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FISCAL IMPACT REPORT

SPONSOR <u>Lente</u>	LAST UPDATED <u>2/12/24</u> ORIGINAL DATE <u>1/24/24</u>
SHORT TITLE <u>Tribal Education Trust Fund</u>	BILL NUMBER <u>House Bill 134/aHEC/aHAFC/aHF1#1</u>
	ANALYST <u>Liu</u>

REVENUE* (dollars in thousands)

Type	FY24	FY25	FY26	FY27	FY28	Recurring or Nonrecurring	Fund Affected
		\$1,000.0	\$1,989.0	\$1,967.1	\$1,945.5	Recurring	Tribal Education Trust Fund

Parentheses () indicate revenue decreases.
 *Amounts reflect most recent analysis of this legislation.

Relates to House Bill 39, House Bill 135
 Is a companion to an appropriation in the General Appropriation Act

Sources of Information

LFC Files
 Legislative Education Study Committee (LESC) Files

Agency Analysis Received From
 State Investment Council (SIC)
 Indian Affairs Department (IAD)
 Public Education Department (PED)

SUMMARY

Synopsis of HFI#1 Amendment to House Bill 134

The House Floor #1 amendment to House Bill 134 strikes the House Education Committee (HEC) amendments relating to the composition and convening of the tribal education trust fund (TETF) formula disbursement task force by LESC and removes optional involvement of the Indian Affairs Department (IAD) on the task force. The amendment also strikes all references to the original tribal education trust fund (TETF) disbursement task force and associated duties and rights. The amendment further strikes the House Appropriations and Finance Committee (HAFC) amendments relating to technical adjustments.

The amendment requires distributions to tribes between FY26 and FY30 to be based on 5 percent of the prior calendar year-end market value of TETF. For FY31 and subsequent years, the

distribution will be based on 5 percent of the prior five-year average market value. The amendment clarifies that beneficiaries of TETF distributions will be New Mexico tribes and their respective students in New Mexico educational institutions. Additionally, the amendment defines a New Mexico tribe as a federally recognized Indian nation, tribe, or pueblo located wholly or partially in New Mexico and on whose land in New Mexico Native American students are being educated.

The amendment requires PED to distribute funds through an equitable formula that considers Native American student populations and tribal education capacity needs, developed in a unanimous consensus process of consultation, collaboration, and communication with New Mexico tribes by June 1, 2025. Peacemakers may be appointed in the event of a dispute regarding the formula.

The amendment removes the April 15 deadline for tribes to submit operating budgets and plans and the October 15 deadline for tribes to submit spending reports and an assessment of program impact, student engagement, and student outcomes to PED. The amendment replaces the requirements with an annual tribal spending report and tribal assessment of impact and outcomes based on tribally determined criteria.

The amendment strikes the \$100 thousand or 1 percent TETF distribution to PED for administration of the fund.

Synopsis of HAFC Amendment to House Bill 134

The HAFC amendment to House Bill 134 strikes the \$100 million appropriation from the bill.

Synopsis of HEC Amendment to House Bill 134

The HEC amendment to House Bill 134 removes the \$12.5 million minimum distribution from the trust fund, effectively making the annual distribution 5 percent of the five-year average of the fund's year-end market values. The amendment further clarifies that PED will implement the disbursement formula developed by the tribal education trust fund (TETF) disbursement formula task force and allocate disbursement to tribes rather than a single tribe.

Additionally, to determine task force membership, the amendment makes LESC responsible for convening representatives from the 23 New Mexico tribes, pueblos, and nations to determine membership of the TETF task force by September 1, 2024, rather than the nine representatives outlined in the original bill. The secretary of Indian Affairs Department (IAD) may participate in deliberations with tribal representatives in an advisory capacity. LESC will transmit the proposal for task force membership to PED to then convene the task force.

