

**Testimony of
Levin Center at Wayne Law
Before
Executive Board of the Legislative Council
Hearing on Legislative Resolution 226**

October 20, 2021

Thank you, Chair and other members of the Legislative Council here today. My name is Ben Eikey, and I am from the Levin Center at Wayne State University Law School in Detroit, Michigan. We are a center dedicated to the enhancement of legislative oversight and fact-based civil discourse. Before joining the Levin Center, I worked for the Michigan Legislature and also spent time in Washington, D.C. with the Office of U.S. Rep. John Moolenaar (R-MI). I am delighted to testify today in support of Legislative Resolution 226, and thank the sponsor, Senator Cavanaugh, for her leadership in introducing this resolution.

The Levin Center would like to commend the Executive Board of the Legislative Council for holding this hearing on Legislative Resolution 226. This resolution seeks an interim study to examine how the Nebraska Legislature conducts oversight and how it might do a better job getting to the bottom of important issues. The Levin Center's founder, the late Senator Carl Levin, believed that good government requires good oversight, so we strongly support steps to strengthen your oversight efforts. Better oversight would help the Nebraska legislature to better safeguard taxpayer dollars, monitor state agencies, ensure wise use of public resources, and engage in decision-making based on established facts.

Today, state legislative oversight efforts vary dramatically across the country. Many state legislatures engage in minimal oversight of important functions such as state contracting. Those are two of the conclusions of an academic study commissioned by the Levin Center in 2018, to take an in-depth look at how all 50 state legislatures were conducting oversight. The study's findings, which were published in 2019, focus on six different dimensions to evaluate legislative oversight efforts in every state, including Nebraska, and are available at www.stateoversightmap.org. Nebraska was also one of ten states highlighted in a 2020 Levin Center case study of how state legislatures monitored emergency contracts signed in response to the pandemic. This report is entitled, "State Legislative Oversight of Emergency Contracts Related to Covid-19: Three Case Studies," and is also available on the Levin Center's website.

The 50-state study is now two years old, the pandemic study is far from comprehensive, and both studies were conducted by people from outside of the state, which is why the study proposed by Legislative Resolution 226 is both fitting and timely. In addition, this body already has a legislative auditor with the expertise and resources to do the job.

Oversight in the Nebraska Legislature appears to have several positive aspects which include not only its own legislative auditor but also special oversight committees, an elected auditor of public accounts, and specific inspector general offices for corrections and children’s behavioral services. At the same time, Nebraska’s legislative oversight regime has some gaps and vulnerabilities. For example, contract oversight does not appear to be assigned to a specific legislative committee, and oversight mechanisms may not be in place to allow contract or other oversight during periods when the legislature is out of session. These and other aspects of legislative oversight could be discussed and improved should this Board approve L.R. 226.

It may be useful to know that other state legislatures have commissioned and used studies to revamp and strengthen their oversight efforts, especially concerning state spending through state contracts. Recent examples of this include Idaho, Louisiana, and Hawaii. The experience of those states demonstrates that oversight studies are both practical and productive.

It is good to see the Nebraska Legislature’s Executive Board considering ways in which the Nebraska Legislature might join its fellow state legislatures in strengthening oversight, safeguarding taxpayer dollars, and ensuring better services for its residents. Legislative Resolution 226 offers a way to advance those goals by confirming current oversight efforts and identifying potential improvements through an interim study. In an addendum to my statement, I’ve included additional information about existing oversight studies and best oversight practices that could be considered during the course of any such study.

Thank you for allowing the Levin Center to be part of your oversight review process. I am happy to answer any questions.

Addendum: Recent Oversight Reports and Best Practices

Recent Oversight Reports

2019 Report: 50-State Study

In the 2019 report commissioned by the Levin Center to examine general oversight efforts in each of the 50 states, the Nebraska legislature is described as “making good faith efforts to conduct oversight.”¹ The state’s major strengths are described as legislators who use special oversight committees in response to “highly publicized failures of state agencies” resulting in “highly cooperative and honest attempts at oversight.”² Key challenges identified in the 2019 report for Nebraska are how “problems persist with certain agencies” and how to encourage routine oversight of government programs rather than only reactions to exposed problems.³

¹ Nebraska report at 1, <http://stateoversightmap.org/wp-content/uploads/state-reports/Nebraska.pdf>

² Nebraska report at 1, <http://stateoversightmap.org/wp-content/uploads/state-reports/Nebraska.pdf>

³ Nebraska report at 2, <http://stateoversightmap.org/wp-content/uploads/state-reports/Nebraska.pdf>

