information about the federal Reading First program, which was created by Congress when it enacted the *No Child Left Behind Act of 2001* (NCLB). She said that in September 2002 the US Department of Education (USDE) announced that New Mexico would receive approximately \$55.0 million over six years starting in FY 03 to implement Reading First. Through school year 2004-2005, she said, the state has received approximately \$29.7 million. At least \$23.8 million, or approximately 80 percent, has been or will be allocated to school district subgrantees, and up to \$5.9 million, or approximately 20 percent, has been or will be reserved for statewide activities including professional development. Ms. Herman directed the committee's attention to Attachment 1 behind Tab 5 in their notebooks for a summary of annual Reading First budgets.

Ms. Herman said that Reading First funding is intended to enable districts to establish research-based reading programs for students in kindergarten through grade 3 so that students are reading well by the third grade. It provides for significantly increased teacher professional development to ensure that all teachers, including special education teachers, have the skills they need to teach reading effectively, to screen students effectively, and to identify and overcome the barriers that students face in learning to read. She explained that the scientifically based research underlying Reading First programs was reported by the National Reading Panel, a group of 14 reading experts convened at congressional request. The panel identified five key components shown to be essential to a child's learning to read: phonemic awareness, phonics, vocabulary development, reading fluency including oral reading skills, and reading comprehension strategies. In addition to creating a state plan based on these essential components, in order to receive Reading First funds a state must participate in a national evaluation and form a Reading Leadership Team that includes the Governor, the chief state school officer, and ranking members of legislative education committees. Ms. Herman indicated that a list of the members of the New Mexico Reading Leadership Team was attached to the staff brief.

Dr. Paolillo began her presentation by stating that the data she would discuss were contained in a PowerPoint report attached to the staff brief. She said that Reading First grants are awarded to districts based on a competitive application process and that PED had awarded Reading First grants to 90 public schools in 30 school districts serving 16,439 students in kindergarten through grade 3. Of these schools, 24 have been identified by PED to be "in need of improvement." Dr. Paolillo emphasized that schools and districts must understand that Reading First requires a very restrictive and prescriptive approach to reading instruction to which staff must be willing to adhere, including the following: employing a reading coach; adopting a core reading program, an intervention program and supplemental materials that must be followed faithfully; participating in staff professional development; using frequent and extensive assessments and evaluation; remaining in constant contact with PED through teleconferencing; and reporting assessment results electronically. She said that three schools have discontinued Reading First programs because they did not wish to adhere to its prescriptive requirements. According to Dr. Paolillo, while the program is showing some good results, PED has determined that it will make no new Reading First grants until at least school year 2006-2007, when all current schools are implementing Reading First appropriately. Regarding issues that have arisen in

implementing the program since the original plan was created, Dr. Paolillo said that New Mexico Reading First initially allocated an insufficient amount per pupil; therefore, funds have been redistributed to raise the allocation from \$400 per student to \$1,200. She said that, in preparing their budgets, districts are instructed to ask for what they really need to properly implement the program.

Dr. Paolillo said that she was particularly proud to note that USDE has acknowledged New Mexico's right to teach students to read in Spanish, based on the fact that the state constitution indicates an intention that New Mexico remain a Spanish-speaking state. Dr. Paolillo said that the research is clear: students learn to read best in their first language; later they can transfer reading skills to other languages with little effort.

According to Dr. Paolillo, evaluation data from spring 2005 indicate that Reading First is working, and is closing the reading achievement gap in New Mexico. She said that a majority of districts (18 out of 25) show improved performance on the Dynamic Indicators of Basic Early Literacy Skills (DIBELS), with an increase in the number of students reading at benchmark (grade level) and a decrease in those needing intensive intervention. Statewide, kindergartners show the greatest gains in pre- and post-test results, with approximately 28 percent at benchmark level in October 2004 and approximately 70 percent at benchmark by May 2005. Dr. Paolillo stated that assessments of New Mexico first graders did not show improvement, which she attributes to the fact that mid-year in first grade, students are tested for the first time for oral reading fluency, which Reading First schools have not emphasized sufficiently. They are now directed to give more attention to oral reading in kindergarten and early first grade. She said that second and third graders show increases, although less dramatic ones than in kindergarten, in the percent of students reading at benchmark.

Dr. Paolillo said that PED is very encouraged to note that the achievement gap among racial and ethnic groups is decreasing with Reading First and that Native Americans, the ethnic group with the lowest percent of proficient readers in the state, show the greatest gains, with the percentage of students at benchmark increasing by approximately 9.3 points from November 2003 to January 2005. The percentage of African-American students reading at benchmark in the same period increased by approximately 8.5 points, Hispanic students approximately 7.4 points, and Anglo students by approximately 6.6 points.

Committee Discussion:

In response to a committee member's question whether PED will revert Reading First funds to USDE, Dr. Paolillo said that \$1.0 million had reverted under a previous director but that she did not intend to let that happen again. She also indicated that the flow of funds from PED to districts has improved because the department now approves budget adjustment requests within five days.

In response to a committee member's question whether schools are required to select core reading programs from a prescribed list, Dr. Paolillo said that, although the formal federal policy states that there is no list, in practice USDE requires that the programs selected be ranked by an instrument developed by the University of Oregon. She stated that, because New Mexico *Reading First* was implemented slowly and without proper direction during its early stages and because grantees did not receive proper guidance, they have had to make changes to meet new "non-negotiable" program requirements such as the use of certain highly ranked core programs.

In response to a committee member's question regarding the selection of Reading First grantees, Dr. Paolillo responded that there have two rounds of applications from districts in response to PED requests for proposals (RFPs). Because there is a finite amount of money, grants are awarded to districts with the greatest need as well as the capacity to implement the program successfully. She stated that some applicants did not meet program criteria that a high percent of student population must be in the bottom quartile in reading achievement, and a high percent must be eligible for Title I services. She indicated that PED offered technical assistance in grant writing to applicants for the 2004 RFP, but that the department can make a more concerted effort to encourage districts that would benefit most from the program to apply in the next round.

In response to a committee member's question whether rural school districts got "lost in the shuffle" in funding competitions despite a high level of need, Dr. Paolillo stated that districts whose applications had not been funded would have another opportunity to apply and that PED would assure that rural districts were treated fairly.

