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LEGISLATIVE EDUCATION STUDY COMMITTEE

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MINUTES
LESC MEETING
MAY 25-27, 2011

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Frances Ramírez-Maestas, Director
David Harrell, PhD, Deputy Director

Representative Rick Miera, Chair, called the meeting of the Legislative Education Study Committee (LESC) to order at 9:07 a.m., Wednesday, May 25, 2011, in Room 307 of the State Capitol, in Santa Fe, New Mexico.

The following LESC members were present:

Representatives Rick Miera, Chair, Nora Espinoza, Mary Helen Garcia, Jimmie C. Hall, Dennis J. Roch, and Mimi Stewart; and Senators Cynthia Nava, Vice Chair, Mary Jane M. García, Gay G. Kernan, and Lynda M. Lovejoy.

The following LESC advisory members were also present:

Representatives Alonzo Baldonado, Ray Begaye, Eleanor Chávez, George Dodge, Jr., Roberto "Bobby" J. Gonzales, and Sheryl Williams Stapleton; and Senators Vernon D. Asbill, Stephen H. Fischmann, John Pinto, and Sander Rue.

On a motion by Representative Roch, seconded by Representative Espinoza, the committee voted unanimously to amend the agenda by reversing the order of agenda items 2 and 3 so that the presentation by Secretary-designate Hanna Skandera would precede the presentation by LESC staff.

SUMMARY OF FY 12 PUBLIC SCHOOL-RELATED APPROPRIATIONS
AND SELECTED LANGUAGE

The Chair recognized Mr. Peter B. van Moorsel, LESC staff, for an overview of the public school-related legislation and FY 12 appropriations from the 2011 session.

Referring the committee to an LESC memorandum and its attachments dated May 25, 2010, *Summary of Public Education-related Legislation Passed by the 50th Legislature, 1st Session, 2011*, Mr. van Moorsel reported that in total, the *General Appropriation Act of 2011* appropriates over \$2.39 billion in recurring General Fund dollars for public school support and related recurring appropriations, including approximately \$2.25 billion to the State Equalization

Guarantee (SEG), also known as the Public School Funding Formula. This figure represents a \$56.7 million, or 2.6 percent, increase over FY 10 when only General Fund dollars are considered, but a \$31.6 million, or 1.4 percent, decrease when one-time federal *American Recovery and Reinvestment Act* (ARRA) dollars used in the SEG are considered.

Mr. van Moorsel noted that the SEG appropriation includes program cost reductions of:

- \$4.8 million to reflect shift in the retirement contributions from the employer to a return-to-work employee;
- \$3.46 million to suspend certain state-required assessments in FY 12; and
- \$17.2 million in administrative and efficiency savings.

Mr. van Moorsel referred the committee to another reduction to program cost that was contingent on the enactment of legislation and footnoted in Table 1. The legislation, he stated, decreases employer contribution rates by 1.75 percent but shifts or increases the employee contribution rate by the same percentage. The amount of the reduction to program cost, which is approximately \$27.27 million, is not reflected, Mr. van Moorsel explained, primarily because language to implement the reduction, including a reduction for public schools, was included in Section 10, Appropriation Reductions, of the *General Appropriation Act of 2011*, rather than in the section of the act that includes the FY 12 appropriations to state agencies.

Other recurring appropriations of the 2011 Legislature, Mr. van Moorsel reported, include:

- nearly \$114.1 million for categorical public school support for statutorily created funds and initiatives, including public school transportation, supplemental distributions, the Instructional Material Fund, dual credit instructional materials, and the Indian Education Fund; and
- approximately \$27.8 million to fund the operations of the Public Education Department (PED) and other education-related initiatives funded with recurring dollars, among them:
 - the operations of regional education cooperatives;
 - K-3 Plus;
 - New Mexico PreK;
 - Innovative Digital Education and Learning-New Mexico (IDEAL-NM);
 - the operational costs for the Operating Budget Management and Student Teacher Accountability Reporting Systems;
 - Advanced Placement;
 - Apprenticeship Assistance;
 - Breakfast for Elementary Students; and
 - the Graduation, Reality, and Dual-Role Skills (GRADS) program.

In nonrecurring appropriations, Mr. van Moorsel stated, the 2011 Legislature:

- extended, through FY 12, the time for expending the \$6.0 million appropriation of the 2010 Legislature for emergency support to school districts experiencing shortfalls;
- for FY 11 and FY 12, appropriated \$2.0 million in emergency support. Mr. van Moorsel added that, combined with the nearly \$2.0 million in recurring dollars for emergency

supplemental, nearly \$4.0 million will be available to provide financial support to school districts or state-chartered charter schools statewide;

- appropriated \$2.5 million to PED for the Governor's reform initiatives, which include providing technical assistance to low performing schools; improving data systems; IDEAL-NM; computer-administered assessments and common core standards implementation; and
- \$1.2 million from the Transportation Emergency Fund for increased fuel costs faced by school districts and state-chartered charter schools.

Committee Discussion

In response to a committee member question regarding the percentage of recurring General Fund dollars to public education, Mr. van Moorsel said that, for FY 12, approximately 44.2 percent of recurring General Fund dollars were appropriated to public education, compared to approximately 45 percent in FY 11.

In response to a question from a committee member whether a school district may pay the 1.75 percent retirement contribution swap for its employees, Mr. Paul Aguilar, Deputy Secretary for Finance and Operations, PED, stated that the view of the PED attorney is that such a practice is not acceptable primarily because the contribution swap is considered a salary reduction. He added, however, that a school district or charter school could increase employee salaries across the board by that amount.

On an issue related to the 1.75 percent retirement contribution swap, Ms. Frances Ramírez-Maestas, LESC Director, reported that a recent report by Legislative Finance Committee (LFC) staff indicated that, after reviewing the process the Department of Finance and Administration (DFA) used to generate the reductions for the 1.75 percent pension contribution shift for FY 12 operating budgets, it appears that state agencies were under-allocated by approximately \$1.9 million and public schools were over-allocated by approximately \$1.9 million. As a result, Ms. Ramírez-Maestas stated, public schools appear to be bearing a disproportionate share of the pension cost. Mr. Charles Sallee, Deputy Director for Program Evaluation, LFC, reported that Mr. David Abbey, LFC Director, had discussed this matter with Mr. Richard May, Cabinet Secretary, DFA, who indicated that DFA staff would examine the calculation. The Chair requested LESC staff to monitor the matter and prepare a letter from the LESC chairs to DFA, if necessary, to resolve the matter as soon as possible so that FY 12 operating budgets do not have to be adjusted after the beginning of the fiscal year.

AUDIT RESULTS

The Chair recognized Ms. Hanna Skandera, Secretary-designate of Public Education, to report on the background and results of the audit by the Public Education Department (PED) of 34 school districts. She noted that PED reviewed 10,000 files in nine days.

Referring the committee to a handout, the Secretary-designate briefed the committee on the timeline of events:

- March 31: PED's evaluation of 80-day to 80-day enrollment data reveals a 116 percent increase in unit growth despite only a 1.0 percent increase in student enrollment;

- April 1: PED holds annual meeting with stakeholders to discuss the unit value;
- April 6 (Spring Budget Workshop): Initial planning unit value and intention to audit district data announced (the audit was initiated because 58 percent of additional unit claims were in Special Education and Training and Experience (T&E));
- April 12: PED sends memo to all districts announcing audit and timelines;
- April 14: 34 districts receive individual letters regarding audit;
- April 15: 34 districts contacted, audit process explained, and audits scheduled;
- April 27: Secretary-designate calls superintendents and provides audit findings, memo with findings released;
- May 3 and 4: school districts are presented with individual summary sheets of the initial audit findings; and
- May 9: letters of noncompliance sent to school districts.

The PED handout, she noted, listed the following audit questions:

- Did the data reported by districts through STARS match student records? (state law)
- Were the services reported actually provided? (state law)
- Was the appropriate evaluation for eligibility determination specifically related to pre-school used? (state and federal law)

The Secretary-designate stated that districts were identified for an initial audit based on an examination of data in nine specific categories:

- teacher training and experience;
- A/B membership;
- C Level and C Level gifted;
- D Level and D Level gifted;
- ancillary FTEs;
- ancillary/special education membership;
- 3-year DD membership;
- 4-year DD membership; and
- 3-4 year cohort rates.

Furthermore, Ms. Skandera stated, PED flagged districts that exceeded the statewide average growth rate by more than 200 percent from last year's 80th day to this year's 80th day in any of the nine categories, or had unusually high trends requiring additional review. She noted that despite a 10 percent threshold for reviewing files, in very small districts PED staff reviewed 100 percent of the files. However, she said, PED reviewed only 5.0 percent of the files for Las Cruces Public Schools because it is a large district even though it had flags in five out of nine categories. She also stated that districts with more flags required on-site reviews, while districts with fewer flags received desktop reviews.