Synopsis of Original House Bill 134

House Bill 134 appropriates \$100 million from the general fund to create a tribal education trust fund (TETF), managed by the State Investment Council (SIC), that will make annual distributions for PED to distribute to each New Mexico tribe based on recommendations from a temporary TETF disbursement formula task force composed of nine representatives from tribes, pueblos, nations, PED, and the Indian Education Advisory Council. The bill establishes minimum distribution requirements, administrative and reporting responsibilities for PED, tribes,

and SIC, and legislative authorization to tap the fund in the event of a general fund deficit and exhausting available reserves. The effective date of this bill is July 1, 2024. This bill is endorsed by LESC.

FISCAL IMPLICATIONS

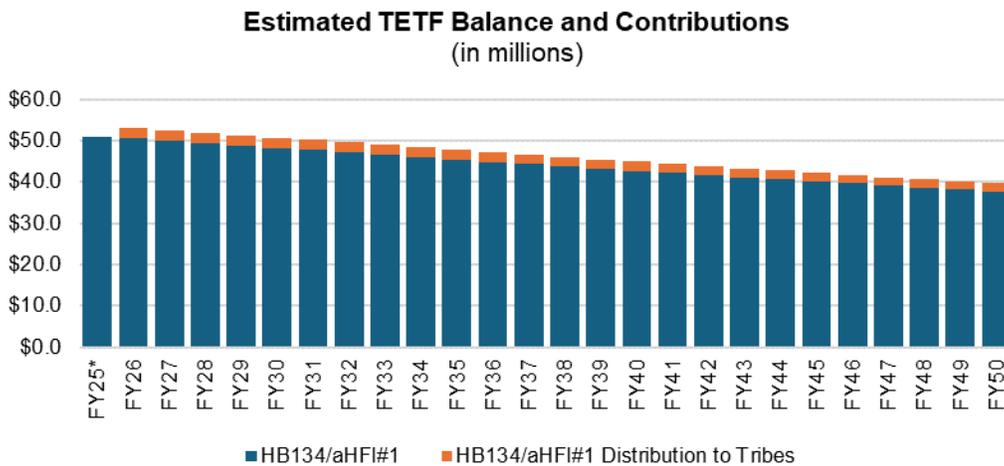
The appropriation of \$100 million contained in this bill is a nonrecurring expense to the general fund to create a new trust fund. As such, any unexpended or unencumbered balance remaining at the end of FY25 will not revert to the general fund. The HAFC amendment removes this appropriation; however, the HAFC Substitute for House Bills 2 and 3 includes \$50 million for TETF. The fiscal impact charts and tables in this analysis are based on the \$50 million appropriation.

Provisions of the unamended bill distribute TETF revenues from the fund annually (beginning in FY26) based on the greater of \$12.5 million or 5 percent of the average of year-end market values of TETF for the preceding five calendar years. The HEC amendment strikes the \$12.5 million distribution option. Additionally, the unamended bill makes another TETF distribution to PED for administrative costs based on the lesser of \$100 thousand or 1 percent of the fund. PED will distribute the annual TETF to tribes based on tribal needs and tribal size in accordance with a distribution formula developed by a task force. The House Floor amendment strikes the distribution to PED and the task force.

The bill charges SIC with management of the fund. This allows higher investment earning potential than if managed as part of the state's treasury balances. However, the balance of the fund, the annual distributions, and the reserve risk of the fund suggest investment returns will likely be minimal. Assuming an aggressive return of 4 percent for the size and distributional characteristics of the fund, LFC staff estimated the bill before being amended would have provided relatively flat distributions of \$12.5 million to Indian nations, tribes, or pueblos and \$100 thousand to PED for about 11 years. Because the balance of the TETF is not expected to grow, the total distributions would likely have remained close to the minimum of \$12.5 million a year. To achieve a sustainable level of funding with a \$12.5 million minimum distribution, the annual return would have needed to be over 11.5 percent every year. The HEC amendment removes the \$12.5 million minimum distribution, effectively making the annual distribution 5 percent of the five-year average of the fund's year-end market values.

This change extends the availability of distributions for many years but is likely to be unsustainable in the long run unless annual returns average more than 5 percent. The amendment also creates an issue with calculating the first distribution in FY26 (see "Technical Issues"). The House Floor amendment sets the distribution at 5 percent of the prior year-end market value of the fund between FY26 and FY30, with subsequent years relying on the prior five-year average market value.