A committee member remarked upon a recent presentation the member had attended that described schools in Alaska in which students are instructed in their native language for the first three years, before they convert to reading and learning in English. The committee member stated that these schools are reporting success and suggested that it might benefit the committee to hear a presentation on this model.

In response to a committee member's question why teachers still need training in the basics of reading instruction after they complete a college program, Dr. Paolillo agreed that teachers often finish education programs without really knowing how to teach reading using methods validated by scientifically based research. She said this was partly attributable to frequent changes in reading theory over the past years.

A member of the committee raised two concerns. The member noted, first, that the state Reading Leadership Team has met only once, two years ago, and needs to be reconvened; and secondly, that Reading First is not intended to affect only the teachers in schools that apply, but that it promotes good strategies for all teachers. The member noted that district applications must include plans to provide professional development in these strategies for every teacher and suggested that PED is not doing enough to assure that districts follow through with these plans.

Senator Duran requested that PED provide the LESC with information about the eligibility requirements for Reading First grants.

Senator Tsosie requested that PED provide the LESC with a list of the Reading First districts, with their gains in reading achievement in rank order.

Senator Duran and Representative Begaye requested that PED provide the LESC with a list of all the districts that had applied for Reading First grants and, for those not funded, the reasons for those decisions.

There being no further questions from the committee, Senator Nava thanked the presenter.

INSTRUCTIONAL MATERIAL PROCESS

Ms. Frances Maestas, LESC staff, introduced Mr. Gilbert Perea, Assistant Secretary, Program Support and Pupil Transportation, Public Education Department (PED), to discuss the activities of the department in implementing the amendments to the *Instructional Material Law* enacted in 2005 and the results of the first summer institute.

Ms. Maestas explained that in 2005 the LESC endorsed and the Legislature passed legislation to amend the *Instructional Material Law* to:

- require PED to allocate by April 1 (rather than by July 1) 90 percent of the initial allocation for the purchase of instructional material;
- require PED, by rule, to establish a summer review process of core/basal instructional material in the content area under adoption that is facilitated by content area experts and that:
 - ensures that instructional material purchased from the multiple list meets PED's standards and benchmarks;
 - utilizes Level 2 and Level 3A teachers as reviewers; and
 - includes Level 1 teachers, students in teacher preparation programs, parents, and community representatives; d
- create the Instructional Material Adoption Fund to allow PED to collect fees from publishers submitting materials to be reviewed for adoption;
- allow PED to provide a stipend from the Instructional Material Adoption Fund to the reviewers for participating in the review to ensure that instructional material purchased from the adoption list meets the standards and benchmarks;
- allow school districts and eligible state institutions to expend 50 percent (rather than 30 percent) for materials not on the state adoption list;
- require PED to make direct payments to book depositories or publishers on behalf of each private school to allow these schools to obtain textbooks for students in a more timely manner; and
- allow a superintendent to apply to PED for a waiver of the use of allocated funds for the purchase of instructional material either included or not included in the multiple lists. If a waiver is granted, a budget adjustment request submitted by the district to PED will not be required.

Mr. Perea began his presentation by recognizing and commending the staff of the Instructional Material Bureau: Ms. Betty Kee, Director; Ms. Marjorie Gillespie, Educational Administrator; and Ms. Sharyn Perea, Administrative Assistant, for their efforts in facilitating the changes in the instructional material review process immediately after the changes were signed into law.

Mr. Perea reported that, to implement the requirements now in the law, the department:

- developed a rule, effective June 1, 2005;
- held a workshop with private schools on May 13, 2005; and
- coordinated and conducted the first Instructional Materials Summer Review Institute from June 5 through June 10, 2005 at the College of Santa Fe for the review and adoption of science, health, and physical education materials for school year 2006-2007.

With regard to the summer institute, Mr. Perea reported that:

- 35 publishers submitted materials for review;
- PED collected approximately \$184,000 in publishers fees for the Instructional Material Review Fund;
- 72 reviewers, nine of whom were facilitators, participated in the review process; and
- the results, or recommendations, had been submitted to the Secretary of Public Education for her consideration and action by July 7, 2005.

Finally, Mr. Perea reported that the teachers that participated in the summer review process indicated that the process was one of the best professional development activities of their career, primarily because of the opportunity to collaborate with highly qualified content experts from around the state.

Committee Discussion:

In response to a committee member's question relating to the satisfaction of private schools with the changes in law, Mr. Perea reported that the evaluation results of the PED workshop held for private schools in May indicated a satisfaction rate of approximately 93 percent.

In response to a committee member's question relating to the number of items selected for adoption, Mr. Perea reported that 256 items have been recommended to the Secretary of Public Education for adoption in the core basal, or instruction list.

In response to a committee member's question about the selection of summer institute reviewers, Mr. Perea said that PED provided informational material to superintendents and principals; posted an application on the PED website; and, by email, solicited nominations from administrators and directors of instruction statewide immediately after the 2005 legislative session concluded. The selection of the reviewers, he stated, was determined by a team of PED staff focused on ensuring that the participants included Level 2 and Level 3 teachers (current practitioners) representing all grade levels.

In response to a committee member's question about the compensation provided to the reviewers, Mr. Perea reported that the facilitators received \$150 a day plus mileage; the reviewers received \$125 a day plus mileage; and room and board was provided for all participants.

NCLB UPDATE AND THE COUNCIL ON EXCELLENCE & EQUITY

Senator Nava welcomed Dr. Veronica C. García, Secretary of Public Education, who presented an overview of the Secretary's Council on Equity and Excellence and its recommendations regarding closing the achievement gap. Secretary García also provided the committee with an update on *No Child Left Behind Act of 2001* (NCLB) focused on the US Department of Education's (USDE) "bright-line" principles, new federal flexibility regarding NCLB implementation, and short-term and long-term policy that relate to special education.

The Council on Excellence and Equity

In introducing her presentation, Dr. García said that she would refer to handouts provided to the committee on paper and, in part, on CD ROM. She stated that in December 2004 she announced the formation of The Council on Excellence and Equity as a component of Project Excel, which is described by the PED as an aggressive, integrated action plan to close the achievement gap in public education and to raise expectations and achievement levels for all students. She said that the council consists of over 40 members including legislators, local school board members, school administrators, parents, teachers, and colleges of education from across the state; and that it will meet quarterly to assist and advise the Secretary on department policy.