The initial focus of the audit, the Secretary-designate reported, was on \$17.8 million in additional funding claims from 34 districts. Initial findings indicated:

- eight districts exhibited exemplary data quality, accurate record keeping, strong accountability, and no compliance infractions;

- thirteen districts had minor compliance issues such as poor data quality, inaccurate or delayed record keeping, discrepancies between data submitted to PED and data included in IEPs (Individualized Education Plans), unintentional technical errors, and potential questions regarding level of services provided;
- four districts had major compliance issues, which include inconsistencies with state or federal laws for special education services; and
- nine districts were cited as needing in-depth audits due to severe data quality issues, inability to validate records and provider service logs, and unusually high ancillary rates, among other findings. An independent auditor, she added, has been selected to conduct the audits.

To conclude, the Secretary-designate stated that the department's next steps include:

- selecting charter schools for a similar audit;
- conducting an additional audit of the nine identified districts;
- ensuring that districts with minor and major findings are in compliance with state and federal law;
- making policy recommendations;
- identifying additional areas for review in consultation with the LFC and LESC; and
- placing an emphasis on accurate data and reporting.

AUDIT OF SELECTED SCHOOL DISTRICTS AND CHARTER SCHOOLS BY THE PUBLIC EDUCATION DEPARTMENT (PED)

The Chair recognized Mr. Craig J. Johnson, LESC staff, to discuss events that led to the Public Education Department (PED) audit of 34 selected school districts; the PED audit process and initial results; and LESC staff observations about the audit activities.

Mr. Johnson stated that circumstances surrounding the PED audit began with the setting of the preliminary unit value. He explained that, for school year 2011-2012, the *General Appropriation Act of 2011* requires the Secretary-designate to establish a preliminary unit value to establish school budgets. The language in the act also allows the Secretary-designate, after verification of the number of units statewide, to adjust the unit value no later than January 31.

On April 1, 2011, Mr. Johnson noted, PED staff met with staff from the LESC and the Legislative Finance Committee (LFC), superintendents, and other stakeholders to discuss the preliminary unit value for the upcoming school year. During this meeting, PED reported a potential increase in statewide program units of 7,900 units. Based on these units, on April 7, 2011, the Secretary-designate set the preliminary unit value at \$3,585.97, a decrease of \$126.20 from this year's final unit value.

Mr. Johnson emphasized that on April 12, 2011, PED announced that the department would be conducting an audit of 34 school districts and cited the estimated increase of approximately 7,900 units as a basis for the audit. In a memorandum dated the same day, he stated, Secretary-designate Skandera wrote, "This enormous increase from last year's growth suggests potential inconsistencies or errors in the data provided and intentional gaming of the system to receive

additional funds.” For the review of the committee, Mr. Johnson noted, the memorandum is included in the staff report as Attachment 2.

The change in units, Mr. Johnson stated, was based on an analysis of last year’s 80th day data compared to this year’s 80th day data, and the unit changes are summarized in the table on page 5 of the staff report.

The increase in projected units, he noted, is largely a result of:

- student enrollment;
- an increase in the reported number of special education units; and
- increases in the teacher training and experience index.

Directing the committee to Attachment 5 of the staff report, Mr. Johnson indicated that 34 school districts were informed on April 14 of their selection in the PED audit.

On April 18, Mr. Johnson continued, PED began fieldwork; and on April 27, PED announced audit findings. He emphasized that relative to a standard audit, allowing just over a week to analyze 10,000 records from 34 school districts may be questionable.

Mr. Johnson said that, while supportive of efforts to use quality data to ensure a correct distribution of funds, LESC staff are concerned that the deadline provided too short a time frame to examine data sufficiently and to report findings, and insufficient time for school districts to respond to findings. As a result, he added, the LESC Director provided PED a letter that outlined staff concerns, including reservations about PED’s selection of districts based, almost exclusively, on a comparison of the statewide average growth from 2010-2011 80th day to 2011-2012 80th day to the districts’ growth over the same time frame.

Mr. Johnson explained that analysis of long-term trend data, perhaps in conjunction with year-over-year growth, would provide more telling information about district practices. For example, a school district showing a large increase in special education students from one year to the next may still be well below the average state identification rate; conversely, a district with little or no increase or even a decrease from one year to the next may be well above the average statewide rate.

Committee Discussion

When asked by a committee member if the federal government could reduce funding to any one of the audited school districts, the Secretary-designate said that the federal government has the option to reduce or withhold funding for issues of noncompliance.

In response to a committee member’s question why some districts received a phone audit while others received an on-site audit, the Secretary-designate stated that the decision for a phone versus on-site audit was based on the number of data flags identified for each district.

In response to a related question why PED staff conducted the district audits in as few as 10 days, the Secretary-designate stated that there was a sense of urgency to do the audits primarily because of the public school budget review and approval timelines.

In response to a committee member's question regarding the additional audit of nine districts, the Secretary-designate stated that a firm based in Albuquerque will conduct the additional audit of those districts and will be paid with funds from the Office of Education Accountability budget, which was zeroed out by the Department of Finance and Administration.

Some committee members thanked the Secretary-designate for quickly and aggressively doing her job. Other committee members expressed concern with the audit methodology, the tone, and the urgency of the audit. One committee member stated that the merit of the audit was lost by the tone used by the department in describing the process to the media.

On a related issue, a committee member requested that the interim workplan include a report on special education requirements for preschool students transferring into kindergarten. The issue is whether the state may be over-identifying students coming from IDEA Part C to IDEA Part B. The committee member explained that it is possible that 90 percent of children transferring from Part C to Part B have direct speech therapy services used for language development and that the state may be labeling them and placing them in individualized programs before they can benefit from the curriculum.

A committee member recommended that PED reinstate audits at least every three years.

LESC SURVEY OF AUDITED SCHOOL DISTRICTS

The Chair recognized Mr. Craig J. Johnson, LESC staff, to discuss the findings of the LESC survey of the 34 audited school districts. Mr. Johnson stated that the purpose of the survey was for the LESC to better understand the audit process and school district perspectives.

Referring the committee to a copy of the LESC survey questions included as an attachment to the LESC staff report, Mr. Johnson reported that on May 9, 2011, LESC staff emailed the superintendents of the 34 school districts selected by PED for an audit to request their participation in an online survey consisting of approximately 24 questions. Of the 34 superintendents who received the survey, Mr. Johnson noted, 30 responded by May 20, 2011 for a response rate of over 88 percent.

Mr. Johnson then reviewed the district responses:

- entrance conference: 64.3 percent (18 of 28) of districts did not receive an entrance conference;
- reason selected: 82.1 percent (23 of 28) indicated they did not receive information or data on how the districts were selected;
- districts' reports on the amount of district staff time involved ranged from five to over 200 hours;
- all respondents indicated that Individualized Education Plans (IEPs) were reviewed; 93 percent (13 of 14) indicated that documentation showing whether services prescribed in the IEP were provided were reviewed;
- only one respondent indicated Training and Experience (T&E) files were reviewed; two respondents indicated the number of special education ancillary staff were reviewed;

- documents: 71 percent (10 of 14) encountered issues when trying to provide documents; most commonly cited issues were the short time frame to provide documents and busy fax machines;
- clarification: 78 percent (11 of 14) indicated that PED asked for clarification about the documents provided;
- district response: 69 percent (20 of 29) indicated that PED did not ask for a district response;
- budget review: 35.7 percent (10 of 28) indicated that their budget review has been affected by the audit;
- audit results: 42.9 percent (12 of 28) indicated they received the audit results verbally over the phone; and
- categories: 82 percent (23 of 28) indicated that PED did provide a reason why the district was placed in a particular compliance category.

Mr. Johnson reported that, while some districts expressed support for the audit primarily because they felt all districts should be held accountable, he noted that concerns by the districts, in general, included the:

- media coverage;
- selection criteria;
- time frame being “too fast...too rushed”;
- unequal proportion of files reviewed from district to district;
- lack of entrance and exit conferences;
- lack of an opportunity for districts to respond to findings; and
- lack of a response from PED to district inquiries regarding their findings.

To conclude, Mr. Johnson stated that some districts indicated that the audit procedures appeared disconnected from one of the stated purposes of the audit, which was to identify “gaming of the system to receive additional funds.” Mr. Johnson added that, while one of the stated purposes of the audit was to identify formula chasing, the audit tools and records requests appeared more oriented toward special education legal compliance.

