MINUTES OF THE
NEW MEXICO STATE BOARD OF FINANCE

SPECIAL MEETING
Santa Fe, New Mexico
June 24, 2014

A Special Meeting of the New Mexico State Board of Finance was called to order on this date at 1:19 p.m. in the Governor’s Cabinet Room, Fourth Floor, State Capitol Building, Santa Fe, New Mexico.

1. ROLL CALL: QUORUM PRESENT

Members Present:
The Hon. Susana Martinez, President [arriving at 1:30]
The Hon. John Sanchez, Lt. Governor
The Hon. James B. Lewis, State Treasurer
Mr. Michael Brasher, Public Member, Secretary
Mr. Robert J. Aragon, Public Member
Mr. Del Archuleta, Public Member
Mr. John Kormanik, Public Member

Members Excused:
None

Staff Present:
Dr. Thomas E. Clifford, Secretary of Finance and Administration
Ms. Stephanie Schardin Clarke, Director, State Board of Finance
Mr. Jeff Primm, Deputy Director, State Board of Finance

Legal Counsel Present:
Mr. Luis Carrasco, Attorney General’s Office
Ms. Sally Malavé, Attorney General’s Office

Others Present:
[See sign-in sheets.]

2. APPROVAL OF AGENDA

NEXT REGULAR MEETING: TUESDAY, July 15, 2014

Mr. Brasher moved for approval. Mr. Aragon seconded the motion, which passed 6-0 by voice.
EMERGENCY FUND BALANCES
Presenter: Stephanie Schardin Clarke, Director

   Operating Reserve Fund  $531,336.99
   Emergency Water Fund   $58,428.17

Ms. Clarke reported these balances.

GENERAL SERVICES DEPARTMENT
Presenter: Pamela Nicosin, Deputy Director, Facilities Management Division

4. Requests Approval to Adopt July through December 2014 Schedule of Repairs

Ms. Nicosin explained that her division comes before the Board every six months to request approval
for projects to be completed from the Capitol Buildings Repair Fund in the next six months. She
reviewed projects requested. In the past there was a cap of $25,000 per month for emergencies. She
asked that the monthly cap be removed and the costs limited only to $200,000 for the six-month period.
The total amount of projects requested was $4,091,922.

   Member Brasher suggested the Board needed to decide on a per month emergency cap higher than
   $25,000 but lower than $200,000. He asked Ms. Nicosin where they look in the event they have an
   emergency that exceeds the cap. She responded that typically they use severance tax bond
   appropriations that are available for improvements statewide.

   Mr. Archuleta suggested the cap should be set using data that could be provided by FMD. He asked
   for information as to how FMD prioritizes projects for CBRF funding. Ms. Nicosin directed the Board to a
   spreadsheet and reviewed a process for receiving bids and including a contingency. She indicated that
   currently GSD is not charging these projects an administrative fee.

   Mr. Archuleta asked given more needs than available funding, how GSD chooses which projects
   receive funding. Ms. Nicosin said they budget and prioritize the most urgent needs.

[Governor Martinez joined the proceedings.]

   Mr. Archuleta asked for clarification on the $200,000 request for emergencies. Ms. Nicosin said
   they are requesting this flexibility for one year. They are trying to complete projects more timely and at
   this time are requesting SBOF approval to complete projects within 2 years.

   Dr. Clifford said it was difficult to know what is being approved since the list is categorical rather
   than project specific. It would help the Board to have a tracking report to show funding being drawn
   down. Ms. Nicosin said a new reporting function is in development that will show expenditures by
   project.

   Treasurer Lewis asked about how it is decided whether to repair or replace. Ms. Nicosin said they
   analyze the life cycle costs and whether a repair can be delayed until a future renovation of the building.
Mr. Archuleta requested that at the next Board meeting Ms. Nicosin present a Capitol Building Repair Fund expenditure tracking and data on past emergency expenditures.

Mr. Archuleta moved for approval. Governor Martinez seconded the motion, which passed 7-0 by voice.