According to Dr. García, the council held its first meeting as a retreat on April 23, 2005 to establish its overall strategy and goals, which include:

- holding community conversations in each region, collaboratively organized with local leaders;
- aligning professional development systems based on a social community model, including input from the community conversations;
- developing a clear legislative program, examples of which include:
 - a memorial to study interagency collaboration to support the whole student/whole community model;
 - amending and broadening the *Indian Education Act*; and
 - legislation to support school-based health centers and “grow your own teachers” approaches;
- carrying out an effective public awareness campaign/strategy; and
- holding a successful 2006 conference on closing the achievement gap.

Dr. García described the first community conversation, which was held in Bernalillo on April 25. She stated that a broad spectrum of the community attended and that the presentation of school demographics and poor achievement data drew a strong, focused reaction. The students present said that they should be held to a higher standard, and parents discussed the need to engage other parents and to communicate with them in their native language. Dr. García said that the district superintendent has now begun to develop an action plan for the community. Future community conversations will be convened in Gallup, Las Cruces, and other sites, with the goal of holding them throughout the state.

Dr. García discussed the process of aligning professional development with best practices in math, science, reading, and instruction of limited English proficient students. She said that the education system needs to focus resources in a coordinated way, with collaboration among institutions of higher education and organizations such as Regional Educational Technology Assistance (RETA) and Re:Learning. She also cited the strong connection between obesity and poor achievement, which she discussed with a group of business leaders at a gathering in Albuquerque. Dr. García added that state agencies like PED must go beyond NCLB to focus on the whole child through collaboration with other agencies that serve the same clients such as the Children, Youth and Families Department and the Department of Health. Dr. García said that PED’s legislative initiatives would include promotion of more interagency cooperation to maximize resources. She also pointed out the value of the “grow-your-own-teachers” model, another legislative initiative targeted by the council, which recruits local high school students to become teachers.

Meetings of the Council of Chief State School Officers (CCSSO) and US Education Secretary Margaret Spellings

Dr. García then turned the committee's attention to the subject of the new flexibility in implementation of NCLB announced by Margaret Spellings, US Secretary of Education. Dr. García explained that Secretary Spellings has set out four "bright line" principles that are fundamental to and non-negotiable in the implementation of NCLB, as follows:

- ensuring students are learning;
- making the school system accountable;
- ensuring that information is accessible and parents have options; and
- improving teacher quality.

Together with other chief state school officers, Dr. García attended two meetings with the Secretary to seek greater flexibility in satisfying the technical requirements of NCLB. According to Dr. García, the CCSSO believes that the key elements of NCLB accountability should represent the guiding principles that all states, school districts, schools, and students strive to attain. However, the CCSSO maintains that, so long as a state continues to demonstrate significant improvement in the percent of students proficient in reading and math and a narrowing achievement gap, the USDE should offer genuine flexibility that allows states to adopt or continue to operate their unique accountability systems, whether based on a growth or status model.

Dr. García said that, at the first meeting of the CCSSO on April 7, 2005, Secretary Spellings announced "a new path" for NCLB: "a new, common-sense approach to implementing NCLB" based on the bright-line principles, which would set the parameters for the flexibility USDE can offer. She said that USDE is committed to providing states with the flexibility they need to implement the law in a manner that reflects each state's unique circumstances and priorities, in keeping with NCLB. Dr. García listed the three areas where the Secretary indicated flexibility would be granted: special education, limited English proficiency (LEP), and developing a growth model for measuring adequate yearly progress (AYP). At a second meeting between the CCSSO and Secretary Spellings on April 17, 2005, Dr. García said she had an opportunity to share New Mexico's concerns regarding NCLB, concerns that she expressed in greater depth during a third, one-to-one visit with the US Secretary on May 20, 2005. These concerns were the following:

- bilingual issues, LEP, and the requirements of the New Mexico constitution;
- Native American student issues, such as the three year requirement to attain English language proficiency; the reading challenges faced by students from a culture whose language is not written; and the requirements of the New Mexico *Indian Education Act*;
- rRural school issues such as the need for middle school teachers with multiple certifications in smaller schools;
- supplemental educational services (SES) and school choice and the conviction that SES, rather than school choice, ought to be the first option for students in schools that fail to make AYP for two years;
- the growth model for AYP, for which New Mexico would like to be a pilot state; and
- a request to serve on the LEP committee being formed by USDE.

Dr. García stated that she was invited to serve on the LEP committee, which has its first meeting on June 30, 2005, and that she was asked to bring experts in linguistics. She plans to bring a specialist in Native American languages. Regarding the other issues that she had raised Dr. García, said that Secretary Spellings indicated that New Mexico should submit its flexibility requests to USDE; however, the Secretary noted she can waive only those requirements that are in regulation, not those specified in statute.

Regarding the flexibility issue, Dr. García said that USDE issued information and guidelines on May 10, 2005, detailing new flexibility regarding assessment of students with disabilities who have persistent academic deficiencies—those who “can make significant progress but may not reach grade-level achievement standards within the same time frame as other students.” The number of students who may be included in this group is subject to a 2.0 percent cap at the district and state level. The guidelines provide for interim, one-year adjustments to measuring AYP for students with disabilities to allow states time to develop proficiency assessment processes for those students, who must be measured against the same content standards as other students but alternate achievement standards. Dr. García said that USDE would grant this flexibility only to states that meet all the Title I and *Individuals with Disabilities Education Act* (IDEA) requirements directly related to achievement and instruction for students with disabilities in the following ways:

- achieve a statewide participation rate for students with disabilities at or above 95 percent;
- make appropriate accommodations available for students with disabilities;
- make alternate assessments in reading/language arts and math available for students with disabilities who cannot participate in the regular assessment even with accommodations, and report the results for these assessments; and
- provide in the state accountability plan for a minimum subgroup size for students with disabilities that equals that for other subgroups.

Dr. García directed the attention of the committee to a copy of a May 31, 2005 letter from PED to USDE requesting that New Mexico be allowed to take advantage of the interim option for spring 2005 AYP determinations and seeking permission to amend the state plan regarding assessment of students with disabilities. The letter states that New Mexico would commit to developing a new assessment for students with persistent academic deficiencies that would use modified achievement standards based on grade-level content standards. Under the amended state plan, the number of students who score proficient or above on the new assessment must be capped at 2.0 percent of total proficient scores at the state and district level.