SIC noted the minimum distribution of \$12.5 million in the unamended bill set an aggressive spending policy, likely distributing more than 10 percent of the fund by FY26 (compared to the land grant permanent fund distribution rate of 6.1 percent and severance tax permanent fund distribution rate of 4.7 percent). SIC expected that, even with high market returns (i.e., greater than 7 percent) during its early years of operation, the corpus of the fund would erode with each year's distributions. Even with this structure of TETF is similar to the water trust fund and conservation legacy permanent fund, which have been initially structured to meet current needs rather than serve as self-sustaining permanent endowments.



*Includes \$1 million in estimated gains for FY25 on top of the \$50 million endowment in House Bill 2

SIC notes TETF differs substantially in resources and beneficiaries from other funds, such as the land grant permanent fund (LGPF) and, therefore, may need to be invested with a different risk and return profile. For example, LGPF receives cash inflows from the State Land Office that currently exceed annual cash distributions, whereas TETF will be funded with a one-time appropriation. SIC notes this difference may lead to different tolerance for risk and long-term investment goals. Given the inflows, LGPF can absorb short-term losses without impacting distributions to beneficiaries, whereas large swings in the investment returns of TETF may cause fluctuations in distributions. This factor may suggest a lower risk profile for TETF. On the flipside, SIC notes this same factor may suggest a higher risk profile for TETF, because in the absence of significant long-term growth that exceeds both the distribution rate and inflation, the real value of distributions from TETF will decrease every year.

Provisions of this bill permit the Legislature to appropriate from TETF to the general fund to avoid an “unconstitutional deficit.” However, this emergency appropriation is only authorized after exhausting available funds from the appropriation contingency fund, general fund operating reserve, tax stabilization reserve, state-support reserve, and tobacco settlement permanent fund.

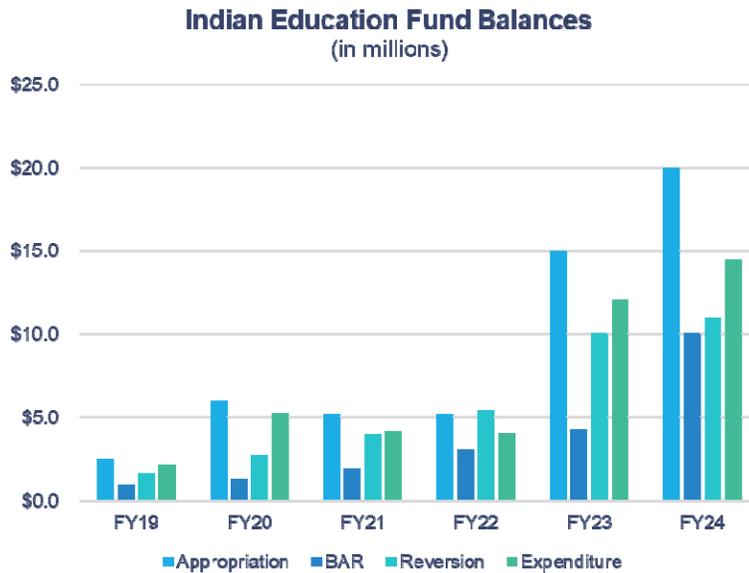
SIGNIFICANT ISSUES

Indian Education Fund. Currently, tribes, pueblos, and nations receive reimbursements from the Indian education fund (IEF) on an annual basis, rather than a distribution from a trust fund, and the Legislature has increased appropriations in recent years for IEF awards. In FY18, IEF appropriations totaled \$2.5 million; in FY24 the appropriation was \$20 million. PED makes IEF awards based on priorities established by the PED secretary and assistant secretary of Indian education to implement the Indian Education Act. For FY24, the Legislature appropriated \$20 million to IEF. In FY24, PED reported the following budgeted amounts:

