

The Education Trust Board of New Mexico

THE HONORABLE MICHELLE LUJAN GRISHAM
GOVERNOR OF NEW MEXICO

DR. KATE O'NEILL, CABINET SECRETARY
NEW MEXICO HIGHER EDUCATION DEPARTMENT



BOARD MEMBERS
SANDRA LIGGETT, CHAIR
ROBERT J. DESIDERIO, VICE-CHAIR
DR. JOSE Z. GARCIA
DAVID JANSEN
MARK JARMIE

EXECUTIVE DIRECTOR
THEODORE MILLER

Meeting Minutes of November 20, 2019

1516 Paseo de Peralta, Santa Fe, New Mexico 87501

Board Members in Attendance

Sandra Liggett, Chair (by telephone)
Robert Desiderio, Vice-Chair (by telephone)
Dr. Jose Garcia – Member (by telephone)
Mark Jarmie – Member (by telephone)
David Jansen – Member (by telephone)

Other Individuals in Attendance

Theodore Miller -- Executive Director ETB
Vera Lyons – Secretary
Jocelyn Black Hodes (by telephone)
Helen Atkeson – Hogan Lovells (by telephone)
Michelle Nelson -- Court Reporter

1) CALL TO ORDER

At the Chair's request, the Vice-Chair called the meeting to order at 2:00 PM. The role was called and all five Board members were present. A quorum existed.

2) APPROVAL OF AGENDA

Mr. Desiderio turned to the agenda and asked if there was any discussion. There being no discussion he called for a motion to approve the agenda. Dr. Garcia so moved. Mr. Jansen seconded the motion. All present voted to approve the agenda as presented to the meeting.

3) PUBLIC COMMENT

The Vice-Chair asked if there were any public comments. There were no public comments.

4) UPDATES

APPROVED
Board Secretary
Vera Lyons
2/6/2020

Mr. Desiderio asked the executive director to present updates to the board.

Mr. Miller began by noting that some incorrect information in the recent Morningstar review of Scholar'sEdge was corrected by Morningstar, but that the rating of "Neutral" did not change.

He then updated the HoganLovells billing matter. As approved by the board at the last meeting, a ruling request was made to the State Purchasing Agent to pay the outstanding amount of the HoganLovells legal bill from June, 2019. The request was granted, although as discussed with the board at the last meeting, the ruling considered that a "process violation" had occurred. This was described by counsel to the General Services Department (GSD) as the normal method for dealing with such matters.

Since the approval was for an amount from a prior fiscal year, it was submitted to DFA as a request for a "prior year approval" of payment. Staff was awaiting a response from the Department of Finance and Administration (DFA).

Finally he noted that Oppenheimer/Invesco had informed him that Oppenheimer's transfer agency system would be migrated to the Invesco transfer agency system over the same weekend as the planned conversion of the 529 plans to Ascensus. He had complained to Oppenheimer/Invesco of the risks attendant to this, and was waiting for a response as to whether or not the proposed transfer agency integration could be performed at another time.

5) APPROVAL OF TEP AND SE PLAN DISCLOSURE DOCUMENTS

Mr. Miller then asked Ms. Atkeson to address the request for approval of the plan disclosure documents for TEP and Scholar'sEdge. She began by noting that this was the first time that such documents were being presented to the board for approval. She noted that the documents describe the issuance of municipal securities by the board, and that the best practice is to obtain board approval of the documents describing the securities.

She noted that Ascensus, Ascensus Investment Advisors and their subcontractor Principal had drafted the documents, but that they had been reviewed by counsel and staff for the board. In addition the board had been given a certificate by the vendors that the content of the documents is accurate as to their activities and that the statements regarding the trust and the investments are materially accurate and complete.

She also noted that the certificate also covers descriptions supplied for the plan websites as well as other plan materials.

Mr. Jarmie asked if there was an indemnity running to the board. She stated that in the program manager agreement an indemnity runs from Ascensus and Ascensus Investment Advisors. In the services agreement an indemnity runs from Principal.

Mr. Desiderio asked if the certificate covers the accuracy and completeness of the information. Ms. Atkeson confirmed that it did. He also asked if any inaccuracy or incompleteness would bring in the indemnity. She confirmed that it would.

Ms. Atkeson stated that a motion by the board should include approval of the documents themselves as well as approval for their use by Ascensus and its subcontractors in the distribution of interests in the plans.

Dr. Garcia asked if the board members who are lawyers were comfortable with such a motion.

Mr. Desiderio said he was comfortable in relying on the recommendation of counsel and board staff with regard to the matter. Ms. Atkeson then described in some detail the work done by legal counsel and the board staff in reviewing the documents on behalf of the board.

Mr. Desiderio asked if they had been previously distributed to the board. Ms. Atkeson noted that they had been distributed to the board on the previous Saturday. Ms. Liggett noted that she had received them.

Dr. Garcia asked Mr. Jarmie if he approved of the documents. Mr. Jarmie stated that he had looked at them, but had not gone over them in detail. Dr. Garcia asked if they should be further reviewed. Ms. Liggett noted that the documents had to go out no later than December 9. Ms. Atkeson noted that they in fact had to go out several days earlier so that existing account owners would be aware of the new investments in the plan as well as how their existing investments would be “mapped” into the new investments.

Dr. Garcia asked again if the attorneys on the board were comfortable with the documents. Ms. Liggett stated that she was comfortable acting in reliance on the recommendation of counsel and board staff. She was not an expert in such matters, but she recognized that the board had been diligently represented in the review of the documents.