**DISBURSEMENT OF FUNDS**
Presenter: Paul Aguilar, Deputy Cabinet Secretary

5. a) Public Education Department – Requests Approval of Transfer and Distribution of Funds from the State Equalization Guarantee (up to $16,000,000)

Mr. Aguilar explained that the New Mexico Public Education Department (PED) is in an ongoing litigation with the United States Department of Education (USDOE) regarding special education Maintenance of Effort from 2010, 2011 and so forth. The Legislature has made a number appropriations that will help the New Mexico Public Education Department litigate the Maintenance of Effort issue with the USDOE in 2014.

He said PED came before the Board last year making a similar request related to appropriations for FY 2013. The litigation with the USDOE has established a methodology for determining a level of effort the PED needs to maintain in terms of making dollars available to a school district for the education of special education students. The PED methodology uses a special education public education funding formula and has an adjustment factor that accounts for schools that are doing great things and moving kids out of special education and improving their position and status. The USDOE has chosen to ignore those pieces, relying only on the argument that what we should make available as much as we made available at our high point year, which was FY 2009. He said the State does not have an unmet liability this year under the state’s calculation. But the USDOE calculation indicates the State has a liability of about $18,000,000. He said the State’s accountants advised that in order to properly book this appropriation and make it available if in fact PED is not successful in its hearing, we need to ask the Board for approval of three separate items.

Agenda item 5.a is a recurring general fund appropriation. In the event the federal government rules against New Mexico, this money will remain available with disclosure on the State’s audit. With Board approval, it remains available as a liability to be expended in the event that the State needs to distribute the $18,000,000 at some point in the future. The appropriation is in Section 4 of the General Appropriations Act and is subject to reversion if PED does not obtain Board approval. The PED is requesting to have the authority to book this as a liability. No dollars will be spent at this time until final determination by the USDOE and at that time PED will again come before the Board for approval to disburse those funds subject final decision of the USDOE.

Mr. Brasher disclosed that he works for the Albuquerque Public Schools and asked Board Counsel whether he must recuse himself. Mr. Carrasco advised Mr. Brasher does not need to recuse himself.

Treasurer Lewis asked if the USDOE has given any indication of a timeline for the final decision. Mr. Aguilar said it had not, but that PED had a preliminary hearing on some legal issues and wanted to take advantage of a couple of pieces of federal regulation. The hearing officer has submitted his
recommendation to the secretary of education but PED had not received final word yet on that piece. Once PED receives a decision on that there will be a full hearing and that has not been scheduled.

Mr. Kormanik said his first question applied to action that the Board took last year for a very similar appropriation. He asked what was the status of those funds and whether they have been distributed to school districts.

Mr. Aguilar said last year the Board approved a $16,800,000 distribution to school districts and that was made on June 30, 2013. Mr. Kormanik asked whether PED could make that distribution based on the methodology that PED was using for the MOE.

Mr. Aguilar said there is the State’s methodology and the federal methodology and to protect the State’s legal position he didn’t think it would be appropriate to distribute the dollars the federal government determined were appropriate. The State distributed the $16,800,000 the Board approved in FY 2013 and took the remainder of the appropriation for FY13 as is contained in HB 628 and it’s been booked in PED’s audit and the liability was disclosed so that those funds remain available pending the outcome of the final hearing, which will affect multiple years. Mr. Kormanik asked whether these funds that were provided for FY13 and FY14 would not be available until after the school year. He asked whether cash that goes to the school districts after the school year is completed goes into cash balances. Mr. Aguilar responded that the federal government isn’t concerned about how much the districts expend to meet the needs of the special education children, they are concerned about the amount of money the state makes available.

Mr. Aragon said that courts often find it necessary to put dollars in escrow or a trust. Mr. Aguilar confirmed this was a similar situation to placing funds in an escrow or trust. Mr. Aragon asked for confirmation that setting aside the funds will assure that in the event the State is unsuccessful in this litigation it would have satisfied the USDOE requirements. Mr. Aguilar responded in the affirmative.