Dr. García stated that initial computations by PED suggest that not many districts in New Mexico will benefit under the one-year option. She said that USDE has allocated \$14.0 million for states that need to develop new assessments for students with persistent academic deficiencies and that New Mexico is one of the states that must start from scratch in developing alternative achievement standards and appropriate assessments for these students.

Finally, Dr. García said that she would be sending another letter to USDE, requesting flexibility in other areas that she had discussed with Secretary Spelling, and that she would be happy to report to the LESC on these requests in June.

Committee Discussion:

A member of the committee broached the subject of real and perceived conflicts between NCLB and state and federal Indian law and policies, such as the *Indian Education Act*, that impose a clear duty on schools to impart native language and culture. Dr. García agreed that this message must be heard many times to be grasped.

In response to a committee member's concerns regarding coordination between PED and the BIA in the implementation of NCLB, Dr. García said that the agencies are beginning to work together; for instance, the state is performing AYP calculations—but not determinations—for the bureau, and BIA schools are now participating in state assessments. She said that collaboration is imperative so that the many Indian students who transfer between the two systems are not placed at a disadvantage.

In response to a committee member's question about how the CCSSO is addressing broad issues of concern with USDE, Dr. García responded that the council had worked with USDE on the new special education flexibility and that some but not all of its suggestions were accepted. She also explained that the 14-state NCLB cost study, discussed at the May meeting of the LESC, was a CCSSO project. In terms of state efforts, Dr. García said that New Mexico had sent a letter to former Education Secretary Paige raising concerns about NCLB implementation. Because that letter was never answered, she suspects that it will be resubmitted. The department has also scheduled briefings with the New Mexico Congressional delegation, on the theory that the best hope for substantive change in NCLB is reauthorization of the statute in 2007.

Dr. García alerted the committee that this spring was the first time all grades 3 through 8 plus 11 took the state assessment, which could increase the number of schools that do not achieve AYP in the fall 2005 designations. She stated that not making AYP does not necessarily indicate that a school is not succeeding, since many schools show growth but do not meet AYP because of participation rates or the performance of just one subgroup. Although the state accountability system attempts to make finer distinctions, NCLB sanctions apply to all of these schools, which may be very difficult for the press and constituents to understand. She said that PED was trying to work with schools in the corrective action cycle with appropriate interventions based on their actual needs.

In response to a discussion among committee members regarding the need to have consistent messages from various New Mexico governmental entities to federal officials on the subject of NCLB, Dr. García agreed that the more stakeholder groups conveying the same message, the better.

In response to a committee member's question regarding her request to Secretary Spellings that New Mexico serve as a pilot state to test a growth model of measuring AYP, Dr. García stated that she had discussed this request with the Secretary in their May meeting and that she would put it in writing along with other requests for flexibility.

A motion was made by Senator Sharer and seconded by Senator Papan to request that the LESC write a letter to Secretary Spellings regarding the NCLB concerns discussed during this meeting and requesting appropriate flexibility; and that the committee send courtesy copies of the letter to the New Mexico congressional delegation. The committee approved the motion by consensus.

Senator Nava thanked the presenters and, with the consensus of the committee, recessed the LESC meeting at 4:31 p.m.

**MINUTES
LESC MEETING
WEDNESDAY, JUNE 15, 2005**

Senator Cynthia Nava, Chair, called the Legislative Education Study Committee (LESC) meeting to order on June 15, 2005, at 9:05 a.m., State Capitol, Room 322, Santa Fe, New Mexico.

The following LESG members were present:

Senators Cynthia Nava, Chair, Gay G. Kernan, Mary Kay Papen, and William E. Sharer; and Representatives Rick Miera, Vice Chair, Joni Marie Gutierrez, Mimi Stewart, and W.C. "Dub" Williams.

The following LESG advisory members were present:

Senators Dianna J. Duran, Mary Jane M. Garcia, and Leonard Tsosie; and Representatives Ray Begaye, William "Ed" Boykin, Kandy Cordova, Jimmie C. Hall, John A. Heaton, and Sheryl Williams Stapleton.

**SUPPLEMENTAL EDUCATIONAL SERVICES FOR SCHOOLS
IN NEED OF IMPROVEMENT**

Dr. David Harrell, LESG staff, introduced the presenters: Mr. Sam Ornelas, Director, Title I, Public Education Department (PED); and Ms. Arlene Strumor, Deputy General Counsel, PED. Their role, Dr. Harrell said, was to present the PED perspective on two issues related to supplemental educational services (SES) and to explain a rule that PED was drafting to govern certain aspects of SES providers' services. Dr. Harrell also noted that Ms. Alice Chavez-Villa, owner and director of The One Room School House, had been scheduled to present but was unable to do so. She had, however, sent a letter that she asked to be provided to the committee.

Dr. Harrell explained that the two issues related to SES had arisen since the committee last examined the topic during the 2004 interim: (1) the prospect that non-Title I schools must offer SES and pay for them with funds other than Title I; and (2) the practice of some SES providers of offering incentives or rewards to students or parents.

To put these issues in their overall legal context, Dr. Harrell reminded the committee that both state and federal law provide a series of consequences, or sanctions, for schools that fail to make "adequate yearly progress" (AYP).

- Schools begin to face the series of sanctions after two consecutive years of not making AYP, Dr. Harrell said. At that point, a school enters the school improvement cycle as a school in need of improvement. Among other actions, a school in its first year of school improvement, together with the district, must provide or pay for transportation, within available funds, for students who exercise their option of transferring to a higher ranked school.

- After three consecutive years of not making AYP, *No Child Left Behind Act of 2001* (NCLB) requires a school to provide its low-income students with SES, including after-school programs, tutoring, and summer services, within available funds. State law makes SES available to all students in the given school, within available funds.

In addition to requiring these services, Dr. Harrell continued, both state and federal law provide a mechanism for funding them. The NCLB requires districts to set aside a certain portion of their Title I funds for these purposes; and, in 2003, state law created the Schools in Need of Improvement Fund, to be administered by PED. However, the Legislature has never provided an appropriation to the fund because of information from PED that federal funds would be available each year to meet these needs.