Dr. Garcia asked Mr. Jarmie if he was comfortable with taking action at the meeting. Mr. Jarmie stated that he was prepared to rely on the decades of experience of counsel and the executive director. He did not think that further review would materially assist him in making an informed decision.

Mr. Jarmie made a motion to approve the documents and their use as described to the board. Dr. Garcia seconded the motion. The vote to approve the motion was unanimous.

6) APPROVAL OF WEBSITE HOSTING CONTRACT

Mr. Miller then addressed the matter of the new website hosting contract. He noted that GSD had approved the release to the board of the Evaluation Committee’s recommendation with regard to the website hosting contract. He reviewed the Committee’s written recommendation of SilverTech, Inc. with the board. He noted that despite an original RFP issuance and then a reissuance of the RFP the only company that bid on the business in both instances was SilverTech.

Mr. Jarmie asked why there was only one bidder. Mr. Miller was of the opinion that many firms do not like to bid on government business because of the complexity of the RFP process. He noted that staff reached out to several New Mexico firms but that none of them bid. He also noted the sophistication of the website. It is a tier one financial services website, and not simply an informational website. It uses a sophisticated content management system and a web platform that are not commonly used by most website providers.

Mr. Miller then addressed the form of contract. He noted that it was a standard form state IT contract adapted for website hosting with the advice of HoganLovells. It had been reviewed and approved by both the Department of Information Technology (DoIT) and GSD.

Vice-Chair Desiderio called for a motion. Dr. Garcia moved to approve the website hosting contract substantially in the form presented to the meeting. Mr. Jansen seconded the motion. The vote to approve the motion was unanimous.

7) APPROVAL OF CONVERSION AGREEMENT

Mr. Miller then asked Ms. Atkeson to begin the discussion of the conversion agreement. Ms. Atkeson noted that the program manager agreement with OppenheimerFunds requires that firm to work with the new program manager to accomplish an efficient and effective transfer of assets to the new contractor. Ascensus as the new program manager has requirements built into its program manager agreement to provide conversion services for the 529 program. The details of how the various parties would carry out the conversion are typically included in a conversion agreement. After a long period of negotiation the conversion agreement is ready for board approval. From the board's perspective, besides outlining the duties of the parties, the agreement is designed to protect the board in the event that some conversion activity goes awry. It is the responsibility of the parties to effect the conversion. The board is indemnified against liability resulting from such matters.

She observed that the board has been made a party to the conversion agreement rather than simply a third party beneficiary of it. This is the more typical approach. It means that the board must approve the execution of the agreement on its behalf.

Vice-Chair Desiderio noted that there were several redlined sections in the agreement, and asked if they were added by ETB counsel and staff.

Mr. Miller noted by way of background that conversion agreements are typically not finalized until well into the conversion process. The parties begin the conversion activities in advance in order to effect a timely conversion. He then went on to review the redlined sections. He also noted that in his opinion it has been typical of the previous program manager to extend the negotiations surrounding agreements in an attempt to gain negotiating leverage. He also noted that outside counsel had been brought in by the previous program manager, and that in recent weeks outside counsel had attempted to add additional provisions to the conversion agreement. In Mr. Miller's view this was over-lawyering the agreement. Over the previous weekend he had emailed the business parties, OppenheimerFunds, Ascensus and Principal, and set up a call to finalize outstanding matters and conclude the conversion agreement.

He noted that there were four principal items that needed to be addressed. The first was the payment by Ascensus to OppenheimerFunds of certain conversion costs. OppenheimerFunds had resisted putting a dollar figure on these costs. OppenheimerFunds finally agreed to put a cost figure in the conversion agreement.

The second item was the reimbursement of OppenheimerFunds for certain contingent deferred sales charges related to Class C shares. This initial estimate for these charges was computed by OppenheimerFunds. Due to continued turnover at OppenheimerFunds, a new person was put in charge of computing this amount just prior to conversion, and the cost nearly doubled. Mr. Miller asked that the cost be recomputed, and it came in much closer to the original estimate.

The third item was the acceptance of responsibility for overdraft charges in the event that OppenheimerFunds was unable to deliver all the program's funds to the new custodian at conversion. In such a case the custodian bank will typically cover any resulting shortfall, but will impose overdraft charges. This covering of overdraft charges by the party responsible for delivering the funds is normal industry practice. Mr. Miller elevated this matter within Invesco and the matter was resolved.

OppenheimerFunds proposed a time limit on responsibility for such charges. Mr. Miller noted that he objected to this provision based on the responsibility of the firm to deliver the funds. The provision was then removed.

The fourth item was related to the determination of when the conversion was deemed to be complete. OppenheimerFunds and Ascensus were reminded that the determination of completion of the conversion was not up to these firms but to the board. The agreement now reflected this result.

Mr. Miller then asked the board for approval of the conversion agreement substantially in the form presented to the board, as well as authority on behalf of the board to deem the conversion complete.

At this point Ms. Liggett had to leave the meeting. She noted that a quorum was still present, and indicated her support for the conversion agreement.

Mr. Desiderio called for two motions. One to approve the execution of the agreement with any necessary changes, and the other to authorize Mr. Miller to deem the conversion complete on behalf of the board.

Mr. Jansen made the first motion. Mr. Jarmie seconded the motion. The vote to approve the motion was unanimous. Mr. Jansen also made the second motion. Mr. Jarmie seconded that motion as well. The Vice-Chair asked for a vote. The vote to approve the motion was unanimous.

8) ADJOURNMENT

Mr. Desiderio asked for a motion to adjourn the meeting. Dr. Garcia so moved. Mr. Jansen seconded the motion. The vote to adjourn was unanimous.

The meeting adjourned at 2:46 PM