Mr. Aragon asked whether PED was asking the Board to approve a bookkeeping procedure. He commented that what he thought was more compelling about having this discussion is that we’re having this discussion. He said it is repugnant at every level that we are compelled to have this discussion. Mr. Aragon discussed the disconnect between the USDOE needs and interests, which have nothing to do with the needs of children.

Responding to a question from Governor Martinez, Mr. Aguilar said in 2010 the funding formula special education line generated about $385,000,000. Governor Martinez asked whether we spent $305,000,000 and whether every child’s special needs were met. And if so, she asked why the USDOE is suing the State. Mr. Aguilar stated that in 2009 we had a high level of funding available to special education lines. There is no year that has gone by that the needs of special education children have not been met. Every child that needed special education received what they needed and weren’t turned away. Mr. Aguilar said this has nothing to do with the kids, it has to do with what was available in 2009.

Governor Martinez said she understood that in 2009 we did not deny a single special education child. To this day not one child has been denied. The fight is about whether the State has money hanging out there, just in case.

Mr. Aguilar commented that the USDOE doesn’t care how we spend it, they just want to make sure that we make it available. School districts can spend it on whatever they choose. Mr. Aguilar clarified
that the USDOE doesn’t even require that the dictated funds are even ultimately spent on special education needs. If not needed, the funds could be repurposed.

Mr. Aragon asked if there wasn’t a mechanism for schools to succeed and move children out of a position of need, that children are expected to stay in special education. Mr. Aguilar confirmed that was correct. That same question was posed to USDOE Secretary Duncan with no answer.

Governor Martinez posited that districts could game the system on whether they keep special needs too long or not long enough in special education. She didn’t see any logic in what the federal government is doing, especially because it doesn’t necessarily demand improvements in the provision of services to special needs children. It has nothing to do with the mission of helping our special education children get better.

Mr. Archuleta clarified that it amounted to the federal government holding us to the same or higher level of expenditures that we had spent at our highest year. Mr. Aguilar clarified that the liability in 2011/2012 was a one-year hit, but that in subsequent years the hit could carry forward. Mr. Archuleta inquired about how other states have been affected by similar issues. Mr. Aguilar said that since other states establish special education funding through a line item, rather than a funding formula like New Mexico, they have not tended to have the same issues.

Mr. Brasher asked how much was spent on special education. Mr. Aguilar responded that each student has its own needs plan that the school has to provide. $305,000,000 was spent on special education. Mr. Brasher said he was displeased that Washington was bypassing the local elected officials in dictating how much money needs to be made available to address local needs. These decisions need to be made at a local level.

Governor Martinez asked why 2009 instead of 2005 was the benchmark. Mr. Aguilar answered that it was because 2009 was the high water mark and confirmed that we can never spend less. That is the data on which the federal government makes its determination of what is needed.

Mr. Aragon said the real issue is how to define public education. The failures of our schools were tied to when Washington’s educational bureaucracy took over public education. He held up APS as an example of how the system has gone awry. He stated that New Mexico taxpayers send in federal taxes that work their way through a number of bureaucrats that reduce the dollars that actually make it back to New Mexico.

Governor Martinez asked what would happen if we met the needs of every special needs student and didn’t make the MOE available. Mr. Aguilar said that New Mexico’s allotment would be reduced. Governor voiced frustration that the federal government doesn’t seem to understand numerous explanations that our equalization funding system to fairly fund all communities is different.

Lt. Governor Sanchez voiced frustration that states have to live within their budget, unlike the federal government, and that the federal government is hurting the very people that New Mexico is trying to help: our students.

Mr. Kormanik asked how much money the federal government sends to the State for special education. Mr. Aguilar said it was $94,000,000 or about 3 percent. He said what’s at risk is the gap
between MOE and what we spend being deducted from the $94,000,000. So, if you use the federal methodology about $18,000,000 is at risk.

Mr. Kormanik asked, if Board didn’t ask, could we rely on the legislature to eventually solve the problem. Mr. Aguilar said that the need now is to budget funds in the same year as the liability. Mr. Kormanik asked, why we couldn’t do it as a deficiency appropriation. Mr. Aguilar said the federal government may not see a future appropriation as sufficient, especially if we rejected a current year appropriation.

