Legislative Finance Committee
Meeting Minutes
State Capitol Building, Room 307
Santa Fe, New Mexico
June 9, 10, 11, 2010

Wednesday, June 9

The following members were present on Wednesday, June 9: Chairman Luciano "Lucky" Varela, Vice-Chairman John Arthur Smith, Representatives Donald E. Bratton, Rhonda S. King, Don Tripp, Edward C. Sandoval, Jeannette O. Wallace, Nick L. Salazar, and Henry "Kiki" Saavedra; and Senators Sue Wilson Beffort, Carroll Leavell, John M. Sapien, Mary Kay Papen, Pete Campos, Linda Lopez (for Carlos Cisneros), and Rod Adair (for Stuart Ingle). Representatives Dennis Kintigh, Antonio Lujan, and Danice Picraux attended as guests.

Evaluation of Developmental Disabilities Program. Pam Galbraith, program evaluator, LFC, reported the developmental disabilities program is operated by the Department of Health (DOH) and the Human Services Department (HSD). The developmental disabilities waiver (DD waiver) is an emotionally charged issue for all stakeholders. The program is becoming unaffordable; it is imperative to ensure the right individuals are receiving the correct services at the right time. The departments and the Legislature have the opportunity to revamp the program to one which contains costs allowing more individuals to be served.

Waivers are granted allowing states to provide home- and community-based services for targeted populations as an alternative to institutionalization; it is reinforced by the federal government stating the costs of services through providers must be neutral with costs associated with intermediate care facilities for the mentally disabled.

The New Mexico waiver was granted in 1984 and is scheduled to expire next year. The present DD waiver serves 3,792 individuals; however there are currently an additional 100 individuals in the enrollment process and 4,555 individuals on the waiting list.

The departments have a multitude of regulations and standards, including

- contracts with over 300 providers
- an unresolved class action lawsuit
- critical budget issues

In FY08, the total cost for waiver services between state and federal funds totaled $260 million. The costs per individual averages $71.4 thousand annually plus an additional $7.4 thousand for services through regular Medicaid; the New Mexico program is in the top 10 most expensive in the country. Costs do not include operational expenses for the division. As of 2008, the cost of a client in an intermediate care facility (ICF/MR) totaled $84.3 thousand.

Ms. Galbraith said there is concern with the federal match from Medicaid as it relates to the waiver program. The American Recovery and Reinvestment Act (ARRA) enhanced the FMAP for 27 months and is due to expire at the end of this year; Congress has not acted on extending the enhancement. Without the enhancement, the state will experience a $16.9 million shortfall in operating costs for FY11. LFC staff recommends a contingency plan be prepared by the departments for LFC and Department of Finance and Administration (DFA) if it becomes evident that the FMAP will decrease and general fund shortfalls will occur.

LFC staff addressed needs assessments of individuals who are either considered for waiver enrollment or those already on the waiver. The existing assessment system (the process and tool) are not adequate. The process has been handed over to contracted independent case managers who have limited oversight. The tool is outdated, is no longer supported by the vendor, and does not tie an individual's needs or to their budget. An annual resource allotment (ARA) is determined based on the level of care and provides funding for part of the services made for an individual. To develop accurate individual budgets, rates and providers costs need to be correct; the last rate validation study for the waiver program was completed in 2000. An integrated information system is not available between departments, the division, and their providers allowing real-time information exchange.

The average time on the waiting list is from seven to eight years. As of May 2010, there were 4,555 individuals on the list. Most individuals on the waiting list are eligible for Medicaid benefits and 2,700 received services through the regular Medicaid plan or through one of the managed care plans. Accurate utilization data is important to monitor service delivery and quality and set rates for MCOs. The department does not routinely review the status of individuals on the list, which would aid in determining needs that could be met through a different funding source or what needs might be once allocation status is reached, giving the department the opportunity to predict future costs for the waiver.

LFC staff recommends HSD share detailed MCO data used to develop rates with the Legislature, validate the financial data contained in MCO spending reports, provide Medicaid and managed care contracts and rates, and provide complete actuarial rate certification letters and amounts paid by MCOs by client type holding the MCOs accountable for complete data, including the sub-capitation rates paid by MCOs to their own contracted providers. DOH should perform routine reviews of waiting list clients to determine medical and financial eligibility. The number on the waiting list would prevent a review of the entire list at one time; reviews could be limited to a specified number of individuals at the top of each list in each region.

LFC staff reviewed program oversight, cost management and benefit redesign. The system fragmentation complicates effective oversight of the program, resulting in the agency overspending budgets, causes information gaps and inaccuracies, and prevents expansion of services to others in need. The department's contract with the utilization review agency is limited, allowing spending for services beyond budget. The joint powers agreement (JPA) between HSD and DOH is outdated and does not reflect current practice; however, it is under revision. During the evaluation, it was difficult to obtain information from the departments that could be reconciled because of timing of collection, lack of an integrated system, and ad hoc reporting from other agencies and other departments. LFC staff does not agree that it is an appropriate responsibility for case managers to submit all levels of care: initial assessments and annual resource allocations should be completed by state staff to determine the annual resource allocation. LFC recommends all exceptions for care go through the department or the utilization review agency and the contract for the utilization review agency be amended including contract rates.

In FY07, $15 million was spent on relief hours for family living providers; $25 million was spent in FY08. Because of the state encouraging therapists to evaluate clients in community settings, most therapy billings are at a higher community rate. Very few therapists maintain an office and do not have overhead expenses. LFC staff recommends consideration be given to therapists' office and community rates becoming a single rate. LFC staff recommends the department review the mandated case management visits. Providers are paid by the level of care for individuals living in a provider-owned home; there is no consideration for family living. LFC recommends the level of care be determined in family living.