Indian Education Fund Grant Name	FY23 Budget (in thousands)	FY24 Budget (in thousands)
Indian Education Grant – Tribes, Nations, Pueblos	\$2,053.2	\$4,000.0
Indian Education Grant – Districts, Charters	\$2,853.8	\$5,000.0
Indigenous Language Fellows	\$2,871.5	\$2,871.5

Native American Community-Based Immersion Schools	\$954.8	\$954.8
Curriculum, Instruction, and Assessment	\$200.0	\$200.0
Native American Language Program	\$250.0	\$250.0
Indigenous Education Initiative	\$1,500.0	\$1,500.0
Native Language Teacher Pipeline	\$693.0	\$693.0
Recruit and Retain Indigenous Personnel	\$974.0	\$3,250.0
Pay Parity for 520 Certificate Teachers*	\$419.7	\$4,000.0
Total	\$12,770.0	\$22,719.3

*PED also allocated \$1.5 million from general fund appropriations from the General Appropriation Act of 2022
 Source: LESC Files



In FY23, PED requested budget adjustment authority to carry over \$10 million in unspent IEF awards from FY23 for expenditure in FY24. In previous years, the IEF has accumulated balances from significant reversions, begging the question on the ability for tribes to spend or obligate PED awards. Tribes contend the department historically issued late award notifications and other issues, such as delays in getting signatures or approvals, have contributed to unspent IEF awards.

Analysis provided by the Tribal Education Alliance, an advocacy organization, notes disbursements from the TETF would provide allocations to tribal education departments to fund after-school programs, Native language classes, college and career preparation programs, social support services, and other out-of-school education programs.

PERFORMANCE IMPLICATIONS

A 2021 LFC evaluation on implementation of the Indian Education Act found Native American students continue to perform well below peers on state and national measures of achievement, despite the availability of nearly \$147 million in state and federal funds at public schools and institutions of higher education for purposes aligned to the act. The report noted a history of understaffing at PED’s Indian Education Division, difficulties with funding utilization, challenges with local collaboration, and a lack of specific, targeted outcomes have resulted in a system that has not served Native American students in a comprehensive and coordinated manner.

The LFC evaluation found Native American student enrollment in public schools fell to 32.4 thousand students in FY19, an 8.5 percent decrease over the prior five years. Four-year high

school graduation rates for Native American students increased to 69 percent in FY19, an 11-percentage point improvement over the prior five years, but still 6 percentage points lower than the statewide average of 75 percent. For FY22, the graduation rate dropped to 72 percent for Native American students but narrowed to 4 percentage points below the statewide average.

Similarly, Native American student reading and math proficiency rates improved marginally over the same period but remained below statewide averages. This trend remains the same for FY23, with Native American students reported as 23 percent proficient in reading and 13 percent proficient in math compared to the statewide average proficiencies of 38 percent in reading and 24 percent in math.

ADMINISTRATIVE IMPLICATIONS

TETF Disbursement Formula Task Force. In the unamended bill, membership of the TETF disbursement formula task force would have included nine representatives nominated by the leadership of New Mexico's Indian nations, tribes, and pueblos and appointed by the assistant secretary of Indian education, including:

- Three Navajo Nation representatives,
- One Mescalero Apache tribe representative,
- One Jicarilla Apache Nation representative,
- One southern pueblo representative,
- One northern pueblo representative,
- One western pueblo representative, and
- The chair of the Indian education advisory council.

The HEC amendment removes the task force composition above and instead, to determine task force membership, makes LESC convene representatives from the 23 New Mexico nations, tribes, and pueblos to propose an equitable tribal representation on the TETF formula task force by September 1, 2024. The secretary of IAD may participate in deliberations with tribal representatives in an advisory capacity. LESC would transmit the proposal for task force membership to PED, and PED would then solicit and accept task force appointments pursuant to the proposal before convening the task force. The House Floor amendment strikes the HEC amendment.