Regarding the first issue, Dr. Harrell said that, according to PED and the US Department of Education (USDE), districts may use funds from state, local, or private sources, as well as funds from certain federal programs, to provide SES for non-Title I students. This issue has only now begun to emerge in New Mexico, Dr. Harrell continued, as, according to PED, only two non-Title I schools are currently required to offer SES: Española Valley High School and Carlos F. Vigil Mid-high School, both in the Española Public Schools. The issue is likely to grow, however, as more schools fall into the school improvement cycle. Once the new school rankings are issued in August 2005, PED will know how many non-Title I schools must offer SES during school year 2005-2006. The department does not expect the number to increase dramatically, however.

Regarding the second issue, Dr. Harrell said that in other states, more so than in New Mexico, some SES providers have begun offering incentives to parents and/or students as enticements for selecting those vendors' services, raising questions about business ethics and the mixing of public education and private enterprise. Often these incentives take the form of gifts or other giveaways unrelated to the educational services that the vendors provide, causing increasing concern that parents or students may select a provider based upon the incentive being offered rather than the quality of services to be provided.

In New Mexico, according to PED, the use of incentives seems to be limited to two of the 22 state-approved SES providers, who offer them not as recruitment tools but as rewards for student attendance or achievement. Academia.net, based in St. Paul, Minnesota (one of several vendors based in other states), offers MP 3 players; and The One Room School House, based in Las Cruces, offers a variety of rewards.

Until quite recently, Dr. Harrell said, there had been limited federal guidance on these practices. In fact, the original position of USDE was to offer very little oversight in order to provide "as little regulation as possible so the market can be as vibrant as possible." Then on June 13, 2005, the USDE issued its anticipated guidance manual covering virtually all aspects of SES. Among other points related to incentives, these guidelines suggest that state education agencies (SEAs) "consider developing a policy with regard to providers' use of financial incentives or other gifts," in consultation with providers, applicable to all providers evenly, and not barring "standard marketing practices." This policy, the federal guidelines further suggest, might allow "nominal incentives" to parents or students to attend information sessions but should prohibit gifts or financial incentives for enrolling in a given program. The USDE guidelines also advise SEAs to prohibit unfair business practices, kickbacks, and false advertising and to "watch for [school district] practices that give preferential treatment to certain providers" because of a prior relationship between the provider and the district.

In advance of this federal guidance, Dr. Harrell continued, PED has drafted a rule to address the issue in New Mexico before it becomes the problem that it has elsewhere.

Mr. Ornelas said that, on June 10, 2005, PED issued a new request for proposals for SES vendors, in addition to the 22 already approved; and that the draft rule, scheduled for a public hearing on June 17, had been developed through consultation with school districts that must offer SES and with the vendors who provide them. He also noted that it is uncommon for USDE to revise its guidelines, as it has done with SES; but a number of questions and issues, like those addressed in this presentation, warranted the revision.

Ms. Strumor said that the advent of SES has created a new relationship between private providers and public education. To address this relationship in a “proactive” way, the Secretary of Public Education directed PED staff to draft a rule addressing three issues: the use of incentives, the use of rewards, and the timeline for services. Ms. Strumor added that she will convey the committee’s comments to the Secretary, who will consider them, together with the public comment that the department receives through 5:00 p.m. on June 17, in her final decision about the content of the rule.

Turning to the draft rule, which Dr. Harrell had included as an attachment to the staff brief, Mr. Ornelas reviewed the definitions of key terms. Incentives, Mr. Ornelas explained, are “any goods, facilities, services, gifts, coupons, discounts, rebates, or cash offered or given to anyone by or on behalf of a supplemental educational services provider to promote selection of their [sic] services by parents or guardians of eligible children.” In contrast, rewards are “an acceptable classroom incentive with no redeemable monetary value to an eligible child or that child’s parent or guardian and that is offered to an eligible child only as a reward for attendance, continued participation, or achievement related to a provider’s services.” Effective with school year 2005-2006, Mr. Ornelas continued, the draft rule would prohibit incentives but allow rewards – such as pizza parties, school supplies, or the opportunity to order discounted instructional material – if the parents consent to the offering of such rewards.

The definition of another key term, supplemental educational services, Mr. Ornelas said, comes directly from NCLB: “tutoring and other supplemental academic enrichment services that are in addition to instruction provided during the school day and are of high quality, research-based, and specifically designed to increase the academic achievement of eligible children on required academic assessments and attain proficiency in meeting the state’s academic achievement standards.” Mr. Ornelas also emphasized that, under NCLB, only low-income children are eligible for SES, whereas under state law all students in a school that has not met AYP for three consecutive years are eligible.

Regarding the timeline, Mr. Ornelas explained that, as currently drafted, the rule requires school districts to notify parents about the availability of SES within two weeks after school has begun; provides for a four-week enrollment period beginning after the two weeks’ notice; requires SES services to begin within four weeks after the enrollment period ends; and requires SES providers to complete at least 60 percent of the services to eligible, enrolled children prior to the administration of the state-mandated criterion-referenced tests (CRTs, which are the primary measures of AYP). Mr. Ornelas added that PED is considering two amendments to these provisions, however: (1) not limiting districts to a four-week enrollment period but allowing open enrollment; and (2) requiring that 60 percent of the SES services be provided to at least 90 percent, rather than all, of the students enrolled in the program before the CRTs are administered. The 60/90 provision, Mr. Ornelas said, is modeled after a policy used in the Philadelphia, Pennsylvania public schools.

As the final part of the presentation, Dr. Harrell distributed copies of the letter from Ms. Chavez-Villa. In brief, the letter explains that, because of her own background in poverty, Ms. Chavez-Villa has chosen to reinvest some of the profits from her tutoring company into the families whose children have enrolled in her program in an effort to enhance the children's overall development and the families' welfare. Benefits that she has provided for students' attendance or achievement include karate lessons, gymnastics lessons, shoes, gift cards, and a small stipend for the families' utility bills. "We as vendors," Ms. Chavez-Villa writes, "all have the same opportunities to market and present our program to schools and parents . . . I just so happened to create something that was not only beneficial to me, but to my students, their families, and to my teacher-tutors."

