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**LEGISLATIVE EDUCATION STUDY COMMITTEE**  
**BILL ANALYSIS**  
**55th Legislature, 1st Session, 2021**

<b>Bill Number</b>	<u>HJR1/HECS/aSFC</u>	<b>Sponsor</b>	<u>HEC</u>
<b>Tracking Number</b>	<u>.219555.1</u>	<b>Committee Referrals</b>	<u>HCEDC/HEC;SRC/ SFC</u>
<b>Short Title</b>	<u>Permanent Fund for Early Childhood, CA</u>		
<b>Analyst</b>	<u>Hoxie</u>	<b>Original Date</b>	<u>2/9/2021</u>
		<b>Last Updated</b>	<u>3/17/2021</u>

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**BILL SUMMARY**

Synopsis of SFC Amendment

The Senate Finance Committee amendments to House Education Committee substitute for House Joint Resolution 1 increases the additional annual distribution from the land grant permanent fund (LGPF) to 1.25 percent. Of the additional 1.25 percent distribution, HJR1/HECS/aSFC specifies 60 percent shall be for early childhood education and 40 percent shall be for public schools to enhance instruction for students at-risk of failure, extend the school year, and compensate public school teachers.

The proposed constitutional amendment would require congressional approval for distributions for early childhood education to become effective, in addition to the voter approval required for all constitutional amendments.

Current language in the New Mexico Constitution, relative to additional annual LGPF distribution, prohibits additional annual distribution from the LGPF if its average year-end market value for the preceding five years is less than \$10 billion. HJR1/HECS/aSFC amends this provision and prohibits additional annual distribution from the LGPF if its average year-end market value for the preceding five years is less than \$17 billion.

Finally, SFC amendments strike the word “services” on page 4 of the committee substitute, requiring the additional distribution from the LGPF be used for early childhood education. Prior to this amendment, the bill allowed for additional distributions from the LGPF to be used for early childhood educational services, which is a broader use of funds.

Synopsis of HEC Committee Substitute

The House Education Committee Substitute for House Joint Resolution 1 (HJR1/HECS) proposes to ask voters to amend Article XII, Section 7, of the constitution of the state of New Mexico to increase annual distributions from the land grant permanent fund (LGPF) by 1 percent for all beneficiaries, provided the amount of additional distribution from the permanent school fund,

currently reserved for public schools, would be designated for early childhood education services that are nonsectarian, nondenominational, and administered by the state for children until they are eligible for kindergarten.

Synopsis of Original Bill

House Joint Resolution 1 (HJR1) amends Article XII, Section 7, of the constitution of the state of New Mexico to increase annual distributions from the land grant permanent fund (LGPF) by 1 percent for all beneficiaries, provided the amount of additional distribution from the permanent school fund, currently reserved for public schools, would be designated for early childhood education services that are nonsectarian, nondenominational, and administered by the state for children until they are eligible for kindergarten. The joint resolution requires the approval of voters at the next statewide general or special election and the consent of the U.S. Congress to become effective.

**FISCAL IMPACT**

House joint resolutions do not carry appropriations.

If approved by voters, HJR1/HECS/aSFC would amend Article XII, Section 7, of the state constitution to increase annual distributions from the LGPF by an additional 1.25 percent, provided 60 percent of the additional amount be designated for early childhood education and 40 percent of the additional amount be allocated for public schools. The joint resolution proposes an additional 1.25 percent distribution of the average of year-end market values of the LGPF for the immediately preceding five calendar years. The additional 1.25 percent distribution, based on Legislative Finance Committee (LFC) estimates, will result in distribution of an additional \$245.7 million in FY23. Under the amendment's specified percentages, this would provide \$126.9 million for early childhood education, \$84.6 million for public education as specified in the amendment, and \$34.2 million for the LGPF's other beneficiaries.

In analysis for the original bill, SIC notes that from a long-term, multi-decade perspective, an endowment fund like the LGPF that distributes 5 percent of its corpus will ultimately deliver more money to New Mexico education overall than a fund distributing 6 percent. This is a result of increased investment gains over time. SIC notes the LGPF would deliver approximately \$4.5 billion additional funds to beneficiaries after 25 years relative to a 5 percent distribution but would have lost an estimated \$11 billion in value. While additional distributions from the LGPF would produce more revenue for its beneficiaries in the short term, the additional 1 percent distribution would reduce the amount of funds available for future investment, therefore reducing future distributions. The question for the Legislature to consider is whether the added cost over the long run is an appropriate trade-off for the added benefits HJR1 is expected to deliver in the short run.