SCHOOL DISTRICT TESTIMONY

The Chair recognized the following individuals for school district testimony:

- Dr. Eugene Schmidt, Superintendent of Los Alamos Public Schools, who provided the committee with a copy of all documents requested by the Public Education Department (PED) for the district’s audit and a local newspaper story. He noted that the district was flagged because it showed large increases in special education Level C students, an increase attributable to current students in Level D being moved to Level C. While he applauds PED’s efforts to address increases in special education students, he noted that the department needs to understand shifts of students from one level to another and emphasized that future audits should not use small data points.
- Gloria Chavez, Assistant Superintendent of Instructional Accountability, Grants-Cibola County Schools, who reported that:

- the district found out about the audit on television news;
 - many of the audit questions could have been answered during an entrance or exit review; however neither was held;
 - PED auditors were on-site from about 10:30 am to 4:00 pm and reviewed approximately 20 files out of almost 100 files pulled at their request; and
 - the district stands by the accuracy of its data, and despite a PED assessment one month earlier that found all of the district's Individual Education Plans (IEPs) to be 100 percent correct, the district was selected for an audit because of claims the IEPs are 100 percent wrong.
- Superintendent Anna Lisa Benegas-Peña, Hatch Valley Public Schools, who supported audits as beneficial. Alluding to a program evaluation of the district conducted by staff from the Legislative Finance Committee (LFC) last November, Dr. Benegas-Peña commented on the professionalism of the LFC staff, and noted that, unlike the PED audit, that process took months. She concluded by stating that the LFC audit provided valuable information to the district, unlike the PED audit.
 - Special Education Director Penny Coppedge, Cimarron Municipal Schools, who expressed concern that the PED audit of the district consisted of a two-minute phone call and fax transmission of information requested by PED. She stated that she submitted a corrective action plan to the department; however, PED has not responded and the district has been placed on the major violations list.
 - Interim Superintendent Jim Leshner, Dulce Independent Schools, who offered his appreciation to the Secretary-designate for initiating the audit and making a personal call to him before the news went to the press. He noted that the district is scheduled to update its computer system for IEP preparation by 2012. He reported that the district prepared a report in response to audit findings and that the district is waiting to receive a letter from PED notifying the district that Dulce is no longer on the list for an additional audit.
 - Superintendent Brenda Vigil, Tularosa Municipal Schools, who voiced concern about the tone of the audit and media coverage. She also noted that on a Friday, after district operational hours, the district received an email notice from PED for a document request that was due by the following Monday. Of the documents requested by PED, Ms. Vigil stated, PED indicated the information was accurate except for one student who had not received occupational therapy services. Unfortunately, Ms. Vigil added, the district occupational therapist was out on extended sick leave and a replacement was not readily available to provide the necessary services. The audit, she stated, caused alarm and resulted in a call from one parent who wanted an immediate audit of her child's IEP and child-generated funding.
 - Superintendent Terry Myers, Clovis Municipal Schools, who emphasized that any audit should be about trust-building. He recalled that when the PED auditors arrived they appeared to be unsure about what they were looking for and when they left the district after approximately four hours, they would not share or discuss any items surrounding the audit.
 - Superintendent Cheryl Wilson, Socorro Consolidated Schools, who affirmed that the districts want to be a respected part of a team. She stated that transparency requires

accuracy, which in her opinion requires quality time which the PED audit timeline did not allow. Dr. Wilson advocated for “less bureaucracy and more data,” and she commended district staff for fulfilling PED’s work request over the weekend after receiving late notice on a Friday. She defended the district’s T&E levels and called it a natural progression. She stated that she feels optimistic that PED can learn from the errors it made and be more respectful with the districts, noting that it is difficult to maintain district morale under these conditions.

- Superintendent Joe Razor, Bloomfield Schools, who stated that his district was cited for occupational therapy (OT) services that the district has not been able to provide because their occupational therapist left the district and a replacement has not been found. He emphasized that, if PED had invested more time in the review of the district, the department would have determined that the district had notified parents and was providing compensatory OT services.
- Superintendent Winston Brooks, Albuquerque Public Schools, who testified that district staff disagree that the district’s special education numbers have increased 200 percent. He noted that only .006 percent of files at APS were examined by PED, and he believes that 56 of 57 file issues resulted from a data disconnect. He admitted that APS did fail to provide one IEP. Alluding to a committee member’s reference to “poor data quality,” he emphasized that two forensic data people from New Mexico State University examined the district’s data systems and found that the system was better than that of most Fortune 500 companies.
- Superintendent Ray Arsenault, Gallup-McKinley County Public Schools, who testified that the district audit occurred during spring break week when the schools were closed and data were inaccessible. He reported that he was out of state at the time and learned of the audit from the television news. These circumstances, he stated, possibly resulted in the district being selected for an additional audit. Mary Reed, Special Education Director, reported that the district was cited because it did not have a separate class for gifted students. She explained that the district clusters gifted children to provide services; however, PED staff stated the district’s practice was unacceptable.
- Superintendent Jamie Widner, Melrose Public Schools, who informed the committee that he did not receive an email notification of the audit and that PED rejected his request for an on-site review. He stated that the district had a 9.5 percent increase in prekindergarten enrollment, but he was told by PED staff that the increase was 380 percent. With regard to how Melrose was identified as one of nine districts selected for an in-depth audit, Mr. Widner stated that the district had an average of 19 special education students over the last several years and this year it had 21 students. Mr. Widner emphasized that he questions the audit process, not the need for an audit.

SUPERINTENDENTS AND COMMUNITY INPUT

The Chair recognized Mr. Tom Sullivan, Executive Director of the New Mexico Coalition of School Administrators, who explained that one of the ways to discredit a district intentionally is to look at special education, which is the most regulated area of education auditing. He

appreciated the remarks of a committee member who advised that there should be no errors in special education. However Mr. Sullivan explained that if we randomly inspect the special education files of districts with clean audits, something could always be found. He also pointed out that in standard audits there are opportunities to explain findings and make corrections but that in this instance most districts were never given a chance to do so.

Mr. Sullivan admired the restraint of superintendents whose districts had been audited, and he suggested that 400 of the 435 findings could have been corrected on the spot. He also believes that the purpose of the audit was to discredit the districts, contending that there was no urgency, no need to rush, and no findings of fraudulent behavior.

The Chair also recognized Mr. Joe Guillen, Executive Director of the New Mexico School Boards Association, who thanked the committee for the hearing. He also thanked PED for advocating more accurate data and thanked the Chair and staff for the opportunity to collaborate.

There being no other business, the Chair, with the consensus of the committee, recessed the LESC meeting at 4:02 p.m.

MINUTES LESC MEETING THURSDAY, MAY 26, 2011

Representative Rick Miera, Chair, called the committee to order at 9:10 a.m., in Room 307 of the State Capitol, in Santa Fe, New Mexico.

The following LESC members were present:

Representatives Rick Miera, Chair, Nora Espinoza, Mary Helen Garcia, Jimmie C. Hall, Dennis J. Roch, and Mimi Stewart; and Senators Mary Jane M. García, Gay G. Kernan, and Lynda M. Lovejoy.

The following LESC advisory members were also present:

Representatives Alonzo Baldonado, Ray Begaye, Eleanor Chávez, George Dodge, Jr., Roberto “Bobby” J. Gonzales, and Sheryl Williams Stapleton; and Senators Vernon D. Asbill, Stephen H. Fischmann, Howie C. Morales, John Pinto, and Sander Rue.

Representative Thomas A. García was also in attendance.

UPDATES

For these items, the chair requested a background summary of each topic by LESC staff, followed by an update by the Secretary-designate.

Ms. Pamela Herman, LESC staff, briefed the committee on the A-B-C-D-F schools rating system. She explained that in 2011, legislation was enacted that, beginning in school year 2011-

2012, creates a new public school accountability system, to operate in addition to, and separate from, the existing adequate yearly progress system created in state and federal law.

Among its provisions, Ms. Herman noted, the legislation requires that:

- all public schools be graded annually on an A-F scale that will be established pursuant to Public Education Department (PED) rule after input from the Secretary's Superintendents Council;
- the rating scale for elementary and middle schools include, at a minimum, a combination of the following factors:
 - student proficiency, including achievement on the New Mexico standards-based assessments;
 - student growth (as defined in the act) in reading and mathematics; and
 - growth of the lowest 25th percentile of students in the public school in reading and mathematics;
- the scale for high schools include, at a minimum, a combination of the following factors:
 - student proficiency;
 - student growth in reading and mathematics;
 - growth of the lowest 25th percentile of students in the school in reading and mathematics; and additional academic indicators such as: high school graduation rates; growth in high school graduation rates; Advanced Placement and International Baccalaureate courses; dual enrollment courses; and SAT and ACT scores;
- parents of a student in a public school rated F for two of the last four years have the right to school options, which include, in addition to any rights provided in federal law, the right either:
 - to transfer the student to any public school in the state not rated F; or
 - to have the student continue schooling by distance learning through the statewide cyber academy or a local cyber academy, at the cost to the school district or charter school in which the student is enrolled; and
- PED ensure that a local school board or charter school governing body is prioritizing resources of a public school rated D or F toward proven programs and methods linked to improving student achievement, until the school earns a grade of C or better for two consecutive years.

Ms. Herman added that other provisions amend the *Public School Finance Act* to:

- require PED, in the budget approval process, to ensure that resources are prioritized as noted above; and
- create an explicit exception in law, in the case of a public school rated D or F for two consecutive years, to the stated responsibility of local school boards and charter school governing boards to determine budget priorities based on local needs.

Ms. Herman also noted that the language in the legislation noted above that authorizes PED involvement in a public school's budget prioritization process may contain internal contradictions as to how soon PED can intervene:

- in two subsections, the legislation refers to schools rated D or F without a time limitation; however,
- in a third subsection, the legislation requires that the public school be rated D or F for two consecutive years.