Committee Discussion:

Before taking questions from the committee, the Chair invited SES vendors in the audience to speak:

- Ms. Elizabeth Ethelbah and Ms. Elizabeth Lawrence, owners of Advantage Tutoring, together with their program director David Bowman, explained that their program is academically based; that it provides professional development for its tutors, especially those who may lack a background in reading; that it uses its own internal evaluation; and that parents should select a vendor based upon the program, not any incentives.
- Ms. Margie Aragon, with Youth Development, Inc., said that her program provides 100 percent of the tutoring by the time the CRTs are administered, not the 60 percent that the PED rule has proposed, and that each student receives 24 to 25 hours of tutoring.
- Dr. Alex Kolkmeier, with InSight Educational Services, said that her greatest concern is that the window for enrollment should be wider. Another emerging problem, she said, is the discrepancy between the per-student caps and the rates charged by the providers: if too few hours of tutoring are provided, student outcomes are compromised. Another issue, according to Dr. Kolkmeier, is that public school teachers are generally unfamiliar with SES.

In response to a question from the Chair, Mr. Ornelas said that the number of hours of tutoring that a provider offers depends upon the vendor's proposal and the contract between the vendor and the school district.

In response to a question from the Chair, Dr. Harrell said that the spending caps – that is, the amount of money allocated per student for tutoring services – vary by district, according to the district's Title I Part A allocation and student demographics, and that PED has provided the LESC office with a by-district list. Mr. Ornelas added that the statewide average is approximately \$1,200.

In response to a committee member's question and concern that the 60/90 provision is a very low minimum standard that school districts should seek to exceed, Ms. Strumor said that the RFP could acknowledge this ratio as a minimum standard and permit a higher one although changing the parameters of an RFP inevitably creates tension. Mr. Ornelas explained that most providers offer twice-weekly tutoring sessions for a total of 20 sessions. Under the 60 percent provision, at least 12 of these sessions must be offered before the CRTs are administered. Because of contracting delays and other factors beyond the vendors' control, Mr. Ornelas continued, it may be difficult to require more sessions before the administration of the CRTs.

In response to a question from the Chair about the evaluation of SES providers, Mr. Ornelas said that PED has continued its contract with the Center for the Education and Study of Diverse Populations at New Mexico Highlands University and that the evaluation should be completed by the end of the summer of 2005.

In response to other committee members' questions about the evaluation of SES providers, Mr. Ornelas said that there was no evaluation during the first year of operation (school year 2002-2003) and that the second year's evaluation did not produce all the data needed for a full high-stakes evaluation. Therefore, the evaluation of the current year's services (school year 2004-2005) will be the first that might be used to remove an ineffective vendor from the state-approved list. Federal law requires two successive years of poor evaluations before a vendor may be removed from the state list.

In response to a committee member's concern that the 60/90 model from Philadelphia may not apply in New Mexico, Mr. Ornelas said that both NCLB and USDE guidance specify certain contract components but also allow school districts to add administrative provisions, as long as the districts – or the state, for that matter – do not attempt to modify a vendor's program design.

In response to a committee member's question about the source of funds for SES for non-Title I schools or students, Dr. Harrell said that the funds must come from sources other than Title I. Possibilities include other federal programs like the Title V and Rural Low-income Funds that Española Public Schools is using, private sources, and state appropriations. Dr. Rindone added that, during the May 2005 LESC meeting, Albuquerque Public Schools (APS) had said that the district does not have funds for SES for non-Title I students.

In response to a committee member's question whether successful SES providers may work themselves out of job once the schools that their clients attend emerge from the school improvement cycle, Dr. Harrell said that, given the AYP requirements, virtually all public schools will eventually be required to offer SES, providing a fairly stable market for tutoring services.

In response to a committee member's question whether the SES tutors are licensed teachers, Mr. Ornelas said that some are and some are not. Federal guidelines, he continued, prohibit a state from requiring that SES tutors be licensed teachers. Even so, Mr. Ornelas added, if a provider is not effective, based on two years of poor evaluations, that provider can be removed from the state-approved list; in addition, the RFP allows districts to discontinue the services of an unsatisfactory provider. Also in response, Ms. Ethlebah said that her company hires only certified teachers because the students her company serves need the best tutors possible.

In response to a committee member's question about a school district's being an approved SES vendor, Mr. Ornelas explained that federal law allows all types of entities to be providers. The only restriction on school districts is that a district designated as in need of improvement cannot be a vendor.

In response to a committee member's question about the pre- and post-tests that SES vendors use, Mr. Ornelas said that, under federal guidelines, the vendors are free to select their own. Other factors include the students' scores on CRTs and parent surveys.

In response to a committee member's question, Mr. Ornelas said that approximately 3,800 students have received SES and that only one district, APS, has had to prioritize which students will receive SES.

In response to a question from the Chair about the process for reimbursing vendors, Mr. Ornelas explained that the details are prescribed in the contract between the vendor and the school district but that PED has advised districts to include in the contract requirements regarding student attendance. Furthermore, the state cannot pay for services until they are provided.

As the discussion progressed, committee members raised a number of other concerns, among them: that vendors who engage in unfair practices should be subject to criminal prosecution; that the timeline that PED has proposed provides very little time for services to be provided; that state law should be aligned with federal law regarding which students are eligible for SES; that SES tutors should be certified teachers; that there are too few local vendors on the state-approved list and that out-of-state vendors may not understand the unique cultural and linguistic needs in New Mexico; that parents do not always understand the qualifications of the vendors they select; that the use of rewards for student attendance or achievement can backfire; that rewards and incentives will become less relevant as the evaluation process proceeds; that the evaluation of SES vendors should assign more weight to students' CRT scores; and that the funding of SES may have an adverse impact on the Public School Funding Formula.

Senator Nava requested that PED provide an ethnic breakdown of the 3,800 students receiving SES.

Senator Nava requested that PED indicate the qualifications of the tutors employed by SES vendors, including the number of tutors who are certified teachers.

Representative Stewart requested that PED provide the names of the assessment instruments that the various SES vendors are using to measure students' academic progress.