DOH allows $5 thousand to be used every five years by an individual to perform environmental modifications. In FY07, $551 thousand was spent on modifications. In FY08, $935 thousand was spent on modifications. Modifications can be done appropriately on the home of the family or client; however, payment is also made on modifications of provider-owned homes. LFC recommends that consideration be given to providers paying for their own modifications or at least part of it.

Individuals have the opportunity to receive $1 thousand a year to assist them in achieving desired outcomes. In the DD waiver standards, funds could be used for a fitness membership, tuition, dues for a social membership club, etc. In FY07, $35 thousand was spent for goods and services and $800 thousand in FY08. If everyone is allowed $1 thousand a year, it raises a potential liability for the department of $3.8 million per year. LFC staff recommends goods and services be tied to the patient's plan of care and promoting independence or well-being. DOH and HSD should develop and submit a comprehensive cost-benefit analysis to DFA and LFC on the value of a rate validation study and implementation of an effective assessment process and an integrated information system. DOH should move forward immediately with cost-savings strategies using information gathered from stakeholders, its own experience, and LFC staff recommendations. Utilization reviews, as well as all exceptions and outliers, should be done based on established criteria should be completed by the utilization review agency or the department. The substitute or respite care should be included in the annual resource allocation and level of care should be used in establishing family living rates.

Ms. Galbraith noted that DOH was a national leader in its expansion of the home- and community-based services and closing large institutions and has been recognized nationally for performance.

Individuals on the DD waiver have been impacted by the Jackson Lawsuit even though they are not a member of the lawsuit according to interviewees; it has become a medical model, is intrusive, restricts independence, and limits freedom of risk. The lawsuit has a complicated process for disengagement with more than 500 objectives with multiple action steps for the department. LFC staff strongly urges the department urge the court to focus on outcomes and let the department determine the action steps. The Legislature needs more information on the waiver program; there are not performance measures in the GAA. LFC staff strongly recommends the Health and Human Services Committee request routine disengagement reports from the department.

Dr. Alfredo Vigil, secretary, Department of Health (DOH), addressed the committee and said redesigning the DD waiver program is of importance. The department is compelled to review the structure and costs of the program. Substantial progress has been made toward resolution of the Jackson Lawsuit; there is clear and serious acknowledgement that the case has gone on too long and the maximum benefit of the outcome is near. Conclusion of the case will remain one of the department's most important priorities to improve care for the developmentally disabled and the bureaucratic and financial burden to the state and providers.

Katie Falls, secretary, Human Services Department (HSD), added the department agrees with the findings of the report and appreciates the opportunity to review areas with additional information. HSD has not been able to provide adequate data; it is complicated because information rests in various systems. The department is committed to developing a mechanism to access information on a regular basis.

Representative Bratton asked how individuals are removed from the waiting list and put onto the DD waiver. A representative of DOH said the waiting list is first-come, first-served. Representative

Bratton said a priority needs to be established to evaluate those with the greatest needs.

In response to Representative King, Cathy Stevenson, DOH, said the level of care is determined through a process of a functional assessment, a health and physical history determined by a physician, and a level of care abstract. The process is outdated and case managers are making judgment calls. Representative King said case managers associated with entities providing services causes conflicts in the system because there is no external review by the department. Representative King suggested setting up a policy as to who can bid on services to determine the relationship between providers and other entities to disclose information. Ms. Stevenson clarified the initial level of care assessment is completed by the case manager and submitted to Medicaid Utilization Review for review and approval and is also reviewed every third year. Secretary Vigil added the main focus to achieve objectivity and accuracy should be to develop the best standards possible for clients. The Jackson Lawsuit compelled the state to upgrade standards and care for the DD population.

Doris Husted, representing the ARC of New Mexico and a parent of a developmental disabled daughter, testified the waiver does not pay for any services available under Medicaid (prescriptions and doctor visits). The report does not indicate the number of individuals on each waiver service to compare the full costs of each program to determine the effectiveness of spending. Information for the median cost per individual is also needed to determine who is below the average and who the high outliers are. Individuals with Medicaid who are financially eligible can receive PCO services providing in-home or day services. Individuals who are both Medicare and Medicaid eligible can receive services through Coordination of Long-Term Services program.

Fritzie Hardy; Edward Ruiz, owner of Lessons of Life; Patsy Romero, family member; Peter Cubra, lawyer and advocate for persons with disabilities; Ana Otero Hatinaka, director, Association of Developmental Disabilities Community Providers; and Marina Cordova, attorney for family living providers and recipients of the DD Waiver; testified on behalf of changes to the DD waiver program.

Director Abbey acknowledged guests of the International Visitor Leadership Program of the U.S. State Department.

LFC Staff Objection to Budget Adjustment Request for Children, Youth and Families Department Pre-Kindergarten Evaluation. Director Abbey reported the Children, Youth and Families Department (CYFD) is requesting a budget adjustment request (BAR) to transfer $250 thousand from the Public Education Department (PED) to CYFD to fund a contract to evaluate pre-kindergarten services, bringing total evaluation expenditures for the year to $500 thousand. To date, review of the program totals $930 thousand with department intent to spend an additional $500 thousand in FY11; CYFD agreed to reduce the FY11 evaluation amount to $300 thousand. In light of fiscal constraints, LFC recommended prioritizing funding on direct services and not administrative and support costs. The average cost of a pre-K slot is $2.8 thousand. CYFD and PED have not performed evaluations of many other programs such as drop out intervention, home visiting child care, charter schools, and breakfast.

Katherine, Miller, secretary, Department of Finance and Administration (DFA), said the department has the latitude to approve budget adjustments that are legal and justifiable. DFA does not have the legal authority to disapprove the BAR. The budget adjustment was in PED's budget, the contract was in place July 2009, services have been rendered, and funds were moved from PED to CYFD. The Legislature requested evaluations at the time the pre-K program was put into place to compare the programs offered by each department; therefore the base was expanded for appropriate statistical data. Additional general fund dollars were requested in order to evaluate other programs. Dorian

Dodson, secretary, Children, Youth and Families Department (CYFD), added that the BAR is for the current year for a study approved for the FY10 budget.