**Additional Distribution Suspension.** Language in the New Mexico Constitution, relative to additional annual LGPF distribution, prohibits additional annual distribution from the LGPF if its average year-end market value for the preceding five years is less than \$10 billion. The average year-end market value for the preceding five years, when including the year-end value for 2020, totals about \$18 billion, as shown by the chart below:

Land Grant Permanent Fund Net Assets (2016-2020)	
2016	\$15.2
2017	\$17.3
2018	\$17.1
2019	\$18.6
2020	\$21.6
5-Year Average	\$18

Source: SIC and LESC Analysis

The Legislature should note the \$10 billion threshold to suspend additional distributions may be too low to protect the fund given the average balances over the past five years. To use an extreme example, if the fund dropped to \$500 million in 2021, the five-year average year-end market value of the fund over fiscal years 2017, 2018, 2019, 2020, and 2021 would still be \$15 billion, well above the \$10 billion threshold, and the annual distribution would still be required. The following chart uses actual year-end fund balances for 2017-2020, and an example of \$500 million for 2021:

Land Grant Permanent Fund Net Assets "Safety Valve" Example (2017-2021)	
2017	\$17.3
2018	\$17.1
2019	\$18.6
2020	\$21.6
2021	\$0.5
5-Year Average	\$15

Source: SIC and LESC Analysis

The Legislature may want to consider using an ending balance of \$10 billion for a single year instead of a five-year average as a trigger for suspending the annual distribution; alternatively, the Legislature could also consider using a three-year average to trigger suspension of the annual distribution. Given the fact that the current “safety valve” is not activated even with this extreme example, it appears that funds could deteriorate slowly over a long period of time before this provision is enacted to protect the fund. The SFC amendment addresses this challenge by raising the “safety valve” to \$17 billion.

**Other Costs.** HJR1/HECS/aSFC passage will incur additional one-time costs related to bringing the measure to voters, either in a special election or during a general election. Under Section 1-16-4 NMSA 1978 and the New Mexico constitution, the Secretary of State is required to print samples of the text of each constitutional amendment, in both Spanish and English, in an amount equal to 10 percent of the registered voters in the state. The agency is also required to publish them once a week for four weeks preceding the election in newspapers in every country in the state. The estimated cost per constitutional amendment is \$150 thousand to \$200 thousand depending on the size and number of ballots and if additional ballot stations are needed.

**SUBSTANTIVE ISSUES**

**Responding to the *Martinez and Yazzie Sufficiency Lawsuit.*** In the consolidated *Martinez-Yazzie* education sufficiency lawsuit, the 1<sup>st</sup> Judicial District Court ruled the state failed to provide quality programs targeted to meet the specific needs of at-risk students, defined as

economically disadvantaged students, English Learners, Native American students, and students with disabilities. These groups account for the vast majority of the student population in New Mexico. By increasing funding to public schools, the bill could provide funds to address remedies proposed by the *Martinez* and *Yazzie* plaintiffs. Remedies noted by the plaintiffs relating to public schools include increased funding for bilingual programs, multicultural programs, teacher pay, reduced class sizes, and additional scholarships for teacher recruitment. Additionally, on January 29, 2021, the *Yazzie* plaintiffs petitioned the court to order the state of New Mexico to provide essential technology to all at-risk public school students, including Internet access and computers. In addition to the *Martinez* and *Yazzie* education sufficiency lawsuit, the *Zuni* lawsuit over the fairness of the distribution of capital outlay is still ongoing.

Of note is that public schools are the primary beneficiaries of the permanent school fund – but not the specific recipients indicated in original HJR1 language. However, the SFC amendment to the bill requires 40 percent of the additional distribution shall be for the public school permanent fund beneficiary for enhanced instruction for students at risk of failure, extended the school year, and public school teacher compensation.