FINE ARTS EDUCATION ACT

Dr. Kathleen Forrer, LESC staff, introduced Mr. Don Moya, Assistant Secretary for Finance and Operations, Public Education Department (PED), to provide information about the funding of elementary school fine arts programs for FY 06; Dr. Patricia Parkinson, Assistant Secretary for Instructional Support Division, PED, to provide information on the overall status of the fine arts program; Dr. Gloria O. Rendón, Superintendent, Santa Fe Public Schools, and Ms. Karen Rodberg, Director of School Improvement, Central Consolidated Schools, to discuss the implementation of elementary fine arts programs in their respective districts; and Ms. Loie Fecteau, Executive Director, New Mexico Arts, Department of Cultural Affairs, to describe the professional development programs being conducted for artists who are interested in providing elementary school arts education programs. Dr. Parkinson stated that Ms. Vicki Breen, PED Education Administrator for Arts Education, was also available to answer questions; and Dr. Forrer noted that Mrs. Joyce Coll, Board Member, New Mexico Alliance for Arts Education, was in the audience.

To begin, Dr. Forrer explained that the purpose of the *Fine Arts Education Act*, which was enacted in 2003, is to encourage local school districts to offer elementary school students opportunities to participate in fine arts activities, including visual arts, music, theater, and dance. Dr. Forrer said that state statute requires those school districts or charter schools wishing to receive funding for an elementary fine arts program to submit a plan to PED for approval on a yearly basis among other features the plan must include an evaluation component. The *Public*

School Finance Act, she said, requires that the number of fine arts program units be determined by multiplying the full-time equivalent MEM in PED-approved arts programs by a cost differential factor of 0.0166 for FY 04, 0.0332 for FY 05, and 0.05 for FY 06 and succeeding fiscal years.

Noting that funding for the *Fine Arts Education Act* flows through the State Equalization Guarantee (SEG), Dr. Forrer explained that \$21.6 million is currently included in the SEG base for FY 06 and subsequent fiscal years: \$15.6 in base program cost, as determined by school district 2004-2005 operating budgets, and \$6.0 million in the FY 06 SEG appropriation. In addition, she stated, language in the *General Appropriation Act of 2005* requires that for FY 06 PED must distribute the General Fund *Fine Arts Education Act* dollars based on the 0.05 differential and on a full-time-equivalent MEM of 0.8 for each participating student.

Referring committee members to a handout in their notebooks entitled “Elementary Arts in New Mexico: Year 1—2003-2004; Year 2—2004-2005,” Mr. Moya stated that, during school year 2003-2004, approximately \$4.0 million was distributed through the funding formula to fund programs for 80,000 students in 23 school districts and two charter schools at a 1.0 FTE. For school year 2004-2005, he said, PED distributed \$15.5 million through the funding formula, also at 1.0 FTE. Mr Moya noted, however, that, although the number of students funded for school year 2003-2004 had been limited so that the distribution of funding remained within the \$4.0 million included in the SEG appropriation for that year, PED legal counsel advised the department that it should fund all programs for school year 2004-2005 that were approvable, i.e., that PED was required to approve any program that met the criteria established in statute and/or specified by the department. As a consequence, he said, the PED distribution for 2004-2005 exceeded the total funding included for elementary fine arts programs in the FY 04 and FY 05 SEG appropriations. To conclude his portion of the presentation, Mr. Moya stated that a preliminary review of school district and charter school budgets for school year 2005-2006 indicates that approximately \$19.0 million will be distributed through the Public School Funding Formula at the 0.8 FTE; however, the number of students upon which that estimate is based does not include students in new programs.

Speaking from the same handout as Mr. Moya, Dr. Parkinson noted that, in school year 2003-2004, 23 districts and two charter schools provided elementary fine arts programs; in school year 2004-2005, 87 school districts and 13 charter schools provided programs; and in school year 2005-2006, 88 school districts and 14 charter schools are expected to provide programs. She explained that districts are permitted to use the funding generated for elementary fine arts programs for both the program itself and for staff professional development. For school year 2004-2005, she said, arts funding was used to support 648 fine arts staff statewide, including 175 full-time and 35 part-time teachers, 404 artists, and 11 full-time and 23 part-time fine arts coordinators.

Dr. Parkinson then discussed the three components of the elementary fine arts program evaluations—site visits, mid-year reports, and end-of-the-year evaluations:

- **Site Visits:** In school year 2004-2005, site visits were conducted at 34 school districts and three charter schools in order to assess the progress and viability of the programs being offered.

- **Mid-Year Reports:** In school year 2004-2005, all participants completed mid-year reports. Based on those reports, and in consultation with PED, some participants made corrections or adjustments to their programs.
- **End-of-the-Year Evaluations:** In school year 2004-2005, PED amended the renewal application process to include an end-of-the-year evaluation conducted by third-party readers, including “stakeholders from the arts community, school districts, higher education, and other interested community members.” Each evaluation must include data pertaining to the following five questions:
 1. What is working well?
 2. What needs strengthening?
 3. How has professional development been used?
 4. Are student outcomes (test scores, attendance, participation in activities, student work and performance) changing? How?
 5. Is the program addressing changes needed to strengthen the program?

Noting that programs must complete the school year 2004-2005 end-of-the-year evaluation in order to be funded for school year 2005-2006, Dr. Parkinson summarized the results of school year 2004-2005 evaluations:

- 58 school districts and two charter schools were able to respond to all five questions;
- 11 school districts and two charter schools were able to respond to four questions;
- seven school districts and two charter schools were able to respond to three questions;
- five school districts and three charter schools were able to respond to two questions;
- four school districts and one charter school were able to respond to one question; and
- two school districts and three charter schools failed to respond to any of the questions.

Finally, Dr. Parkinson reviewed some of the difficulties that participants have faced in establishing an elementary fine arts program:

- some programs began later in the school year;
- some participants did not understand that funding for the program is distributed through the SEG and not as a categorical grant;
- some participants underprojected the cost of establishing a program; and
- some participants had difficulty finding staff to teach fine arts.

Explaining that for many years the Santa Fe Public Schools (SFPS) depended solely on local organizations, such as the National Dance Institute, Fine Arts for Children and Teens, and Partners in Education, to support fine arts in the schools, Dr. Rendón expressed her gratitude to the Legislature for funding elementary fine arts programs. She stated that SFPS applied for and received elementary fine arts funding for school year 2003-2004, the first year that the program became a part of the Public School Funding Formula. With that initial funding, she said, the district hired an arts program specialist and contracted with providers. Dr. Rendón noted that the money generated for school year 2004-2005 was used to expand the number of program staff, which now includes 13.5 certified art teachers; to provide professional development; and to purchase art supplies. For school year 2005-2006, she added, the district will continue to expand the program by adding the performing arts. In summation, Dr. Rendón stated that the program is working well; the only limitations, she said, are space and time.