Director Abbey said the objection questions the period of time for evaluations and the cost. LFC's recommendation for FY11 expresses concern regarding the magnitude of administrative cost for the program, which diverts services from children. CYFD did not adjust the spending level for fiscal restraints. Secretary Dodson said the anticipated funding level has been adjusted for FY11. Through FY10, $65 million will have been spent on the program.

Representative Bratton expressed concern with a 70 percent increase and the timing of the request for proposal (RFP). Representative Wallace questioned the actions of the evaluations and total cost, including the amount paid to the New Mexico State University (NMSU) for collecting data. Secretary Dodson responded that major program changes have already been made in response to findings; information will be shared with LFC. Vice Chairman Smith said he would like to see more resources go toward the actual services rather than the study.

Vice Chairman Smith and Representative Bratton objected to the budget adjustment request for CYFD. Motion carried to support the BAR.

Health and Human Services Super Complex – Review of Land Acquisition and Building Development. Arturo Jaramillo, secretary, General Services Department (GSD), provided an update on the status of the health and human services complex. There are four phases of the project:

- programming
- selecting an appropriate site
- developing a financial package, and
- issuance of a request for proposal (RFP) for design/build

The state has been working on this project since 2005, and it is premised on better use of federal funds and more efficient use of office space in Santa Fe. Currently, agencies with federal programs and federal participation are housed in a state-owned complex and are not charged rental fees, losing the opportunity for federal participation in the operation and maintenance of the building and its depreciation.

Since the late 1980s, the Human Services Department (HSD) has been housed in leased offices scattered around Santa Fe. The decentralization raised questions in 2005 and today. The super complex provides the opportunity for mixed uses; including integrating not only HSD, but CYFD, the Aging and Long-Term Care Services Department (ALTSD), and the Department of Health (DOH). The first phase will include HSD and CYFD. The financial design of the project, as recommended by the Capitol Building Planning Commission, is to capitalize existing lease revenues to build and maintain a complex through a lease purchase agreement with the New Mexico Finance Authority (NMFA). NMFA bonds will be repaid from the same funds otherwise committed to rental payments. Projected current phase one savings total $87 million (present value of $22 million, plus $46 million in general fund savings) over 35 years. Delaying the project does not save any general fund dollars; they will continue to be paid out inefficiently as opposed to capitalizing those same dollars and amortizing the construction project, as well as paying for maintenance and operating costs and owning a building that has equity and value to state.

According to the New Mexico Constitution, financing agreements entered into by the state for the leasing of building or other real property with an option to purchase property are subject to the following provisions: there is no legal obligation for the state to continue the lease from year to year or to purchase the real property, and the agreement must provide that the lease be terminated if sufficient appropriations are not available to meet the current lease payments.

There are significant savings opportunities; the down economy is driving design and construction bids significantly lower, allowing for purchase of more buildings for the same amount of money. It is the best time for procurement of contractor, architect, and engineer services due to competition. The HSD project creates its own $76 million stimulus condition. The HSD complex strategy is to consolidate operational, functional, and logistical efficiencies through better use of equivalent space, relieving existing crowded and inefficient working conditions, eliminating unnecessary duplication of space, and maximizing the multi-mode transportation systems to reduce travel time, energy costs, and greenhouse gases. The financial package is based on a 1.5 percent increase in payments and 2.5 percent for the next five years. Payments are capped at 3 percent for the remainder of the amortization period. The savings without considering building value is estimated at $94 million (present value of $18 million).

For the land, 16 sites were considered, both state- and- privately owned, and were measured against common criteria. The Las Soleras property, the selected site, consists of 20 acres and is across the street from the proposed railrunner station. The price includes all infrastructure--constructed and in place. The total cost is $7.9 million ($6 million cash and trade of the Galisteo property). In addition to the acreage, there are unconditional options exercisable by the state at no cost through June 2013.

Vice Chairman Smith stated that there will be a direct impact on property taxes and an assumption of paying it at the same rate, assuming there is occupancy; the private sector and the county will be impacted. Secretary Jaramillo said the state of New Mexico's annual lease expenditure in Santa Fe is over $15 million annually.

Alan Branch, commercial broker, Branch Realty, testified Santa Fe has approximately 3.1 million square feet of office space; 436,000 square feet is currently vacant. In 2008, there was a 5 percent vacancy. Vacant space increased to 12.6 percent in 2009 and is up to 15 percent in the current year. Building the super complex would increase the vacancy rate to 26 percent, giving Santa Fe the second highest office vacancy rate in the country. Alternatives were presented to GSD including an opportunity to purchase vacant building space. In response to Chairman Varela, Secretary Jaramillo said the effect on third-party landlords was discussed as House Bill was debated and was part of the policy choice made by the Legislature. The issue also was heard by the Capitol Building Planning Commission. Mark Bertram testified there was never an request for proposals issued for the selection of this site. When commercial realtors were made aware of the project they offered free land. In addition, GSD was shown a site which already has an existing railrunner station and 20-acres. GSD claimed this site had been reviewed and considered. Mr. Bertram noted that the Capitol Building Planning Commission is represented by state government representatives and legislators, but no one from the private sector that has experience in real estate. Rosie Colgate, Colgate Properties, also testified in opposition to the super complex.

Role and Function of the Public Health Program in an Expanding Healthcare Environment. Jack Callaghan, director, Public Health Program, Department of Health (DOH), reported 2009 was the 90th year of existence for public health in the state. Public health focuses on prevention, stopping of outbreaks and diseases, sexually transmitted diseases, tuberculoses, etc. The infrastructure for public health consists of 55 local public health offices. Many issues will remain with or without healthcare reform; children will continue to be vaccinated regardless of insurance status.