Unlike the *Assessment and Accountability Act*, Ms. Herman added, which contains a section that requires PED to adopt formats for reporting adequate yearly progress and that specifies in some detail what must be reported, the *A-B-C-D-F School Rating Act* does not include any requirement for public reporting of ratings, nor does it authorize PED to establish a reporting system in agency rule.

Referring the committee to a copy of an Executive Order issued in April 2011, Ms. Herman reported that the Governor created the New Mexico Effective Teaching Task Force consisting of up to 15 members appointed by and serving at the pleasure of the Governor. Provisions in the Executive Order, she noted, charge the task force with providing recommendations to the Governor, no later than August 22, 2011, regarding how best to measure the effectiveness of teachers and school leaders based on specific parameters, including:

- identified measures of student achievement, representing at least 50 percent of the teacher evaluation, to be used for evaluating teacher performance;
- identification of demonstrated best practices of effective teachers and teaching, to comprise the remaining basis of the evaluation;
- how these measures should be weighted; and
- how the state can transition to a performance-based compensation system acknowledging student growth and progress.

Ms. Herman then provided the committee with background information, explaining that in 2011, the Legislature considered, but did not pass, SB 502, *School Teacher and Principal Evaluation System*. Among its provisions, Ms. Herman said, the bill required PED to convene a work group to develop and make recommendations for a highly objective uniform statewide evaluation framework for school district and charter school teacher evaluation models and school principal evaluations, and to propose a performance-based compensation system that provides incentives for effective teachers and school principals.

Ms. Herman added that the legislation would also have required PED to report to the Governor, the LESC, and the Legislative Finance Committee (LFC) no later than August 2012 on the highly objective uniform statewide evaluation framework; and to present a final report, with recommendations for legislative changes as necessary, to the same entities by December 1, 2012.

Ms. Herman concluded her briefing by stating that the new evaluation process contemplated in SB 502 would have been operational beginning with school year 2012-2013.

Dr. David Harrell, LESC staff, briefed the committee on Senate Executive Message Number 54, regarding PED codifying 11 areas outlined in SB 314, *Autism Education Plan Development*. Dr. Harrell reported that, during the 2011 session, the Legislature passed Senate

Bill 314, *Autism Education Plan Development*, which would have amended the *Public School Code* to require the use of certain information when schools evaluate a student with autism spectrum disorder or develop an education plan for such a student; however, the bill was vetoed. Dr. Harrell noted that the Executive message stated that the bill could jeopardize New Mexico's eligibility for federal funds because it includes a definition of the term "autism spectrum disorder" that differs from the definition employed by the federal *Individuals with Disabilities Education Act* and the related federal regulations. Nonetheless, Dr. Harrell added, the veto message also included a requirement that, by July 2011, through agency rule, school districts and charter schools "use the information (11 areas) outlined in SB 314 when developing an education plan or evaluating a student with autism spectrum disorder."

Dr. Harrell stated that, on May 17, according to PED reports, the department sent a notice of the proposed rulemaking to the *New Mexico Register*, with the intention of presenting a draft rule on May 31, which would mark the beginning of the required 30-day comment period. Dr. Harrell noted that the goal of the department, according to this correspondence, is to have the rule in place by the end of July 2011.

Ms. Herman, LESC staff, briefed the committee on SB 360, *Student Assessment Requirements Suspension, (Laws 2011, Chapter 161)*. She noted that, as one of several cost-saving measures endorsed by the LESC for consideration by the 2011 Legislature, this legislation resulted in an estimated \$3.5 million savings in the FY 12 appropriation to the State Equalization Guarantee (SEG). Ms. Herman explained that the measure temporarily suspends, for one year, the requirement that local school districts administer certain student assessments mandated by state but not federal law.

Among its cost-saving provisions, Ms. Herman continued, the legislation provides that, for school year 2011-2012, PED, school districts, charter schools, and state educational institutions shall not be required to administer the following student assessments:

- in grade 11, a standards-based assessment in social studies;
- in grades 4, 6, 7, and 11, a standards-based writing assessment;
- in grades 9 and 10, short-cycle diagnostic assessments in reading, language arts, and mathematics; and
- in grade 11, a college placement assessment or a work force readiness assessment.

In addition, Ms. Herman said, in school year 2011-2012, a student who has completed the course requirements for high school graduation may graduate without demonstrating competence in required subject areas on the standards-based assessment or assessments or a portfolio of standards-based indicators as established by PED rule.

Ms. Herman identified one issue with these provisions: although the language of the new law excuses students scheduled to graduate in spring 2012 from the high school graduation test requirement, it does not do so for the class of 2013. She said that cohort is still legally required to pass the test, although the law now excuses schools from administering the social studies and writing portions of the test, passage of which is required for graduation.

Mr. Peter B. van Moorsel, LESC staff, outlined the distribution of the special appropriations by the 2011 Legislature. He explained that Section 5 of the *General Appropriation Act of 2011* makes three special nonrecurring appropriations for public schools

for: (1) emergency support; (2) certain Governor's educational reforms; and (3) increased fuel costs. Language in the same section of the act, he noted, also reauthorizes a 2010 appropriation for emergency support to school districts and charter schools to extend the time of expenditure.

Mr. van Moorsel explained that:

- the \$2.0 million appropriation for emergency support includes language that requires:
 - no money be distributed to any school district or state-chartered charter school having cash and invested reserves, or other resources or any combination thereof, equaling 5.0 percent or more of the school district's or state-chartered charter school's operational budget;
 - the appropriation be derived from the "Education Lockbox"; and
 - prior to the distribution of any emergency supplemental funds, the Secretary of Public Education provide the LFC and the LESC with a report outlining: (1) the criteria used to qualify for funds; (2) the financial status of recipients, including the status of recipients' financial audits; and (3) any cost-saving measures recipients implemented before applying for funds; and
- the \$2.5 appropriation for the Governor's educational reforms and initiatives includes provisions that the reforms:
 - include third grade retention, contingent on enactment of House Bill 21 or similar legislation of the 1st Session of the 50th Legislature (this contingency was not met, as no such legislation passed);
 - provide technical assistance to low-performing schools;
 - improve data systems;
 - support Innovative Digital Education and Learning, computer-administered assessments, and common core standards implementation; and
 - be contingent on PED providing a detailed action plan to the LFC and the LESC, and a report outlining the expenditure of funds and the results of reforms and initiatives.

Mr. van Moorsel also said that, to address the risk of increased fuel costs during school years 2010-2011 and 2011-2012, the 2011 Legislature appropriated \$1.2 million from the Transportation Emergency Fund and included language requiring the Secretary to make distributions from the fund:

- first to provide additional funding to school districts and state-chartered charter schools for increased school bus fuel costs;
- based on miles traveled for to-and-from transportation of public school students;
- to school districts and state-chartered charter schools providing supporting documentation that they have incurred increased costs due to higher fuel prices; and
- on a reimbursement basis.

Finally, Mr. van Moorsel reported that the *General Appropriation Act of 2011* extended through FY 12 the period of time for expending the \$6.0 million appropriation to PED made in the *General Appropriation Act of 2010* for emergency support to school districts experiencing shortfalls. According to PED, Mr. van Moorsel noted, approximately \$3.7 million of this

appropriation remained unexpended at the end of FY 11, and it will be available for distribution in FY 12.

Ms. Eilani Gerstner, LESC staff, provided the committee with an overview of the PED guidelines for FY 12 public school budgets. She reported that, for the development of FY 12 public school budgets, PED issued at least two documents: (1) a guidance document titled “A Smarter Return on New Mexico’s Investment: Guiding Principles for the Development of School District Budgets;” and (2) a memorandum entitled “Clarifying the School Year and Length of Day.”

Ms. Gerstner noted that, according to PED’s guidance document, the budget review and approval process will rely on five PED guiding principles and some issues identified by the American Institutes for Research in developing the recommendation for a proposed public school funding formula. For example, she said, among these recommendations are specific and appropriate caseloads (e.g. students per FTE [full-time equivalent position]) for each type of ancillary personnel and their assistants, specific overhead costs for district-level central administration, and maintenance and operations services to schools.

Ms. Gerstner stated that, because PED has until July 1 to approve the operating budgets, the department reported that it does not yet have information on how many districts and charter schools are complying with the five guidelines.

During the 2011 legislative session, Ms. Gerstner reported, LESC-endorsed legislation was enacted that repealed provisions enacted in 2009 requiring that a school year consist of 180 full instructional days for a regular calendar or 150 days for a variable school calendar. As a result, Ms. Gerstner said, requirements were reinstated for a minimum number of hours per year during which regular students must be in school-directed programs, exclusive of lunch, for:

- half-day and full-day kindergarten; 450 hours per year and 900 hours per year, respectively;
- grades 1-6: 990 hours per year; and
- grades 7-12: 1,080 hours per year.