Ms. Rodberg directed the committee members to a handout in their notebooks entitled “Elementary Fine Arts Program Review: school year 2004-2005 Elementary Music Program.” She explained that, during school year 2004-2005, elementary fine arts programs in music served 2,648 children in eight of the 10 elementary schools in Central Consolidated Schools; not enough certified staff were available to serve the other two schools. On average, Ms. Rodberg said, each licensed teacher worked with 400 to 500 students per week, with classes lasting from 30 to 50 minutes each.

In order to expand the capabilities of its music teachers, Ms. Rodberg stated, Central Consolidated Schools hired a new music teacher, a licensed Kodaly trainer who provided professional development for four other teachers throughout the school year. She explained that the Kodaly method of teaching music incorporates hand signals and other means to help students achieve mastery without the need to read musical notes. As evidence of the music program’s success, Ms. Rodberg cited the increased awareness on the part of the regular classroom teachers regarding the positive impact exposure to music has on their students’ ability to acquire literacy and numeracy skills.

Ms. Rodberg noted that, for school year 2005-2006, the district will add five visual and performing arts teachers, who will serve all 10 elementary schools. In addition, Ms. Rodberg reported, the district is building two identical 799-seat performing arts centers, one in Kirtland and one in Shiprock, that will serve the needs of students at all grade levels beginning in the fall of 2005. Stressing the need to involve the whole community in support for the arts in the elementary curriculum, Ms. Rodberg stated her belief that “arts programs must regain some of their importance in the curriculum; cutting them has had a detrimental effect on student achievement in other areas.”

In addition to the handout in the committee member’s notebooks entitled “New Mexico Arts Strategic Plan 2005-2008,” Ms. Fecteau provided three additional handouts to the committee: an invitation to attend a presentation by Ms. Becky Anderson, HandMade in America, on “Arts and Economic Development”; a list of the New Mexico Arts “FY 2006 Grant Funding Awards by County, with Organization Summary”; and a copy of the New Mexico Arts Spring 2005 newsletter *ARTSpeak*.

Noting that Mr. Stuart Ashman, the current Secretary of the New Mexico Department of Cultural Affairs, had been an artist-in-residence in the public schools prior to his current position, Ms. Fecteau said that New Mexico Arts sees its role as supplementing what PED and the local school districts can do to promote fine arts in the classroom. Explaining that New Mexico Arts has identified a need for professional development for teachers, particularly in the rural parts of the state, Ms. Fecteau reported that the organization is developing a proposal for a “performing-arts-education professional development project geared to certified fine arts specialists, district fine arts coordinators, and teaching artists in rural New Mexico.” In addition, Ms. Fecteau noted, New Mexico Arts has held “Artists in the Classroom Workshops” in nine communities throughout the state: Deming, Des Moines, Farmington, Gallup, Hobbs, Mora, Mountainair, Raton, and Taos. These workshops, she continued, were designed to instruct local artists in the logistics of teaching art in the public schools. Stressing the importance of the arts to economic development, Ms. Fecteau concluded her remarks by urging schools to incorporate the arts into their career programs.

Chairman Nava asked Mrs. Coll if she would like to comment on the presentation. Expressing support for the state's efforts to provide opportunities for elementary students to participate in the fine arts, Mrs. Coll said that she hopes to see full funding of the program in the future.

Chairman Nava then provided an opportunity for other members of the audience associated with elementary fine arts programs to comment. Citing a close working relationship with SFPS as an example, Ms. Andrea Fellowes-Walters, Director of Education for the Santa Fe Opera (SFO), noted that, even though the SFO does not receive funding through the *Fine Arts Education Act*, the opera remains committed to familiarizing children throughout northern New Mexico with opera by giving them the opportunity to write and produce their own works. Mr. John Schutz, Coordinator for Visual and Performing Arts, Las Cruces Public Schools; Ms. Janet Kahn, Fine Arts Instructional Manager, Albuquerque Public Schools (APS); and Mr. Luis Delgado, Fine Arts Coordinator, APS, all indicated strong support for the inclusion of fine arts at the elementary school level.

Committee Discussion:

Committee members expressed their support for fine arts programs at the elementary level, citing both the research linking education in the arts to greater success in core academic subjects and the strong artistic tradition among Native Americans. Several committee members also noted that the arts have become an important part of economic development in rural parts of the state.

In response to a committee member's question regarding how much money is available to fund elementary fine arts programs for FY 06, Mr. Moya agreed that \$21.6 million is available. The committee member then asked why PED is projecting that elementary fine arts programs will serve fewer students in FY 06 than were served in FY 05 and why the estimated elementary fine arts funding distribution for FY 06 is only \$19.0 million rather than the \$21.6 million available. Mr. Moya explained that the membership projections and the cost estimate do not include new programs, adding that the actual membership and cost for the new programs will be determined on the 40th day of the new school year. Referring to PED's statement that 88 school districts will offer elementary fine arts programs during school year 2005-2006, the committee member asked which district would not be participating. Dr. Parkinson stated that Lake Arthur had declined to submit a proposal.

In response to a committee member's question regarding the number of certified art teachers available, Mr. Schutz stated that there is a need for more certified art teachers. Noting that a number of postsecondary institutions in the state offer quality art programs, he observed that few students combine their art training with teacher training at the university level. He said that the solution may be to train practicing artists to become teachers.

A committee member asked if pre-kindergarten students are being included in elementary fine arts programs. Dr. Parkinson stated that pre-kindergarten students are not being served at present but could be involved in a developmentally appropriate way. She suggested the possibility of a collaboration between pre-kindergarten arts programs and elementary fine arts programs.

In response to a committee member's question regarding the inclusion of fine arts in the vocational career clusters, Ms. Breen stated that graphics arts and videography are being taught as part of the career clusters in some high schools.

There being no further business, Senator Nava thanked the presenters and, with the consensus of the committee, adjourned the LESC meeting at 12:03 p.m.

_____ **Chairperson**

_____ **Date**