Mr. Archuleta asked if the federal government’s position is that if the State doesn’t need that money they won’t send it to the State. Mr. Aguilar said no, the question is simply making the same or more made available year over year.

Governor Martinez asked, if there is $18,000,000 unspent will the school districts be allowed to spend it on anything else they want? Mr. Aguilar responded in the affirmative.

Lt. Governor Sanchez asked whether it is the authority of the Legislature or the federal government to determine how the money can be spent. Mr. Aguilar said that cash balances remain at the school district and are budgeted by the school board.

Mr. Primm said staff recommends that any approval of item 5.a be contingent upon the Public Education Department appearing at a future Board meeting to present final documentation confirming the exact amount of the distribution and transfer needed to meet maintenance of effort requirements as specified in Laws 2013, Chapter 227, page 202, paragraph beginning on line 22.

Mr. Archuleta moved for approval. Mr. Brasher seconded the motion, which passed 7-0 by voice vote.

b) Public Education Department – Requests Approval of Transfer and Distribution of Funds from the General Fund (up to $10,000,000)

Mr. Primm said staff recommends that any approval of item 5.b be contingent upon the Public Education Department appearing at a future Board meeting to present final documentation confirming the exact amount of the distribution and transfer needed to meet maintenance of effort requirements as specified in Laws 2013, Chapter 227, page 207, paragraph beginning on line 18.

Mr. Archuleta moved for approval. Mr. Kormanik seconded the motion, which passed 7-0 by voice vote.

Governor Martinez noted only the only reason she was voting for this is that the federal government’s threat would result in children’s needs not being met. Knowing what is needed in this State and knowing what effect that would be on kids. The federal government thinks they are smarter than us even though our State funding system works. She said this policy was a perverse Catch 22.

Mr. Brasher voiced frustration that there are some real problems. At the national level, they’re not looking at performance outcomes at all. They’re looking at making
sure year to year the dollars remain the same. There should be some credit given to districts where students are able to move out of the special education system and into regular education. He said this is a state decision, not a federal decision; the federal government should stay out of it. He said his vote does not mean that he is conceding that the State of New Mexico is not complying with the MOE.

Mr. Aragon explained he felt this concept is illegal. He said he thought the situation before the Board amounted to duress because the federal bureaucracy is compelling a vote that is contrary to policy and to meeting of the needs of the students. He said he felt that the federal government has a gun to the Board’s head. He was voting under the duress placed on him by the federal government.

Mr. Kormanik noted the apparent disconnect between outcomes and inputs. The federal government is only focused on inputs. Outcomes can be subjective, but funding should be tied to outcomes.

Lt. Governor Sanchez said he was voting on this with tremendous heartburn based on state versus federal rights.

c) Public Education Department – Presents Certification to State Board of Finance Pursuant to Laws 2013, Chapter 191 (up to $16,000,000)

Mr. Aguilar said that action item 5.a was to transfer internally dollars from the State Equalization Guarantee, in the event that the USDOE would deny that strategy, there is an appropriation contained in the Laws of 2013, Chapter 191, HB628, which provides up to $16,000,000 to be used as back up.

Mr. Primm asked the record to reflect that PED has provided the Board with a preliminary FY14 certification required pursuant to Laws 2013, Chapter 191. However, that act requires after final negotiation and settlement with the USDOE that PED certify the amount necessary to meet special education maintenance of effort requirements after exhausting other funding available. Specific other funding available includes that provided in Section 4 of the 2013 general appropriation act, which was discussed in relation to today’s agenda items 5.a and 5.b. Depending on the outcome of final negotiations and settlement with the USDOE, PED may be required to provide the Board with a final certification pursuant to Laws 2013, Chapter 191. Staff envisions that PED will provide that final certification at the same time the department appears before the Board to meet the contingencies the Board placed on its approval of agenda items 5.a and 5.b.
ADJOURNMENT

Its business completed, the State Board of Finance adjourned the meeting at 3:05 p.m.

Susana Martinez, President

7-15-2014
Date

Michael Brasher, Secretary

7/15/2014
Date