The Women, Infant and Children (WIC) program serves 60 percent of newborns every year. On average there are 30,000 births every year; 50 percent are Medicaid-funded.

Public health tracks and treats a variety of conditions, including meningitis, food-borne illnesses, tuberculosis, etc., and is the only entity that partners with local communities. Mr. Callaghan noted people generally confuse health care with public health. Depending on the community, public health is a partner with primary care. New Mexico provided 750,000 doses of vaccine for children in 774 clinics statewide.

Many public health services are mandated by the federal government. The program received $71 million from the general fund; however, over the last few years the budget has taken a heavy downward trend, going from $85 million in FY09 to $71 million in FY11. The share of the agency's budget from the general fund spent on local programs dropped from 41 percent down to 36 percent. As a result, from FY09 through FY11, contract services were reduced 40 percent. Tobacco settlement revenue funds were also reduced 27 percent.

Gary Chabot, principal analyst, LFC, reported New Mexico led the region in the percentage of population vaccinated for H1N1 and exceeded the national averages in all reported categories. The funding stream for public health will change in 2014 due to mandatory health insurance; approximately 142,000 individuals will be enrolled in Medicaid according to HSD. The department estimates 30 percent of the people receiving direct services from public health are undocumented and will not be eligible for federal benefits under the healthcare reform.

LFC received notification that the department will experience a $4 million reduction of tobacco revenue in FY10. Mr. Callaghan stated this will affect tobacco cessation, diabetes, HIV/aids, and breast and cervical cancer services. Director Abbey said DFA was allotting the entire amount of tobacco funds at the start of the fiscal year in July; however,funds were not received until April near the end of the fiscal year. The June allotment could have been withheld to make up for the shortfall in revenues. Director Abbey suggested that DFA switch to one-twelfth allotments for FY11.

Thursday, June 10

The following members were present on Thursday, June 10: Chairman Luciano "Lucky" Varela, Vice-Chairman John Arthur Smith, Representatives Donald E. Bratton, Rhonda S. King, Don Tripp, Edward C. Sandoval, Jeannette O. Wallace, Nick L. Salazar, and Henry "Kiki" Saavedra; and Senators Sue Wilson Beffort, Carroll Leavell, John M. Sapien, Mary Kay Papen, Peter Wirth (for Pete Campos), Linda Lopez (for Carlos Cisneros), and Rod Adair (for Stuart Ingle). Representatives Antonio Lujan and Jim Trujillo attended as guests.

Quarterly Investment Performance Report. Daniel White, financial economist, LFC, reported on FY10 third-quarter performance for the three major investment agencies: Educational Retirement Board (ERB), Public Employees Retirement Association (PERA), and the State Investment Council (SIC), which manages two separate funds, the land grant permanent fund (LGPF) and the severance tax permanent fund (STPF). Each fund outperformed its policy benchmark although ERB underperformed the 60/40 index. The land grant permanent fund is underperforming its one-year benchmark by 930 basis points (bps) and the severance tax is underperforming by 850 bps.

From a five-year standpoint, ERB and the LGPF are still outperforming benchmarks. However, the LGPF is significantly below the 8 1/2 percent benchmark used to forecast permanent fund distributions. PERA continues to significantly under-perform its five-year benchmark but is improving, as is the severance tax permanent fund.

Fund asset values show a healthy rebound, posting an increase of $7.5 billion over the last year. Despite encouraging numbers, values are down $6 billion from FY08 highs. All agencies' actual asset allocations remained relatively close to target levels with a few minor exceptions, particularly within the severance tax permanent fund. Within alternative asset classes, values are overweighed significantly on economically targeted investments private equity; however, they are under-weighed elsewhere. ERB is slowly implementing a new asset allocation that will systematically decrease public equity exposure and increase its alternative asset allocations.

One-year peer rankings for pension funds are improving significantly. ERB is in the top 10 percent of all U.S. public funds of its size and in the 11th percentile from a five-year perspective. From a 10-year perspective, all funds – with the exception of PERA – are in the last quartile of all public funds or endowments throughout the country. PERA is the 74th percentile.

The economic and financial market environment saw steady growth for the third quarter, with steady equity gains throughout the public equity markets and more parity between developed international equity indices and domestic equity indices. High-yield fixed income assets are performing extremely well; as of March 31 the return on the Barclay's high-yield index was over 56 percent for the year. Since the end of the third quarter, the economy continues to show signs of recovery as industrial production and construction spending continues to show strength.

The land grant permanent fund's credit and structured finance are recovering; however, they are not making significant amounts of money. Private equity continues to underperform. Real estate also underperformed this quarter; since the inception of the real estate program at SIC, they have lost 10.2 percent annually.

Allocation impacts continue to be a drag on the portfolio. At its last meeting, SIC rebalanced its portfolio allocations to decrease domestic equity and increase fixed income and alternative assets.

The severance tax permanent fund is similar to the land grant permanent fund but includes all New Mexico private equity programs. Over the last five years, the severance tax permanent fund underperformed the land grant permanent fund by 90 bps, which may be due to this economic development program. Whether other economic benefits generated by the program outweigh its cost to fund performance is uncertain and difficult to measure.

Michelle Aubel, senior fiscal analyst, LFC, reported on current asset values for PERA and ERB. As of June 30, 2009, the ERB fund asset value was $7.1 billion and is currently at $8.6 billion; the high is $9.4 billion. As of June 30, 2009, PERA's asset value was $9.1 billion; the high was $13.3 billion.

The one-year ranking for PERA improved dramatically from the beginning of the fiscal year; however, there continues to be problems in the five-year and 10-year rankings. Active management added 545 bps; at the beginning of the year it was -500 bps.

ERB placed in the 28th quartile compared with its peers for the quarter and had slightly underperforming managers, leading ERB to look at indexing the large cap mandate. Despite the manager underperformance for the quarter, active management has added 670 bps over one year. Representative Bratton asked if the expected rate of return benchmark would change if allocations are reduced from the amount of holdings and equities to fixed income. Mr. White said it would change in terms of the overall fund; the policy index is used for the target rate of return.