### Congressional Approval

**Background and History of the LGPF.** In anticipation of New Mexico’s pending statehood, the United States transferred 13.4 million acres of federal land to the then-Territory of New Mexico via the Ferguson Act of 1898 and the Enabling Act of 1910 to be held in trust for the benefit of “common schools” (public schools) and other identified state institutions. Currently, the LGPF has 21 beneficiaries. See **Attachment A, Land Grant Permanent Fund Balance and Income Distribution for FY20**. Public school districts receive about 85 percent of LGPF distributions through the permanent school fund. The LGPF is funded by income from nonrenewable resources, such as oil and gas revenues that make up over 90 percent of contributions, and was designed to provide for future generations when those resources are exhausted. It is one of the largest sovereign wealth funds in the country, with a balance of \$22.6 billion at the end of calendar year 2020. Currently, 5 percent of the LGPF five-year average year-end balance is distributed to 21 beneficiaries based on the tracts of land designated to each beneficiary. In FY20, LGPF distributions totaled \$783 million, with about \$638 million distributed to public schools.

The Organic Act established New Mexico as a territory and dedicated lands from each township for government and educational needs. The Ferguson Act of 1898 gave sections 16 and 26 in every township to public schools, while the Enabling Act of 1910 specified that sections 2 and 32 of each township are to be held in trust for public school. Additional provisions in the Enabling Act directed proceeds from the sales, leases, and rents from specific lands for the benefit of public schools. The State Investment Council’s 2018 annual report notes these state trust lands are *held in perpetual trust for 21 designated beneficiaries*. Each beneficiary has specific state trust lands dedicated to that beneficiary along with the revenue generated on those land parcels. This idea of a perpetual trust for the intended beneficiaries is found throughout language included in the Ferguson Act and the Enabling Act; Congress unequivocally demonstrated its intent to protect funds set aside for the public schools.

#### Ferguson Act of 1898

- Congress enacted the Ferguson Act in 1898. Among its provisions, the Ferguson Act allocated sections 16 and 36 in every township in the territory of New Mexico “*for the support of common schools.*” See Section 1 of the Ferguson Act.

- Section 4 of the Ferguson Act allocated five per centum of the proceeds of the sales of public lands within New Mexico by the United States *“to be used as a permanent fund, the interest of which shall only be expended for the support of the common schools within said territory.”*
- Section 9 of the Ferguson Act required the governor, surveyor-general, and solicitor-general of the territory of New Mexico to select lands as they were designated and report those selected lands to the secretary of the Interior Department along with their designated uses, which had to be consistent with the uses set forth in the Ferguson Act.
- Section 10 allowed sections 16 and 36 of each township to be leased for the benefit of public schools. Any money generated by such lease of these sections *“shall be placed to the credit of separate funds for the use of said institutions, and shall be paid out only as directed by the legislative assembly of said territory, and for the purposes indicated herein.”* Section 10 goes on further to note all money received on account of any sales of remaining lands *“shall be place to the credit of separate funds created for the respective purposes named in this act and shall only be used...for the institutions or purposes for which the respective grants of lands are made.”*

#### Enabling Act

- Section 6 of the Enabling Act of 1910 granted sections 2 and 32 in every township to the territory of New Mexico *“for the support of common schools...”* and *“at close of each fiscal year there shall be paid by the secretary of the treasury to the state, as income for its common school fund...”*
- Section 7 allocated the remainder of one million additional acres granted to the territory, or the proceeds of the sale, lease, rent or profits from those lands to be *“added to and become a part of the permanent school fund of said state, distribution from which shall be made in accordance with the first paragraph of section 10 (of the Enabling Act) for the maintenance of the common schools of said state.”*
- Section 9 allocated five per centum of the proceeds of sales of public lands lying within New Mexico that were sold subsequent to the admission of New Mexico into the union for a *“permanent inviolable fund, distributions from which shall be made in accordance with the first paragraph of Section 10 and shall be expended for the support of the common schools within said state.”*
- The first paragraph of Section 10 notes all lands granted to the territory of New Mexico shall be held in trust by the state, to be disposed of only in a manner as provided for in the Enabling Act and for the objects specified in each of the respective provisions of the Enabling Act, and any natural products and money proceeds of any of the land shall be subject to the same trusts as the lands producing the same. *“[D]isposition of any said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust.”* Section 10 goes on to state, *“The use of the natural products thereof, not made in substantial conformity with the provisions of this act, shall be null and void, any provision of the constitution or laws of the said state to the contrary notwithstanding”* and charges the U.S. Attorney General with responsibility for enforcing the Enabling Act.