Also from the 2011 session, Ms. Gerstner said, the *General Appropriation Act of 2011* contains language requiring that, in the process of approving school district and charter school budgets, “[t]he secretary shall ensure that the number of instructional days will not be reduced.” However, Ms. Gerstner noted that in a memorandum dated May 10, 2011, the Secretary-designate directed school districts and charter schools to build their calendars around the minimum instructional hours.

Ms. Gerstner noted that PED is also required to monitor the waivers and report to the LESC and the LFC on any issues or actions of a school district that appear to have an adverse effect on student learning.

Ms. Gerstner then provided the committee with a summary regarding federal dollars to PED and public schools, including the *American Recovery and Reinvestment Act of 2009 (ARRA)* and the *Education Jobs Fund*. She stated that, according to the New Mexico Office of Recovery and Reinvestment (NMORR), New Mexico will receive a total of approximately \$3.9 billion in stimulus and fiscal stabilization dollars from the ARRA over the life of the act.

For public education, Ms. Gerstner reported that New Mexico has received federal support from the following stimulus measures:

- ARRA State Fiscal Stabilization Funds (SFSF);
- Education Jobs Fund dollars;
- other ARRA grants; and
- the Governor's Discretionary Fund.

Ms. Gerstner emphasized that the staff report focused on the expenditure of these federal funds to date and on the remainder available to the state before the grants expire. She stated that, according to PED, the ARRA funds expire on September 30, 2011, while the Education Jobs Fund dollars expire on September 30, 2012.

Ms. Gertsner reported that ARRA State Fiscal Stabilization Fund dollars, which were required to flow through the State Equalization Guarantee (SEG, or public school funding formula), supplanted a total of approximately \$234.1 million in General Fund dollars in the appropriations to the SEG for FY 10 to FY 11. For FY 10, Ms. Gerstner continued, \$164.7 million was appropriated during the 2009 regular legislative session; and \$45.5 million was appropriated during the 2009 special legislative session. For FY 11, \$23.9 million was appropriated during the 2010 legislative session.

Ms. Gerstner stated that, according to NMORR, in addition to the SFSF funds and other ARRA grants, New Mexico's ARRA allocation included nearly \$58.0 million for the Government Services Fund, also known as the Governor's Discretionary Fund. NMORR reports that 95.4 percent of this fund has been allocated to date.

Ms. Gerstner further explained that other General Fund dollars supplanted by federal funds in the SEG were derived from the Education Jobs Fund (Ed Jobs). She said that, according to the US Department of Education (USDE), the purpose of these funds was to provide assistance to states to save or create education jobs for school year 2010-2011.

With specific reference to the one-time Ed Jobs dollars, Ms. Gerstner noted that for FY 11, \$64.4 million supplanted General Fund dollars in the appropriation to the SEG. She also said that according to PED, approximately \$12.6 million of Ed Jobs dollars remain to be reimbursed to school districts and charter schools for school year 2010-2011.

To conclude, Ms. Gerstner reported that a total of \$298.5 million in SFSF and Ed Jobs dollars supplanted General Fund dollars in appropriations to the SEG in FY 10 and FY 11. A total of \$253 million has been restored with General Fund dollars.

The Chair then recognized Secretary-designate Skandera to provide the committee with an update on each topic summarized by LESC staff.

- With regard to the **A-B-C-D-F schools rating system**, Ms. Skandera had met with the Secretary's Superintendents Council on two occasions and expects to schedule two additional meetings. She noted that the department plans to have baseline data released for all schools in the near future. This information, she said, will allow the schools to determine their current rating on the system.

- The **Governor's executive order establishing the Effective Teaching Task Force** addresses many of provisions in the legislation introduced during the 2011 legislative session. Ms. Skandera stated that, after receiving more than 200 nominations on May 19, the Governor selected and appointed all of the members to the task force and announced that their first meeting would be held on June 1. She noted that she expects that the task force will be meeting three to four times a month during the summer in order to be able to provide the Governor with recommendations by the end of August 2011.
- The Governor is in full support of the intent of the **autism education plan development legislation passed by the 2011 Legislature**, but she wants to use federal guidelines to ensure federal funding. She reported that PED staff have developed and published an autism-related rule that should be final by July 2011.
- For the **distribution of the special appropriations of the 2011 Legislature**, PED staff is in the process of determining priorities and best practices for the distribution of these dollars. The Secretary-designate reported that the department has applied for a USDE Striving Readers Grant to support literacy initiatives statewide; is receiving free technical assistance on the department's data system from USDE; and has received a Kellogg Foundation grant to transition to common core curriculum standards.
- The **FY 12 budget guidelines issued by the department** have resulted in at least 57 school districts preserving classroom spending. Ms. Skandera noted that, of the 62 schools that the department has worked with as of this date, most have asked for more guidance in future years.
- PED has made a commitment to work with districts to provide an expedient reimbursement of **federal ARRA and Ed Jobs Fund dollars**. Ms. Skandera stated that PED met with superintendents on March 31 to verify PED data and to encourage districts to expend their federal dollars. PED staff also advised superintendents on the best use of these dollars. For example, Title I dollars could be expended on evidence-based formative assessments and preschool dollars could be used to focus on literacy. She noted that it was her understanding that most of the Ed Jobs dollars will be expended by June 2011.

Committee Discussion

In response to a question about the distribution of the special appropriation for the Governor's education reforms that was contingent on the passage of House Bill 21, the Secretary-designate replied that she cannot report specifics on the allocations, but she said the funds will be based on the Governor's priorities.

The Secretary-designate acknowledged that if PED is successful in receiving the Striving Readers grant from the USDE, the award may change the \$2.5 million special appropriation by allowing more dollars to be allocated to the department's data system.

In response to a question about other criteria that could be used to rate schools, the Secretary-designate stated that other rating factors include short-cycle assessments.

In response to a committee member's question regarding Native American members on the Effective Teacher Task Force, the Secretary-designate reported that a Native American parent and a representative from Gallup-McKinley County are members of the task force.

When a committee member asked who pays for the transportation of a child who moves from an F-rated school, the Secretary-designate stated that the issue will be addressed as the process moves forward.

Regarding the autism rule, a committee member asked whether language says the 11 criteria "must be used" or "may be considered." Dr. Kris Meurer, Director, School and Family Support Bureau, PED, replied that a student's IEP must consider, but not necessarily require, the use of the 11 criteria.

Responding to a committee member question regarding class size waivers, Ms. Ramírez-Maestas noted that the LESC interim workplan includes a report on class size waivers.

SUPERINTENDENTS AND COMMUNITY INPUT

With regard to the A-B-C-D-F schools grading system, Mr. Tom Sullivan, Director of the New Mexico Coalition of School Administrators, noted the following issues that the Secretary's Superintendents Council has identified and that need to be addressed before the grading system is implemented:

- the five-year cohort graduation rate;
- short-cycle assessments;
- student transfers: language that would allow a parent to transfer a student to any school in the state;
- timelines, and;
- the calculation of high school growth.

Mr. Sullivan cautioned that external evaluation experts have recommended going slowly while developing the process, perhaps best phrased as "take your time and get it right."

PUBLIC SCHOOL-RELATED LEGISLATION, 2011 LEGISLATIVE SESSION

The Chair recognized Ms. Pamela Herman, LESC staff, to provide the committee with an overview of the education-related legislation that passed during the 2011 session.

Referring the committee to a memorandum to New Mexico legislators from the LESC chairs, *Summary of Public Education-related Legislation Passed by the 50th Legislature, 1st Session, 2011*, included the committee notebooks, Ms. Herman reported that, at its final meeting at the end of the 2010 interim, the LESC endorsed 36 measures that were introduced in the 2011 session, of which 13 were ultimately enacted. These items, she noted, are summarized on pages 5, 6, and 7 of the LESC memorandum.

Ms. Herman noted that many of the LESC-endorsed bills and memorials addressed school budgets and finance, based on the LESC's interim study of school business office practices;

however, other LESC-endorsed measures for the most part resulted from other presentations to the LESC during the 2010 or prior interims concerning career-technical education; charter school attendance priorities; Title I tutoring services; servicing of postsecondary students loans; bullying; and teacher preparation and licensure, all areas of perennial concern to the committee.

She also stated that two LESC-endorsed bills were passed by both houses but pocket-vetoed by the Governor: (1) HB 43a, *Develop Diploma Stamp System*, and (2) SB 203a, *School Business Official Licensure*. A short description of these measures, she indicated, is included on page 7 of the memorandum.

To conclude, Ms. Herman reported that other public school-related legislation passed by the Legislature and signed into law was summarized on pages 8, 9, and 10 of the LESC memorandum. She noted that the LESC office also maintains a document summarizing public-school related legislation that was introduced but did not pass.

2011 MEMORIALS DIRECTED TO THE LESC

a. SJM 35, Study Indian Education Impact Aid Money

The Chair recognized Mr. Kevin Force, LESC staff, to brief the committee on the provisions of SJM 35, *Study Indian Education Impact Aid Money*.