2020 Report: Emergency Contracts Related to COVID-19

To deepen its understanding of state contract oversight, the Levin Center initiated an investigation into state contracts issued on an emergency basis to combat COVID-19. In October 2020, the Levin Center released a report summarizing three case studies.⁴ Those case studies involved state contracts to test for the virus, provide protective masks to health care workers and first responders, and improve state unemployment benefit claim systems. The contracts were issued by ten states: California, Florida, Illinois, Iowa, Missouri, Nebraska, Ohio, Utah, Washington, and West Virginia. The report documented how all ten states experienced multiple contract problems including unreliable contractors, excessive prices, delayed or failed deliveries, substandard goods or services, or confidentiality breaches. For Nebraska specifically, the report discussed a Test Nebraska contract criticized for being issued on a no-bid basis, for producing inadequate test numbers and delayed test results, and for failing to make use of in-state laboratories with existing testing infrastructure and expertise.

The report also found that state legislative efforts to confront those problems and improve contract performance were haphazard and uneven. While some state legislatures responded to the evidence and demanded reforms, others took little or no action. But the encouraging news was that the case studies demonstrated the potential for state legislatures and individual legislators to exercise effective oversight to improve state contracting. As a result, the report made three broad recommendations, that state legislatures: (1) elevate contract oversight as a legislative objective; (2) establish mechanisms to enable effective contract oversight by lawmakers; and (3) enable year-long contract oversight.

2021 Report: Improving Legislative Contract Oversight

In 2021, the Levin Center commissioned a report led by a Wayne State University professor to examine steps taken by six state legislatures to improve their contract oversight. The states were Alabama, Hawaii, Idaho, Louisiana, Maryland, and Tennessee. The report found that over the following three years, some of those states made dramatic improvements to their contracting practices. The state that made the most progress on contract oversight was the Idaho legislature which, in response to a high-profile contracting scandal, embarked upon a multi-year, multi-pronged effort to strengthen the state's procurement practices. The 2021 report also documented improved contract oversight by Alabama, Louisiana, and Maryland, demonstrating that successful innovations can be made in states with large or small populations, full or part-time legislatures, Republican or Democratic legislative majorities, and Republican or Democratic governors.

⁴ *State Legislative Oversight of Emergency Contracts Related to COVID-19: Three Case Studies* (2020), Elise Bean and Tyler Langley (hereinafter "2020 Report"), https://law.wayne.edu/levin-center/pdfs/three_covid_case_studies-levin_center-final_11-18-2020.pdf?utm_source=link&utm_medium=email-5fa968a8e1a47&utm_campaign=Report+Release%3A+%26quot%3BState+Legislative+Oversight++of++Emergenc&utm_content=Download+the+report.

Best Practices

Together, the three reports described above showcase a number of best oversight practices by state legislatures. Those best practices include the following.

Committee jurisdiction. The reports found that one key problem with oversight was the failure of some state legislatures to assign oversight responsibilities to specific committees. Assigning oversight responsibilities to specific committees encourages those committees and their members to delve into the issues within their jurisdictions. Committees with bipartisan membership, preferably with equal numbers of members from both major political parties, can also help ensure that oversight activities are designed to serve good government functions rather than ‘gotcha’ politics.⁵

Active oversight. The reports showed that another key to effective oversight was a culture and commitment by legislative committees and individual lawmakers to asking clear and challenging questions before, during, and after oversight hearings to get the facts and hold appropriate witnesses accountable for their actions. Investigative tools to uncover the facts included information requests, audit reports, data analysis, meetings with state officials and contractors, hearings, public statements, and press conferences. Many of the case studies demonstrated how active legislative oversight led to concrete improvements in government programs, state contracts, and state laws.

Collaboration. Oversight also seemed most effective when legislators, state personnel, state attorneys general, comptrollers, inspectors general, and auditors worked together on a collaborative basis.⁶ In Ohio, for example, to foster collaboration, the legislature created a joint committee that combined legislators and executive branch officials to oversee state spending.⁷ Other state legislatures have authorized or required state auditors, comptrollers, and inspectors general to work with the legislature to initiate audits and share results.

⁵ Idaho is one of about ten states whose legislatures have a bipartisan oversight committee with an equal number of members drawn from both major political parties. 2021 Report at 4; 2019 Report at 2-3, 65, <http://stateoversightmap.org/wp-content/uploads/state-reports/Idaho.pdf>.