Mr. White said both the SIC and pension plans have certain long-term rates of investment returns in order to meet current obligations. Under the constitution, the two largest funds are required to make annual distributions to the general fund; the land grant permanent fund also makes distributions to other beneficiaries, including higher education institutions and prisons. The land grant permanent fund changed distributions in 2004 due to a constitutional amendment; distributions increased from 5 percent 5.8 percent. Over the last three years, the land grant permanent fund and the severance tax permanent fund have had annual returns of -1 percent and -2.1 percent and as a result $2.7 billion more was paid out than what was gained. Both funds combined dropped by $1.9 billion resulting in decreased general fund distributions in the future.

Ms. Aubel said both ERB and PERA are mature pension plans. Currently, distributions are greater than incoming funds, causing a gap. To make up the gap, the investment portfolio must earn 8 percent. Based on statute, the boards have the authority to approve the actuarial assumptions, including the long-term investment return. In response to Senator Beffort, Mr. White said bankruptcy proceedings are dependent on individual private equity investments. Additionally there are currently no reporting requirements in statute related to the New Mexico Private Equity Investment Program, making it difficult to gauge the level of economic stimulus created by such investments. Senator Beffort suggested strengthening the statute in the upcoming session. Representative Bratton expressed concern with the 8 percent return rate. Pension plans are set to accrue assets to the benefits of the recipient, assumptions need to be realistic.

Updates on Litigation and Risk Management at State Investment Agencies. Steve Moise, state investment officer, State Investment Council (SIC), reported that SIC is making efforts to address liability protections for council members and staff as they apply statewide. SIC is working with GSD, Risk Management Division and AON -- the company that writes the state's insurance coverage to develop a comprehensive explanation of protections that are afforded to people serving the state.

Bryan Otero, general counsel, SIC, provided a detailed summary of recoveries from 2006 through 2009 and information for ongoing litigation. Over $90 million has been recovered in the last three years. Mr. Moise added that pursuing improperly paid placement fees is very important to the state.

Review of the New Mexico Fraud Against Taxpayers Act. Mr. Otero said the Fraud Against Taxpayers Act (qui tam) mirrors the federal statute. Although claims are fraud-related there are other remedies and potential claims that can be brought under the securities law statutes. SIC has not been provided the opportunity to comment on the qui tam complaint. Claims may interfere with existing agency recovery efforts, creating a conflict. Mr. Otero noted complaints have become politicized.

Mr. Otero said SIC in 2009 adopted transparency and disclosure policies including a prohibition against third-party marketers. SIC also adopted and created two new committees: the Investment Committee (external and internal) and the Audit and Governance Committee. SIC is revisiting all policies and procedures to ensure they are appropriate for the investment process, ensuring a thorough process, and making people accountable. SIC is also working on a new code of ethics and training policy to make sure staff members are aware of their responsibilities and are held accountable. Mr. Moise added that SIC's goal is to assure intergenerational equity for all citizens by providing consistently excellent ethical investment performance.

Jan Goodwin, executive director, Educational Retirement Board (ERB), provided an update on litigation and responses to federal subpoenas. In 2009, the Foy v. ERB and SIC IPRA litigation commenced. Prior to that litigation being filed, ERB electronically imaged agency servers and the hard drives to preserve the data that would be the source of requested documents. It also had a database constructed to store and search the data. It has spent approximately $50 thousand on this process. ERB has provided Mr. Foy more than 36,000 electronic copies from those records. ERB is working with Mr. Foy's counsel to complete production of additional materials sought. In addition, ERB made 37 boxes of materials that were not available in electronic format available for inspection. Mr. Foy's counsel selected 1,400 pages from those materials for copying. The Risk Management Division (RMD) has provided ERB with legal counsel to respond to the IPRA litigation. In addition, ERB has separately contracted with the Canepa and Vidal and the Cuddy McCarthy law firms to assist agency staff in reviewing documents and preparing responses.

ERB received several subpoenas from the U.S. Department of Justice and the Securities Exchange Commission (SEC). ERB has completed its response to all but one subpoena and is working on completing the response to the remaining subpoena. RMD is providing individual past and present ERB board members legal counsel to assist in responding to requests received from SEC.

Class action cases filed this year include Hill v. Vanderbilt Capital Advisors, LLC, et al. and Hammes v. Vanderbilt Capital Advisors, LLC, et al. ERB is a nominal defendant; however, the cases raise legal issues regarding the ERB, which it must respond to. Four past and present ERB members have also been named defendants in these suits. RMD provided counsel for the members; however, it has not provided ERB defense counsel. ERB has retained Freedman Boyd Hollander Goldberger Ives & Duncan, P.A., and Pomerantz Haudek Grossman and Gross LLP to represent it in these cases. ERB also retained those firms to evaluate and bring suit against Aldus Equity, Saul Meyer, and other parties. In addition, ERB is evaluating other potential lawsuits.

Section 22-11-13(H), NMSA 1978, provides for the indemnification of individual ERB board members in connection with investment decisions made in the normal course of their duties. Pursuant to that section, Bruce Malott has chosen to retain counsel to represent him individually in addition to counsel provided by RMD. Mr. Malott has informed ERB he will seek indemnification for fees and expenses he incurs in connection with that representation. Other present or past board members may at some time also seek indemnification.

Terry Slattery, executive director, Public Employees Retirement Association (PERA), reported PERA is participating in the state's Countrywide lawsuits. The courts appointed PERA as the lead plaintiff in a class action of a suit against Well Care Health Plans, an HMO based out of Tampa, Florida. The board is pursuing legal due diligence in its security lending program for possible litigation against Wachovia.