Among its provisions, Mr. Force stated, the memorial requests the LESC to:

- evaluate the status of Indian education Impact Aid set-aside funds to determine if school districts collaborate adequately with tribal officials to identify local needs;
- examine the use of Impact Aid supplemental funds within the 23 school districts that have significant populations of American Indian students to ensure that those funds are being used to meet statutory requirements regarding the educational needs of Native students; and
- hold hearings to receive testimony from certain officials and representatives of certain constituencies.

Mr. Force reported that, according to federal provisions pertaining to Impact Aid:

- funds are provided directly to local education agencies (LEAs) on the basis of statutory criteria provided in grant applications submitted to the US Department of Education (USDE);
- payments under the program are made for:
 - federal acquisition of real property located within the school district;
 - membership and attendance counts of federally connected children; and
 - construction, repairs, maintenance, and modernization of facilities to eligible LEAs; and
- payments made under the program are considered general aid, and they may be employed at the discretion of the LEA, except for those funds awarded for:

- federally connected children with disabilities; and
- facility construction, repairs, and modernization.

Mr. Force noted that provisions in the *Elementary and Secondary Education Act (ESEA)* require LEAs that receive funds for children living on Indian lands to have Indian policies and procedures (IPPs) in place to ensure five things:

1. Indian lands children are allowed to participate in programs on an equal basis with non-Indian lands children;
2. parents of Indian lands children and the tribes have the opportunity to present their views on school district programs and to make recommendations on the school's programs;
3. parents and tribes are consulted and involved in planning the school program;
4. plans, evaluations, and applications of these programs are disseminated to the parents and the tribes; and
5. parents and tribes have an opportunity to present their views on the job that the local schools are doing.

Mr. Force added that, if requested, the USDE is required to provide technical assistance on how to develop and implement these policies. Provisions for IPP review and compliance, he indicated, are in both federal Impact Aid provisions in the ESEA and the program regulations.

Mr. Force indicated that, although the memorial directs the LESC to review the effectiveness of the Impact Aid program and the LEA's compliance with its requirements, the LESC may wish to consider that:

- the Impact Aid program is a federal program administered directly by the USDE;
- the focus of the program is to effectively reimburse LEAs for revenues lost due to action taken by the federal government, or as a result of the relationship between affected students and the federal government;
- LEAs apply for grants directly to, and receive funds directly from, the USDE;
- awards under the program, unless expressly set aside for services for disabled federally connected students or for construction, may be spent at the discretion of the LEAs;
- when disposing of Impact Aid funds, LEAs are responsible to the tribes, the parents, the students, and the USDE for the proper administration of their IPPs;
- if tribes find cause for complaint, they can address these complaints directly to the LEAs or the USDE, as appropriate; and
- if remedial action or sanctions are called for, the USDE is responsible for applying them.

Committee Discussion

A committee member recalled the people who asked that the memorial be introduced. They had verbal complaints but no documentation regarding allegations of money used for travel, lodging and conference meetings instead of using the funds for children. This committee member further suggested that the issues involved were more a district than a state responsibility.

Another committee member suggested that the LESC write a letter to arrange for tribal leaders to have a dialogue with school districts and the federal government, and this member offered to

represent the LESC at a tribal forum in June. The Chair agreed to work on this issue and obtain contact information for Impact Aid officials in Washington, DC.

b. SM 52, *Indian Education Act Effectiveness*

The Chair recognized Ms. Frances Ramírez-Maestas, LESC Director, to brief the committee on SM 52, *Indian Education Act Effectiveness*, which requests the LESC and the Interim Indian Advisory Committee (IAC) to review the effectiveness of the *Indian Education Act*.

Ms. Ramírez-Maestas reported that LESC staff had discussed the memorial with staff from the Legislative Council Service (LCS) to determine if the Interim Indian Advisory Committee (IIAC) would be including SM 52 in its workplan. She indicated that LCS staff were uncertain if the memorial would be discussed as interim committee calendars have not been considered and approved by the Legislative Council.

Among LESC staff concerns, Ms. Ramírez-Maestas stated, is a definition for the term “effectiveness.” She also noted that PED currently has a division that administers the *Indian Education Act*.

After committee discussion, the Chair indicated that he would confer with the chair of the IIAC to determine if this interim committee would include the memorial in its workplan. If included, the Chair requested LESC staff to adjust the LESC interim workplan accordingly, at which time he would appoint Representative Gonzales, Senator Lovejoy, and Representative Begaye to serve on the subcommittee requested by the memorial.

c. SM 70, *Rural Isolation Units Study*

Ms. Ramírez-Maestas reported that Senator Lovejoy, the sponsor of SM 70, had requested that, because of the unavailability of staff from the school district affected by this study, the LESC report be moved to the June interim meeting agenda.

d. SM 71, *Northwest Quadrant Public School Access Study*

The Chair recognized the sponsor of SM 71, Senator Lovejoy, for a summary of the provisions in the memorial. Senator Lovejoy explained that SM 71 requests that the Public Education Department (PED) study access to public education in the northwest quadrant of the state. She informed the committee that the problem centers on Bloomfield Schools refusing to release students who are bused to that district’s high school from 60 miles away when a new high school is available closer by in Gallup-McKinley County Public Schools.

The Chair, noting that the memorial requests a report from PED in August, requested LESC staff to send a letter to PED to provide the committee with a report during the interim and appointed Senator Lovejoy to be the LESC liaison.

REVIEW OF EXECUTIVE VETOES

The Chair recognized Mr. Raúl Burciaga, Director of the Legislative Council Service (LCS), for a report on contemplated action relating to executive vetoes.

Mr. Burciaga explained that some legislators expressed concern that some of the Governor's vetoes may impinge on the Legislature's appropriation powers and establish new ground in a governor's exercise of the veto authority. He reported that two petitions for writs of mandamus had been filed with the New Mexico Supreme Court by two separate groups of legislators challenging at least two of the Governor's partial vetoes.

Referring to copies of the petitions that were provided as handouts, Mr. Burciaga indicated that an unemployment bill passed by the 2011 Legislature designated a specific contribution schedule for employers for calendar year 2012. While the Governor did not veto this bill in its entirety, he stated, she did veto a provision that designates the contribution schedule under which employers are to pay into the Unemployment Compensation Fund. According to the Governor, he noted, this was purportedly a partial veto. Constitutionally, Mr. Burciaga pointed out, partial vetoes are only permitted in legislation that makes an appropriation.

Mr. Burciaga noted that Article 4, Section 22 of the state constitution allows a governor to veto or sign bills and similarly to "approve or disapprove any part or parts, item or items, of *any bill appropriating money . . .*" (emphasis added). If a bill does not appropriate money, then a governor's partial veto is invalid. An appropriation, he emphasized, is a legislative authorization to expend state money for a specific purpose. He reported that the bill in question did not authorize the expenditure of state money because that authorization was already in statute and was not amended in this bill.

Aside from the benefit changes, Mr. Burciaga noted, the bill amended the rate at which employers were to make payments into the unemployment compensation fund. The change, he stated, is similar to a change in the rate of the gross receipts tax.

Mr. Burciaga reported that the money paid by employers into the unemployment compensation fund is immediately transferred to the treasury of the United States government. As such, he added, the unemployment compensation fund established by New Mexico, as with all other states, is established under state law and administered by the state for the payment of compensation, but the funds reside in the federal Unemployment Trust Fund established by the federal *Social Security Act*. Because money in that federal unemployment fund is not state money, he further explained, the bill in question could not be considered legislation that makes an appropriation.

The second petition, Mr. Burciaga reported, refers to the reduction of an appropriation by striking a digit in a number appropriating funds to the Department of Finance and Administration for the New Mexico Mortgage Finance Authority. He explained that the Legislature appropriated \$150,000; however, the Governor struck the "1," thus reducing the appropriation to \$50,000. In this instance, Mr. Burciaga noted, the New Mexico constitution does not expressly give the Governor the power to reduce an item of appropriation.

Until recently, Mr. Burciaga stated, New Mexico courts have not been confronted with the specific question whether a governor can reduce an item of appropriation. Nonetheless, he added, the New Mexico Supreme Court has, in two cases, cited a report by the *American Law Reports* (ALR), which states the general rule that "the governor has generally no power to reduce the amount of an item." When explaining that the power over appropriations is a legislative power, the court stated, citing the ALR, "It is generally held that the governor has no power to scale down an item in an appropriation act."

Mr. Burciaga reported that in 1953 Governor Edwin L. Mechem reduced several items of appropriation in the biennial general appropriations act for the forty-second and forty-third fiscal years. This was when the state had only one 60-day session every two years and no short session. That year, according to Mr. Burciaga, the State Auditor requested an opinion from the Attorney General regarding the reduction of \$2,400 from the biennial legislative appropriations of \$50,000 for office salaries. In that opinion, where the only question was whether the Governor had the ability to reduce an item in the appropriations bill, the Attorney General concluded that the Governor could not substitute his determination for that of the Legislature or reduce an item of appropriation.