⁶ Contract reforms in Idaho and Louisiana provide two examples. 2021 Report at 25-28, 36 (Idaho); 40-41, 47 (Louisiana).

⁷ The Ohio law created a seven-member “Controlling Board” to review state expenditures, including through contracts. The board is housed within the state’s Office of Budget and Management, and its members are the Director of Budget and Management and six legislators from both houses and both political parties. This hybrid executive-legislative board, with its bipartisan, bicameral membership, is charged with providing “legislative oversight over certain capital and operating expenditures by state agencies and has approval authority over various other state fiscal activities.” 2020 Report at 35-36. See also Tennessee’s Advisory Council on State Procurement, which has both executive and legislative branch members, approves state procurement policies, and monitors the implementation of procurement practices. 2021 Report at 86.

Audit reports. Still another critical oversight mechanism is the ability of legislatures to request or require audit reports from the state auditor, inspector general, or comptroller, or from the legislature’s own audit office.⁸ Legislatures have established a variety of procedures to request specific audits, including through resolutions, letters, or committee votes. Those audit reports ensured a steady stream of facts and recommendations on how to improve practices. Legislative committees used those reports in hearings and other investigative efforts to expose problems and develop reforms.⁹

Performance metrics. Another mechanism to help state legislatures monitor programs and contracts requires the use of metrics and deadlines to measure performance, directs the programs and contractors to provide performance information on an ongoing basis, and requires state officials to check actual performance over time.¹⁰

In-depth procurement review. Since 2019, several state legislatures have strengthened their oversight of state-issued contracts, beginning by directing a state auditor or legislative analytical office to conduct a wide-ranging review of the state’s procurement practices and offer recommendations for reforms. The 2021 Report describes how several legislatures used audit reports to initiate wholesale changes to the state’s contracting practices, including by overhauling the statutory procurement code, spurring new contract regulations, beefing up contract monitoring, revamping the state contract database, and strengthening legislative oversight.¹¹

Contract review mechanisms. A common oversight problem in some state legislatures was the lack of established legislative mechanisms to conduct oversight at successive

⁸ In Idaho, the legislature can request audits from two separate offices that support the legislative branch, the Office of Performance Evaluation and the Legislative Audits Division. 2021 Report at 21. In Louisiana, the legislature established the Louisiana Legislative Auditor with a staff of over 250 and the Legislative Audit Advisory Council, a joint chamber committee that can request audits. 2021 Report at 39. In Hawaii, the legislature funds its own Office of the Auditor which can conduct a variety of program and contract audits. 2021 Report at 50. In Maryland, the legislature created within its legislative analytical office an Office of Performance Evaluation and Government Accountability that, among other activities, may issue performance reports for state contracts. 2021 Report at 9, 68-69. In Tennessee, the legislature works with the Office of the Comptroller of the Treasury whose head is elected by the legislature and who responds to legislative audit and information requests. 2021 Report at 87, 97.

⁹ As just one example among many in the 2020 and 2021 reports, a Maryland legislative audit office conducted an in-depth review of over 500 emergency procurements and offered multiple recommendations to improve the state’s emergency contracting practices. 2021 Report at 71-72. Another example is Idaho where the Legislative Audits Division routinely issued brief audit reports on the activities of state entities receiving appropriations and routinely included in those reports information about contract management and any contract problems. Then, during appropriations hearings, Idaho’s Joint Finance-Appropriations Committee quizzed agency officials about any contract issues to ensure they were addressed. 2021 Report at 22-23.

¹⁰ In Idaho, for example, newly designed RFPs for state contracts “require service providers to produce data needed to monitor contracts” and require state procurement personnel to actively monitor contract performance. 2021 Report at 36. In Hawaii, the legislature codified several recommended mechanisms to help state agencies monitor contract performance, including through worksheets, contract timelines, and other measures. 2021 Report at 8-9, 55-56.

¹¹ See 2021 Report at 7-8, 25-28 (Idaho); 55-57 (Hawaii); 67 (Maryland).

stages of the procurement process, including the development of contract terms and pricing, the bidding and award process, and actual contract performance. The 2020 and 2021 reports document a variety of measures used by state legislatures to enable lawmakers to review key contracts at all stages, even when the contracts are issued on an emergency basis or the legislature is out of session.¹² In Idaho, the legislature requires state contracts to include in their pricing the funding needed for the state to monitor contract performance, including through site visits, interviews of affected persons, or other measures.¹³ In other states, the legislatures improved oversight by requiring their governors to provide them with timely notice of large emergency contracts.¹⁴ Knowing lawmakers are reviewing contract actions on an ongoing basis encourages careful work by state procurement personnel.