Gary King, Attorney General, Office of the Attorney General (OAG), reiterated $90 million was recovered for the state. To recover funds, large amounts of documents have to be reviewed, creating a burden on state agencies. Also at issue is whether the request for documents under the Inspection of Public Records Act is circumventing discovery rules in the courts. Mr. King noted OAG is the only office that has the opportunity to pursue criminal actions.

Vice Chairman Smith said there have been several efforts to restructure the teacher's retirement board and asked if there is consideration for legislative changes to comply more thoroughly with recommendations of the Ennis-Knupp study. Ms. Goodwin responded that ERB had its own separate review indicating the make-up of the board was appropriate. No changes are expected regarding board member composition. Mr. Slattery added that PERA created an ad-hoc committee of the board to review recommendations. Chairman Varela asked LFC staff to contact the two gubernatorial candidates to keep them informed about proposed modifications, as well as government restructuring issues.

Mr. King noted OAG was asked to provide an opinion addressing indemnification issues. The Fraud Against Taxpayers Act is a new statute. There have been approximately 100 cases filed under the act; mostly evoked in a number of lawsuits in other courts around the country. New Mexico courts determined triple damages provisions are punitive and cannot be applied retroactively because it violates the expo facto prohibition in the Constitution. In response to Chairman Varela, Chris Schatzman, general counsel, ERB, said ERB statute is only duplicated in substance with PERA statute; SIC does not have a statute. The request to OAG was limited to ERB. PERA does not have an indemnification policy. Mr. Moise noted SIC has a representation policy in place and is working with RMD and AON to address indemnification for all state agencies. Representative Bratton said parameters need to be set in statute to address coverage and limits to coverage. Chairman Varela requested LFC staff contact OAG to identify possible legislation.

<u>New Mexico School for the Deaf – Lars M. Larson Activity Center</u>

<u>School Improvement Initiatives – Identification, Funding and Implementation.</u> Sheila Hyde, deputy secretary, Learning and Accountability, Public Education Department (PED), reported the school improvement grant is part of the Title I 1003(g) fund. PED was given the opportunity to use $24 million over the next three years for specific school improvement activities, as well as $4 million from another Title I school improvement fund available for one year. The U.S. Department of Education set criteria for spending funds that were very specific in the way districts could use the funds and very specific about the role the state had to play in awarding funds designed for dramatic turnaround. Applications that districts submitted to the state were required to be posted on the PED website. All reports and monitoring are completely transparent and require significant accountability. Districts submitted three-year projections of how they would implement reforms; however, funds will be awarded one year at a time. Awards for the first year are between $50 thousand and $2 million per school.

Requirements included

- Schools had to meet federal eligibility definitions.
- Districts picked from four models in their application.
- The state had to apply for funds and include district applications.
- How decisions would be made had to be identified. Districts are required to implement reforms in September

PED staff was assigned to work directly with the schools and a series of webinars were designed to assist in guiding applications. Nine schools were chosen to be funded conditionally; 20 schools were eligible for funding. Funds awarded this year total $11.3 million.

School improvements include

- additional days of instruction
- extended core programs with additional minutes for interventions for reading or math
- extended learning time using a project base
- implementation of positive behavior support programs
- early start for incoming kindergarten students
- jump starts for ninth grade, summer programs
- implementation of writing programs

- English language learner programs
- distance learning opportunities
- credit recovery programs
- health clinics
- common planning time
- parent liaison/parent centers
- parent literacy

Schools that were not determined eligible lacked resources such as

- having a good history of using current resources
- new reform
- extended learning time
- history of challenges to recruit and retain staff
- absence of aligned curriculum
- non-academic supports
- good plans for sustainability
- evidence of capacity

Ms. Hyde said up to $50 thousand is available for a number of schools in need of improvement that did not receive funding. In addition, Race to the Top funding, if awarded, may be used for these persistently low-achieving schools. Districts not receiving school improvement funding recognized that reform can be implemented without additional funding.

Robin Noble, principal, Ramirez Thomas Elementary School (RTES), Santa Fe Public Schools, provided an overview of the school's plan to implement the Turnaround Model. Ms. Noble said proficiency is the focus and goal for the school. According to the last Standards Base Assessment (SBA) test, only 17 percent of students were proficient in math and only 20 percent were proficient in reading. A majority of funds received from the school improvement grant are allocated for human capital to support reform.

George Bickert, principal, Crownpoint High School (CHS), Gallup-McKinley County Schools, provided an overview of CHS's plan to implement the Transformation Model. Mr. Bickert said half of the budget received from the school improvement grant will be spent in the first year on staffing salary incentives and extra hours and time. A portion of funds will be spent on transportation.

In response to Representative Saavedra, Ms. Hyde said there is a need for more parent involvement and more collaboration between schools and parents. The school improvement grant provided an opportunity to provide support to principals. Over the last three years, 39 struggling schools have come out of AYP status. Parental and community involvement is a goal in the educational plan for student success.

Senator Beffort recommended the PED secretary and the Higher Education secretary adopt best practices from accomplished principals. Ms. Hyde said the secretaries of both departments made a commitment to look at student growth and teacher evaluation. If higher education institutions are not producing effective teachers, principals, and other administrators funding will be lost.

Representative King recommended forming a subcommittee of LFC to work on initiatives to improve schools. The initiatives will include both policy and budget to make sure programs that are in place are working and effective.

Strategic Plan, Mission and Fiscal Report for the New Mexico School for the Deaf. Ronald Stern, superintendent, reported the New Mexico School for the Deaf (NMSD), was founded in 1885 by Lars Larson and is the oldest public school in New Mexico. NMSD will celebrate its 125th year of existence this fall. The focus of education has evolved tremendously over the years. NMSD is one of the few schools in the country that has a different perspective of the deaf and hard of hearing. NMSD has two different and distinct roles and has become a model in the United States, not just for being a school that serves the whole state, but also as a statewide outreach agency. NMSD is committed to high expectations throughout the school program, as well as outreach and accountability. NMSD's strategic plan is a road map that is not only comprehensive but takes into account the recommendations and goals in the performance-based budget plan, as well as accreditation reports. NMSD has accreditation through two organizations: the Conference of Educational Administrators of Schools and Programs for the Deaf and the Commission on Schools of the North Central Association of Colleges and Schools. NMSD also has a safety and security report.