Mr. Burciaga noted that the New Mexico Supreme Court will soon decide the specific question whether the Governor's partial veto power includes the power to reduce an item of appropriation. However, he said it can be argued, based on existing case law and other sources that have considered the question, that the Governor's power to reduce an item of appropriation does not exist in the constitution.

In summary, Mr. Burciaga stated that these partial vetoes can be viewed as an attempt to expand the powers of the Executive branch at the expense of the Legislative branch. He also noted that this is not an uncommon practice by executive officers, nor is it a partisan phenomenon. Nevertheless, it probably should be of concern to the Legislature when one of its primary powers is usurped by another branch of government.

To conclude, Mr. Burciaga reviewed other Executive vetoes, including:

- three line-item vetoes that reduced a \$13.4 million appropriation to the state fair (New Mexico Expo) and language that was vetoed authorizing funding for the African American Performing Arts Center and Exhibit Hall; and
- three line-item vetoes that reduced by \$450,000 a \$1.38 million appropriation to the Commission on the Status of Women.

Mr. Burciaga testified that these two line-item or partial vetoes, in his opinion, do not rise to the level of being invalid or unconstitutional. In both cases, he maintained that the Governor partially vetoed distinct parts or items of an appropriation. The merits of what the Legislature passed or what the Governor vetoed are not at issue in these two cases.

Committee Discussion

In response to a committee member's question whether a governor is allowed to change the dollar amount in an appropriation, Mr. Burciaga emphasized that, once a precedent is set with no challenge, presumably any governor can reduce or increase appropriations in the future.

Responding to a committee member's question about a bill passed by the 2010 Legislature relating to a food tax, Mr. Burciaga concurred with the member that the Governor at that time struck the provision repealing the food tax deduction by claiming that it was an appropriations bill. He added that no action was sought on the partial veto and that an Attorney General opinion concluded that the partial veto was appropriate.

DIRECTOR'S REPORT

a. Approval of LESC Minutes for December 2010 and January 2011

On a motion by Senator Kernan, seconded by Senator García, the LESC approved the LESC minutes of the December 2010 meeting and the January 2011 meeting.

b. Approval of LESC Financial Reports for December 2010 and January 2011 through April 2011

On a motion by Representative Hall, seconded by Representative Roch, the LESC approved the financial reports for December 2010 and January 2011 through April 2011.

c. Approval of Revised LESC Policies and Procedures

On a motion by Representative Garcia, seconded by Senator Kernan, the LESC approved the revised LESC Policies and Procedures.

d. Approval of Independent Auditor for FY 11

On a motion by Senator Kernan, seconded by Representative Stewart, the LESC approved the independent auditor for FY 11.

e. Correspondence

Ms. Ramírez-Maestas presented the following items of correspondence to the committee, noting that they are retained in the LESC permanent files the first item was a press release, posted April 4, 2011, relating to a US Supreme Court decision by a 5-4 vote to take away the right of taxpayers to go to court to challenge government programs that provide financial aid to religion. According to the press release, an implication of the decision is the survival of Arizona's program of giving individual taxpayers a dollar-for-dollar credit on their state taxes when they make contributions to private, nonprofit groups that provide scholarships to private school students.

- At the request of the LESC Director, the Chair recognized Ms. Kim Bannerman, Legislative Council Service staff, to brief the committee on taxpayer standing and the Supreme Court ruling in favor of the Arizona education tax credit. Ms. Bannerman noted the key word in the decision is "may," referring to the court's decision to allow tax credits for organizations that collect funds to pay for students to attend private schools. She also testified that the plaintiffs in the suit were taxpayers who made a federal challenge to Arizona law, claiming that it was an infringement of their constitutional rights, and the court ruled that they had no standing as taxpayers.
- Ms. Bannerman continued, to explain that New Mexico has a different constitution than Arizona, and the Attorney General's opinion in 1999 regarding vouchers (not tax credits) said that four constitutional provisions would allow challenges to vouchers, including the anti-donation clause in the New Mexico constitution, which states that no revenues shall be used to support sectarian/private schools.

Other items of correspondence, Ms. Ramírez-Maestas continued, were:

- a PED news release, dated February 9, 2011, *Education Secretary-designate Skandera Announces PED Advisory Team*;
- an *Albuquerque Journal* news article, dated May 12, 2011, *No New University Classroom Facilities*;
- an NCSL Education Committee Federal Information Alert relating to a federal bill introduced to eliminate 43 education programs; and
- a May 20, 2011 letter to the Secretary-designate from Dr. Sandra Rodriguez, Advocate for the Deaf & Hard of Hearing, relating to concerns that the licensure department at the Public Education Department (PED) may not be complying with provisions in current law that provide an alternative portfolio assessment for teacher candidates that are deaf or hard of hearing.

At the request of the LESC Director, the Chair recognized Dr. Rodriguez to discuss the content of her letter to the Secretary-designate. Dr. Rodriguez explained that current law allows a person who has a degree from an accredited teacher education program and who is deaf or hard of hearing to demonstrate competency for a level one, two or three license through a portfolio assessment in lieu of all or part of the New Mexico Teacher Assessment (NMTA). Other provisions, she added, state that until rules have been effective for a period deemed sufficient by PED for a deaf or hard of hearing person to submit a portfolio, any eligible deaf or hard of hearing person who has a degree from an accredited teacher education program is to be granted a temporary teaching license for the level of licensure for which the person will likely qualify. The temporary teaching license, she noted, is effective for no longer than two school years. Dr. Rodriguez emphasized, however, that the PED rule requires persons seeking an alternative assessment to pass the Basic Skills portion of the NMTA with a minimum score of 240 in order to be eligible for a portfolio assessment for the two additional portions of the NMTA. She further noted that, because of the PED rule, those persons who were granted a temporary license have been placed in a position whereby they will lose licensure primarily because there was no alternative route or rule in effect when they were granted temporary licensure.

Committee members expressed concern that agencies are using rule to impose requirements that are contrary to provisions in state law.

A committee member stated that the provisions in law were intended to address the inappropriateness of requiring deaf and hard of hearing teachers to take the standard NMTA and suggested that PED revisit the provisions in law and revise the department's rule.

The Chair directed LESC staff to draft a letter from the committee to PED requesting a response to the committee concerns.

f. Informational Item: Charter School Update

The Chair recognized Dr. David Harrell, LESC staff, to provide an update regarding letters of intent for opening a charter school; and recent rulings by the Secretary-designate of Public Education overturning decisions by the Public Education Commission (PEC) to deny requests for renewal by three charter schools.

Dr. Harrell explained that the *Charter Schools Act* requires the organizers of a proposed charter school to provide written notification to the PEC and the school district in which the charter is proposed to be located. He said the notification is due at least 180 days prior to initial application; and the application deadline is July 1 for consideration for the following fiscal year.

As of that deadline, Dr. Harrell said, the Charter Schools Division (CSD) at PED received 46 letters of intent to apply for a charter for school year 2012-2013, including 23 from parties whose schools would be within the boundaries of Albuquerque Public Schools. Other affected districts and the number of letters in each case, he stated, include:

- Española Public Schools – four;
- Las Cruces Public Schools – three;
- Santa Fe Public Schools – three;
- Deming Public Schools – two;
- Farmington Municipal Schools – two;
- Gallup-McKinley County Public Schools – two; and
- one each in Los Lunas Public Schools, Moriarty-Edgewood Schools, Peñasco Independent Schools, Questa Independent Schools, Rio Rancho Public Schools, Silver Consolidated Schools, and Taos Municipal Schools.

Dr. Harrell noted, however, that there may not be 46 actual applications submitted by the deadline of July 1, 2011 as each year there have been fewer applications than letters of intent. He also stated that the *Charter Schools Act* prohibits more than 15 new start-up charter schools being approved in a single year or 75 new charter schools over a five-year period – although any excess over 15 in one year may be carried over to succeeding years during that five-year period.

On the topic of recent rulings by the Secretary-designate overturning decisions by PEC to deny requests for renewal by three charter schools, Dr. Harrell reported that in December 2010, the PEC heard requests from four charter schools:

- Red River Valley Charter School, initially authorized by Questa Independent Schools; and
- The Learning Community Charter School, La Resolana Leadership Academy, and Ralph J. Bunche Academy, all authorized by Albuquerque Public Schools.

On the recommendation of the CSD, Dr. Harrell noted, the PEC authorized the renewal of the charter of Red River Valley Charter School and rejected the renewal of the other three charter schools. All three appealed to the Secretary-designate of Public Education, who reversed the PEC decision in each case and immediately authorized each one as a state-chartered charter school, specifically granting Ralph J. Bunche Academy and La Resolana Leadership Academy terms of three years and presumably granting The Learning Community Charter School a term of five years.

Dr. Harrell observed that, in all three cases, the Secretary-designate granted the renewals with conditions, the first of which was to address all compliance issues identified in CSD's Renewal Recommendation & Evaluation, correct or update them as needed, and report to the CSD staff no later than the beginning of school year 2011-2012.