Contract database. Virtually every state now has a contract database that can be used by legislators, auditors, and the public to track state-issued contracts,¹⁵ but some provide better information than others.¹⁶ Legislatures can set requirements for the state contract database to ensure information wanted by the legislature is provided on a timely and ongoing basis. Required information might include whether the contract was issued on a competitive basis, how many bids were received, the final contract date and price, the text of the contract itself, performance measures and deadlines, and performance reviews. Nebraska has a state contract database maintained by the

¹² In Louisiana, for example, the legislature required the state procurement office to provide the legislature with a monthly report on state contracts and mandated legislative approval of contracts over \$40,000. 2021 Report at 8, 39-40. In Tennessee, the legislature's Joint Fiscal Review Committee is authorized to review and approve any contract over \$250,000 and lasting more than one year and can also oversee any fee-for-service contract. 2021 Report at 10, 87. In Alabama, the Contract Review Permanent Legislative Oversight Committee receives monthly reports on certain proposed state contracts and can delay approval of a contract for up to 45 days. 2021 Report at 10, 78-79. In Ohio, a bipartisan, executive-legislative joint Controlling Board meets every two weeks to consider and vote on requests for action submitted by state agencies and can use those board meetings to exercise contract oversight. 2020 Report at 35-36. In Illinois, state law requires, at the end of each fiscal quarter, that the Auditor General "shall file with the Legislative Audit Commission and the Governor a complete listing of all emergency procurements reported during the fiscal quarter." The LAC is then required to review those procurements and report to the General Assembly any procurements that "constitute an abuse." 2020 Report at 34.

¹³ One example illustrating how those requirements affect contract management was an Idaho Department of Corrections contract with a company providing out-of-state incarceration of Idaho prisoners. The contract price included funding for Idaho corrections personnel to travel to the out-of-state correctional facilities to evaluate the treatment of Idaho prisoners. Those on-site visits enabled Idaho to identify substandard practices that disadvantaged out-of-state Idaho prisoners and led to contract improvements. 2021 Report at 18, 31-36.

¹⁴ In Utah, for example, a 2020 Emergency Management Act Procurement Process Amendment requires "the Governor, during an epidemic or pandemic disease emergency, to provide notice to the Legislature within 24 hours of an expenditure or procurement that: is greater than \$2 million; uses federal funds received by the state ... and is made using statutory emergency procurement processes." 2020 Report at 17-18. In Illinois, the law requires that "notice of all emergency procurements shall be provided to the Procurement Policy Board," and also "published in the online electronic bulletin," which provides public notice of state contracts. 2020 Report at 34.

¹⁵ See, e.g., <https://www.sioe.org/online-databases-contracts-us-state-governments> (providing a list of online contract databases administered by the states).

¹⁶ The 2021 Report found that Hawaii, for example, provides an unusually accessible database with useful contract information. 2021 Report at 17-18, 49. In Louisiana, after the legislature discovered that its contract database had failed to track as many as 5,000 contracts, it funded a new eProcurement database and spent significant resources ensuring that all state contracts were entered into it. 2021 Report at 8, 40-41.

Department of Administrative Services; an oversight review could include an analysis of whether that database needs to be improved.

Public participation. Finally, some legislatures created mechanisms to enlist the public in efforts to identify, report, and address program or contract problems. South Carolina’s oversight committee, for example, invites public comment via its website on any program or contract under review.¹⁷ Maryland created fraud and waste tip lines to enable public employees or residents to alert state officials to contract problems.¹⁸ Idaho encouraged state procurement personnel to contact participants in contractor-run programs for information about contract performance and, if problems existed, to file complaints with the agency.¹⁹ Perhaps the most innovative approach was taken by the Hawaiian legislature which included 32 members of the public representing various sectors of the Hawaiian economy in a new House committee examining issues related to COVID-19.²⁰ Securing public input is still another oversight technique that can lead to improved contract performance and reforms.

As these best practices indicate, state legislatures have a wealth of options to choose from in any effort to strengthen their oversight practices.

¹⁷ See South Carolina House Legislative Oversight Committee website inviting “public input” on matters under review, <https://www.research.net/r/ProvideInputtotheSCHouseLegislativeOversightCommittee>.

¹⁸ 2021 Report at 9, 72.

¹⁹ Idaho encouraged that approach in a contract involving transport of Medicaid recipients to non-emergency medical appointments. 2021 Report at 30.

²⁰ 2021 Report at 60-62.