Only about one-tenth of 2 percent of all children are deaf or hard of hearing, making them the most misunderstood, under-understood, and underserved. NMSD offers opportunities for all deaf and hard of hearing students to have ongoing access to peers and adults. Too often people equate interpreted communication with direct communication. Interpreters at schools for deaf and hard of hearing often are not the same quality as direct communication. It is difficult to come up with vocabulary and terms to do justice in the hearing world. Too often the deaf and hard of hearing children do not have teachers, counselors, or other professionals who have training or expertise to understand their needs.

Mark Apodaca, director of business and finance, NMSD, reported that the FY11 budget totals $14.5 million. Almost 70 percent of funds cover direct services to students. Seventy-five percent of staff cover direct services in Santa Fe, Las Cruces, Farmington, and Albuquerque.

Rosemary Gallegos, assistant superintendent, Compliance and Outreach, NMSD, reported NMSD has six main service programs:

- early intervention (Step*Hi)
- comprehensive preschool through 12th grade at NMSD Santa Fe
- comprehensive preschool in Albuquerque, Las Cruces, and Farmington
- school-age outreach to educational teams
- center for information training and professional development
- deaf education reform

The Santa Fe school campus is the hub for information and services across the state. Educating a deaf child is about having language rich environments and having access to communities. NMSD has high expectations and a critical mass of peers and adults. Services are unique and provide partnership with the Public Education Department and the Department of Health. Campus instructional services are comprehensive; enrollment increased 50 percent.

The committee was provided testimony by a parent of a graduating student and a tour of the campus by students of NMSD.

Friday, June 11

The following members were present on Friday, June 11: Chairman Luciano "Lucky" Varela, Vice-Chairman John Arthur Smith, Representatives Donald E. Bratton, Rhonda S. King, Larry Larrañaga (for Don Tripp), Jim Trujillo (for Edward C. Sandoval), Jeannette O. Wallace, Nick L. Salazar, and Henry "Kiki" Saavedra; and Senators Sue Wilson Beffort, Carroll Leavell, John M. Sapien, Mary Kay Papen, Pete Campos, Carlos Cisneros, and Rod Adair (for Stuart Ingle). Representative Antonio Lujan attended as a guest.

Third Quarter Performance Reports from Key Agencies. Cathy Fernandez, deputy director, LFC, reported the Accountability in Government Act (AGA) requires key agencies to report quarterly on performance measure outcomes considered significant to the operation of the agency. In 2006 staff of LFC developed a report card method to present performance data to the committee and publishes the report card annually in the Volume I budget recommendation report. Report card ratings are based on scale of red, yellow or green colors with red representing poor performance and green good performance. Ms. Fernandez noted that there has been a trend away from green performance and could be a result of budget reductions.

Ms. Fernandez discussed the need to incorporate benchmark data from other states in the agency reports. The Council of State Governments is working with the Urban Institute on a State Comparative Performance Measurement project to collect, analyze, and publish comparative data. Mark Weber, Principal Analyst, LFC, provided third quarter performance highlights and the report cards for key agencies.

David Hadwiger, assistant division director, State Budget Division, Department of Finance and Administration, (DFA), discussed how the performance budgeting process has consistently been one of the state's strengths. Hadwiger presented general key agency findings including timely reporting, a variety of reporting formats, and FY10 outcomes that either met or exceeded FY10 targets. Where targets were missed, budget reductions and a hiring freeze were attributable to weak performance. Quarterly reports provide a meaningful opportunity for DFA and LFC to provide agencies with feedback. Hadwiger noted that the whole AGA process is most effective when DFA and LFC work together to prepare and implement an annual plan and communicate, clarify, and agree on process, timelines, and measures. Quarterly reporting should continue as a performance management tool and a problem finding tool to help identify solutions. Consideration should be given to adjust FY11 targets or expectations because of budget reductions and the hiring freeze.

Chairman Varela asked whether the State Auditor reviews performance in the annual audit of each state agency, or if it was being addressed at all. Mr. Hadwiger said agencies can ask the State Auditor to engage in special audits; however, the primary source of performance audits is done by the LFC audit staff. Chairman Varela said legislators intended taht the State Auditor be involved in measuring performance through the audit process. Manu Patel, deputy director, LFC, added that attempts have been made to work with the State Auditor to incorporate performance as part of its rules.

Ms. Fernandez said it is important to revisit measures to address agencies' cost-effectiveness and core missions. Chairman Varela suggested that LFC, DFA, and the State Auditor work together to develop a proposal to incorporate performance measures into audits.

Action Plans to Improve Results

Workforce Solutions Department. Ken Ortiz, secretary, Workforce Solutions Department (WSD), reported the economy, loss of jobs, and increase in the number unemployed has had a direct impact on many departments. New Mexico's unemployment rate as of April 2010 was 8.8 percent while the national unemployment rate decreased to 9.8 percent from 9.9 percent. From April 2009 to April

2010, New Mexico's over-the-year job growth was a negative 1.9 percent, representing a loss of 15,500 jobs. Secretary Ortiz provided an overview for 14 performance measures and described corrective action the department is implementing to improve performance.

Taxation and Revenue Department. Rick Homans, secretary, Taxation and Revenue Department (TRD), provided an overview for the department's performance and described action plans where the agency missed targets. TRD is incorporating more online services and creating new websites scheduled to be up and running in July to reduce wait times in Motor Vehicle Division field offices. The electronic services should improve performance and save money. TRD is also using an intranet for employee communication and to eliminate as much paper as possible. Secretary Homans also discussed how the installation of new platforms and a back-end accounting system at MVD would also improve accountability and transparency.