Dr. Harrell said that one of the most significant points to appear in all three cases is the concept of “minimum educational standards,” which the *Charter Schools Act* requires all charter schools to meet and which, according to the PEC, none of these three schools had met. At issue, he explained, is the definition of the term. He added that the Secretary-designate also noted, in each case, that she does “not rule out addressing this issue in a rule after proper notice, public hearing and publication in the New Mexico Register.”

Dr. Harrell noted that the three cases discussed above suggest conflicting roles and responsibilities in the process for charter school appeals, especially with regard to state-chartered charter schools. He then explained some of the conflicts in which a department (CSD) under the direction of the Secretary of Public Education makes recommendations to a chartering authority (the PEC), whose decisions can be appealed to Secretary of Public Education, whom the PEC serves as an advisory body.

Dr. Harrell suggested that some of these issues may be resolved once the provisions of legislation enacted in 2011 are implemented. That bill (SB 446, *Charter School Contracts*, or Laws 2011, Chapter 14) provides for charter school contracts, which, among other features, are intended to:

- prescribe the criteria, processes, and procedures that the chartering authority will use for its ongoing oversight of operational, financial, and academic performance of the charter school; and
- clarify the criteria, procedures, and timelines that the parties have agreed upon to address charter revocation and deficiencies found in the required annual status report.

Beyond that possible remedy, Dr. Harrell suggested that the committee may wish to review the current process of charter school appeals and consider some alternatives.

Committee Discussion

The Chair recognized Mr. Gene Gant, PEC, who explained that in law the PEC is the authorizer of charter schools and that, although the Secretary-designate reversed the PEC’s decisions, the PEC is still responsible for oversight of the three charter schools that were initially rejected. He concluded by citing the following issues:

- standards: there are 21 different districts with charter schools and 21 different oversight rules regarding charter schools; there should be one set of standards for all charter schools in the state;
- rulemaking: the PEC should have input into rules that are considered by PED for charter schools; and
- conflicts of interest: CSD staff supports the PEC under direction from the Secretary of Public Education, who then is allowed to overturn the decisions of PEC and CSD staff.

In response to a committee member question on charter school enrollment limits, Ms. Ramírez-Maestas responded that current law prohibits the approval of a charter school if that school’s enrollment, together with the enrollment of other charter schools in the district, would exceed 10 percent of the total enrollment in districts with a total student enrollment of 1,300 or fewer students. Mr. Tom Sullivan, Director, New Mexico Coalition of School Administrators, reported that the charters in the Jemez Valley Public Schools exceeded the enrollment cap because they

were approved before that provision was enacted. He added that this provision may soon apply to two other districts: Cimarron Municipal Schools and Questa Independent Schools.

Another committee member commented in support of Mr. Gant, recalling that when he was a superintendent his district denied a charter and the denial was upheld; however, the district was instructed to work with the applicant to fix the charter. In that process, the superintendent essentially rewrote the charter.

Responding to a committee member's question regarding the procedure for closing a charter school, Mr. Gant stated that a charter school that failed to renew its charter would close at the end of the current school year (after an appeal, if any). Dr. Harrell added that closing a school is never easy; it is disruptive to students and to the schools where the students are transferred. He also noted that the charter school contract bill (SB 446) attempts to clarify the transition in such a circumstance.

A committee member objected to the phrase "minimal educational standards," proposing that state law should set a higher bar.

g. Informational Item: Administrative Rulemaking

The Chair recognized Mr. Kevin Force, LESC staff, to brief the committee on issues related to administrative rulemaking.

Referring the committee to the staff report, Mr. Force reported that, in recent interims, the LESC has taken an interest in the number and content of the rules promulgated by the Public Education Department (PED) and the Higher Education Department (HED), in some cases to implement requirements of enacted legislation.

Mr. Force explained that New Mexico, unlike most states, lacks a uniform law for administrative rulemaking in general. Rather, he said, each agency can employ its own procedures when creating rules and must adhere to certain provisions of law regarding the rulemaking process prescribed in:

- the *State Rules Act* (Chapter 14, Article 4 NMSA 1978);
- the *New Mexico Administrative Code* (Code) (Title 1, Chapter 24); and
- Chapter 14, Article 11 NMSA 1978, regarding records, rules, notices, and oaths.

Occasionally, Mr. Force noted, an agency will have additional statutory requirements imposed upon it that are particular to that agency and its area of concern. For example, he explained that the *Public School Code* requires PED to "solicit input from local school boards and school districts in the formulation and implementation of department rules."

Mr. Force emphasized that the agency review of public input and other materials may help avoid promulgation of rules that go outside the scope of their enabling statutes or conflict with other rules. Because rulemaking notice requirements are already sparse, Mr. Force emphasized that these provisions provide at least some opportunity for public input and notice while still allowing an agency to act effectively in an emergency.

With regard to administrative and judicial review, Mr. Force explained that according to the state's *Administrative Procedures Act* (APA):

- failure to comply with statutory requirements, such as publication of notice, may result in invalidation of the rulemaking; and
- anyone whose interests may be impaired or damaged by a rulemaking may:
 - petition the agency for a declaratory ruling as to the applicability of the rule (subject to judicial review), unless the agency has good cause to consider the issuance of such a ruling undesirable; and
 - bring an action in the district court of Santa Fe County for declaratory judgment to determine the applicability or validity of a rule.

Committee Discussion

Ms. Ramírez-Maestas informed the committee that Mr. Force worked on administrative rules for the state of Arizona, and she asked him to explain that state's rulemaking process. In brief, Mr. Force explained that Arizona has staff attorneys and an economist who thoroughly review new proposed rules before they are finalized. On that point, one committee member commented that New Mexico does not consider how much rules would cost.

The Chair requested that LESC staff prepare a letter requesting that PED and HED apprise the LESC of the proposed rulemaking of each department.

There being no other business, the Chair, with the consensus of the committee, recessed the LESC meeting at 4:02 p.m.

MINUTES LESC MEETING FRIDAY, MAY 27, 2011

Representative Rick Miera, Chair, called the committee to order at 9:03 a.m., in Room 307 of the State Capitol, in Santa Fe, New Mexico.

The following LESC members were present:

Representatives Rick Miera, Chair, Nora Espinoza, Mary Helen Garcia, Jimmie C. Hall, Dennis J. Roch, and Mimi Stewart; and Senators Mary Jane M. García, Gay G. Kernan, and Lynda M. Lovejoy.

The following LESC advisory members were also present:

Representatives Alonzo Baldonado, Ray Begaye, and Roberto "Bobby" J. Gonzales; and Senators Vernon D. Asbill, Stephen H. Fischmann, Howie C. Morales, John Pinto, and Sander Rue.

PROPOSED ACTIVITIES FOR THE 2012 INTERIM

Referring the committee to the LESC meeting schedule and calendar in the committee notebooks, the Chair emphasized the need to minimize travel, primarily because of the reduced budget for the Legislature, including its interim committees.

Ms. Ramírez-Maestas, LESC Director, reported that the University of New Mexico and Central New Mexico Community College have offered the use of their facilities for an interim meeting.

A committee member requested consideration of an interim meeting in Alamogordo primarily because of a scheduled meeting in the 2010 interim that had to be cancelled because of a special legislative session. The Chair requested that LESC staff look into these options.

On a motion by Representative Roch, seconded by Representative Espinoza, the committee approved the LESC meeting dates with locations to be determined.

Discussion followed regarding topics for LESC meetings. Committee members asked that the following topics be added to the draft workplan:

- an update on implementation of instructional materials in electronic format (re: HB 310, *Electronic Instructional Materials for School*);
- a report on graduation cohort results, including a review of how students in Hobbs Municipal Schools are meeting graduation requirements;
- an update on federal funding for literacy law in New Mexico (re: HJM 27, *Study & Draft of Literacy Law for NM*);
- a report on the gender achievement gap (Contact: Dr. Paul Golding, Santa Fe Boys Newsletter);
- a report on school boards, including: (1) encouraging school boards to focus on proficiency; (2) consolidation of selected school functions; and (3) update on training for school board members (re: New York information received by Mr. Joe Guillen, Executive Director, New Mexico School Boards Association; and HB 277, *School Board Campaign Reporting Act*);
- a presentation on one or two schools that are “Beating the Odds”;
- an update on the recommendations of the LESC School Finance Work Group, including: HJM 11, *Small School District Service Consolidation*; SB 143, *Define School Personnel “Ethical Misconduct”*; SB 203, *School Business Official Licensure*; and *Public School Accounting and Budgeting Manual of Procedures*;
- references to HB 98, *Charter School Audit Monitoring*, in a presentation on charter schools;
- a report on extended school year calendars, including the “balanced calendar” of Las Cruces Public Schools and a report by Albuquerque Public Schools of the district’s nine year-round schools;
- a report on special education ancillary services and FTE statewide; and
- a report on issues raised by HB 603, *Child Care Registry*.

On a motion by Senator Kernan, seconded by Representative Stewart, the committee voted with no objections to accept the LESC workplan as amended.

ADJOURNMENT

There being no further business, the Chair adjourned the LESC meeting at 11:50 a.m.

CSMOR Chair

August 25, 2011 Date