The task force must develop a disbursement formula for PED to use for allocations from TETF that is equitable for each Indian nation, tribe, and pueblo in New Mexico and considers tribal needs, tribal size, base funding amounts, and student counts. Recommendations for the formula will be reported to the governor, Legislature, and PED prior to July 1, 2025. On July 1, 2030, the task force will reconvene to assess the equity and functionality of the formula and provide additional recommendations, if necessary, prior to July 1, 2031. Task force members may receive per diem and mileage as provided for nonsalaried public officers. The House Floor amendment strikes the original task force from the bill.

IAD notes the unamended bill requires each tribe to summarize operating budget, plan, goals, and needs for the ensuing fiscal year by April 15 of each year. Under the unamended bill, spending reports, impact assessments, and student outcomes are due to PED by October 15 annually. Under the unamended bill, PED will, in turn, report to appropriate legislative committees and New Mexico tribes by November 15 each year, summarizing all disbursements

and tribal reports. PED notes this collaboration with tribal governments would add administrative responsibilities to all parties. Tribal governments would take on additional reporting duties, while the PED may establish procedures and adopt rules after consultation with New Mexico tribes, nations, and pueblos.

SIC notes the bill does not identify the proper risk or return profile for TETF. The prudent investor rule referenced in the bill directs an investment manager to implement “an investment strategy having risk and return objectives reasonably suited to the trust.” The prudent investor rule itself, however, does not dictate the appropriate level of risk for any particular trust. In the case of TETF, the clients are PED and New Mexico nations, pueblos, and tribes. SIC notes choosing the proper risk or return profile is a complex process that requires consideration of long-term goals, short-term needs, other available resources to meet needs, political or social tolerance for losses, and an appreciation of the inherent uncertainty of investment markets. SIC will need to work with PED and New Mexico nations, pueblos, and tribes to maintain a proper risk profile for TETF.

The bill requires the state investment officer to report quarterly to LESC and SIC on investment results of TETF beginning in FY25 on October 1 of each year. While this does not place a significant burden on the office, it may create an unwarranted expectation among oversight bodies that quarterly variations in investments results are meaningful. As a permanent fund, TETF will have a long-term investment horizon for which quarterly variation will not be of primary importance. SIC further notes TETF is likely to have assets that are valued on a quarterly lag which will confuse any trends apparent quarter to quarter. For instance, a second quarter report will show results for the second quarter of public equity and the first quarter of private equity (due to the lag in reporting valuations for private market investments).

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill is a companion to House Appropriations and Finance Committee Substitute for House Bills 2 and 3, which includes a \$50 million general fund appropriation for the TETF.

This bill relates to House Bill 39, which appropriates \$27.6 million to higher education institutions for initiatives to support the Native American workforce pipeline, and House Bill 135, which requires IEF distributions to be distributed automatically monthly to New Mexico tribes in a nonreimbursable manner with carryover authority.

TECHNICAL ISSUES

The HEC amendment strikes the \$12.5 million minimum annual distribution but still requires the first distribution in FY26 to be based on 5 percent of the average year-end market values of TETF for the preceding five calendar years. This cannot be calculated because the fund will not have been in existence for five calendar years prior to FY26. The House Floor amendment addresses this technical issue by setting the annual distribution at 5 percent of the prior year market value of the fund for the first five years before using the average prior five-year market value beginning in FY31.

OTHER SUBSTANTIVE ISSUES

On February 14, 2019, the 1st Judicial District Court issued a final judgment and order on the

consolidated *Martinez v. New Mexico* and *Yazzie v. New Mexico* education sufficiency lawsuits and found that New Mexico's public education system failed to provide a constitutionally sufficient education for at-risk students, particularly English language learners, Native American students, and special education students. The court's findings suggested overall public school funding levels, financing methods, and PED oversight were deficient. As such, the court enjoined the state to provide sufficient resources, including instructional materials, properly trained staff, and curricular offerings, necessary for providing the opportunity for a sufficient education for all at-risk students.

Additionally, the court noted the state would need a system of accountability to measure whether the programs and services actually provided the opportunity for a sound basic education and to assure that local school districts spent funds provided in a way that efficiently and effectively met the needs of at-risk students. However, the court stopped short of prescribing specific remedies and deferred decisions on how to achieve education sufficiency to the legislative and executive branch instead.

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