Department of Public Safety. John Denko, secretary, Department of Public Safety, reported the New Mexico State Police have been instrumental in increasing the number of DWI arrests and the reduction of fatal accidents. Seat belt use enforcement has also been increased and has had a positive effect on the fatality rate. New Mexico State Police received national accreditation and was named the showcase agency by the Risk Management Division (RMD) for reduced risk costs. The Special Investigations Division is active in investigating DWI crashes. The Motor Transportation Division installed fixed license plate readers at the ports of entry to scan commercial motor vehicle license plates and federal transportation numbers and is providing staff with more accurate registration information, safety ratings, and tax status. The forensic laboratory continues to assist the Office of the Medical Investigator (OMI) in identifying remains found on the West Mesa in Albuquerque and the lab has also been instrumental in identifying the remains of other bodies that were sent out of state for disposal. Secretary Denko provided an overview for the department's performance measures and described action plans for those not meeting targets.

Representative Larrañaga said small businesses and small contractors are receiving notices to pay gross receipts tax (GRT); however, they do not owe or are exempt from taxation. He also noted that other businesses are receiving tax return adjustment notices. Phil Salazar, director, Audit and Compliance Division, TRD, said the division is working to improve the identification of taxpayers that are not required to report quarterly GRT. Mr. Salazar also reported that TRD staff informs taxpayers and businesses of the newly enacted tax amnesty program through mailing notices.

In response to Senator Beffort, Secretary Ortiz discussed how the state of economy and high unemployment resulted in the transfer of cash balances in the state unemployment trust fund to the federal unemployment insurance (UI)compensation fund. In addition, the Legislature authorized the department to increase the unemployment tax from schedule 0 to schedule 1 effective January 1, 2011. Oritz reported that it is expected the UI fund balance on January 1, 2011, will have dropped to $110 million. Federal extensions of UI benefits and the high unemployment rate is expected to allow $312 million to be paid in UI benefits. WSD intends to request an additional tax schedule increase in the next legislative session. Currently, WSD is looking internally to increase audits, assessments, and collections to collect unemployment insurance taxes that are owed. The department is also working with the Benefit Payment Control Division to ensure identification of fraudulent claims or over payments. Senator Beffort requested the committee be provided a list of qualifications for unemployment.

Objection to Budget Adjustment Request for Educational Retirement Board for Indemnification Costs. Director Abbey reported the Educational Retirement Board (ERB), submitted a budget adjustment request (BAR) totaling $1.5 million to pay for board indemnification costs. ERB requested an opinion from the Office of the Attorney General (OAG) regarding authority and limitations; Mr. Malott, ERB board chairman, and Secretary Miller, DFA, requested additional guidance on interpretation of application statutes. Director Abbey said he objected to the BAR pending a response from the OAG.

Jan Goodwin, executive director, Education Retirement Board (ERB), stated ERB is anticipating requests for reimbursements for FY10. Although there are no formal requests pending, the issue exists. The purpose for the BAR is to provide budget authority for a standing appropriation; the current budget does not include reimbursement expenses.

Dannette Burch, assistant secretary, Department of Finance and Administration, (DFA), reported the indemnification portion of the ERB statute has a standing appropriation and is not subject to the 5 percent limit. DFA or LFC cannot object to a legal BAR. Mutual roles are to evaluate the legal authority for the proposed adjustment. The ERB indemnification statute -22-11-13H, states a constitutionally valid standing appropriation from the educational retirement fund will pay for indemnification claims. DFA is not precluded from reviewing the propriety of proposed contracts and expenditures at a later date. DFA does not believe there is a basis to preclude ERB from budgeting estimates needed to pay valid indemnification claims. Approval of the BAR does not suggest DFA agrees with the ERB policy concerning indemnification or conclusion that any potential indemnification claim is valid. Both statute and ERB policy raise unsettled legal issues. It is preferable that DFA not take a definitive position on actual claims.

Ms. Goodwin said ERB is aware that Mr. Malott has incurred in excess of $300 thousand in legal fees; however, he has not presented a formal request for reimbursement. To date, ERB has not received any requests for reimbursement from members. Representative Larrañaga asked if OAG reviewed the contract. Ms. Goodwin said the board adopted a policy to determine when requests fo reimbursement would be made to board members. ERB anticipates having an outside reviewer review requests for reimbursement. Chris Schatzman, legal counsel, ERB, added the statute specifies the source of indemnification is the educational retirement fund. OAG represents the fund, not individual board members. Representative Bratton said policies and procedures are needed to encourage people to serve on boards and commissions, giving them the protection to which they are entitled but also that some sort of restrictions need to be in place or the funds will be an open checkbook. Right now there does not appear to be any oversight other than the board members, which may be a conflict of interest.

Senator Smith moved to object to the Educational Retirement Board budget adjustment request, seconded by Senator Sapien. Motion carried.

<u>Miscellaneous Business</u>

<u>Action Items</u>

Approval of LFC Minutes -- May 2010. **Senator Cisneros moved to approve the May 2010 LFC minutes, seconded by Senator Leavell. Motion carried.**

Revised Policies and Procedures Manual. Director Abbey said the policies and procedures manual is required to be updated every two years. The manual updates membership, clarifies lead provisions, and updates tuition reimbursement policy. **Senator Cisneros moved to adopt the revised policies and procedures manual, seconded by Representative Bratton. Motion carried.**

Information Items

Director Abbey directed members to the ARRA Status Report, the May 2010 Cash Balance Report, the May 2010 BAR Report, the FY11 LFC Budget Status, the Full-Time Employees by Agency Report, and the LFC Program Evaluation Status Report to review at their own free time.

With no further business, the committee adjourned at approximately 12:24 p.m.

Chairman

Date 7/23/010