Given the strong language in the Enabling Act and language in the state constitution, failure to secure congressional approval to divert funds from the common schools to provide early childhood educational services to children until they are eligible for kindergarten may open the state to litigation. *State ex rel. Interstate Stream Comm’n v. Reynolds* (1963) found the trust created in the

Enabling Act is binding and enforceable, and the Legislature is without power to divert the fund for another purpose than that expressed. Article XXI, Section 9, of the New Mexico Constitution states, “This state and its people consent to all and singular the provisions of the said act of congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said act granted or confirmed to this state, the terms and conditions upon which said grants and confirmations were made and the means and manner in of enforcing such terms and conditions, all in every respect and particular as in said act provide.”

Section 10 of the Enabling Act became a part of New Mexico’s fundamental law to the same extent as if it had been directly incorporated into the constitution when thus expressly consented to by the state and its people in Article XXI, Section 9, of the constitution. See *State ex rel. Interstate Stream Comm’n v. Reynolds*. With the exception of prekindergarten programs offered by public schools and educational services for 3- and 4- year old developmentally delayed students, services for children from birth to kindergarten entry are generally not provided by public schools, and most of the services the constitutional amendment seeks to fund are overseen by the newly created Early Childhood Care and Education Department, rather than the Public Education Department, which has regulatory and administrative authority over public schools (See Section 6 of Article XII of the New Mexico Constitution).

Prior to 1997, U.S. congressional approval was required for any change to the way in which distributions were made from the LGPF. However, in 1997, Congress approved amendments to the Enabling Act of 1910, one of which specified that future distributions “shall be made as provided in Article 12, Section 7, of the Constitution of the State of New Mexico.” At the time, distributions were limited to an amount set out in the Enabling Act of 1910; the amendment to the enabling act allowed the electorate of the state to set the distribution amount through constitutional resolution. The 1997 amendment, however, does not allow the state to divert funds away from any of the 21 intended beneficiaries of land grant permanent funds. The Legislature may want to require congressional approval to ensure the resolution is not subject to legal challenge for providing for a distribution for “early childhood educational services” without congressional approval.

The SFC amendment to this bill addresses the congressional approval concerns by requiring congressional approval through section 3 of the bill.

**Importance of Early Childhood Education.** Substantial evidence demonstrates experiences in early childhood are critical for brain development, and children who participate in high-quality early learning programs have better health, social-emotional, and cognitive outcomes than children who do not participate. Lack of access to high-quality learning opportunities early in life can be a contributing factor to the achievement gap. Research shows some early childhood interventions successfully narrow the achievement gap. Additionally, early childhood education and programs that extend learning time were a focus of the plaintiffs in the consolidated *Martinez* and *Yazzie* education sufficiency lawsuit, which noted that quality full-day prekindergarten is necessary to compensate for the late start on learning experienced by many at-risk students. However, the court’s findings identified shortfalls in areas outside of prekindergarten, including instructional materials, access to technology, summer school, K-3 Plus, smaller class sizes, reading programs, and quality teachers. These other findings are not addressed by HJR1 and creating a new LGPF beneficiary before addressing kindergarten-through-12<sup>th</sup>-grade education findings could pose challenges.

The U.S. Department of Education suggests effective early learning programs provide a return on investment of \$8.60 for every \$1 spent. New Mexico has expanded early childhood education programs over the last 10 years; however, expanding these services should not outpace the development of a highly qualified workforce, which is currently very limited.

**OTHER SIGNIFICANT ISSUES**

**Early Childhood Issues.** HJR1/HECS/aSFC defines “early childhood education” as state-administered “nonsectarian and nondenominational education for children until they are eligible for kindergarten.” Original bill language allowed funding generated from the LGPF to be used for early childhood educational services. The SFC amendment strikes the word “services” on page 4 of the bill, thereby specifying the early childhood portion of the distribution is to be for early childhood education.

In FY21, the Early Childhood Education and Care Department (ECECD) began overseeing all early childhood education and care services. Previously, the responsibility for childhood education and care services was shared by the Children, Youth, and Families Department, Department of Health, and Human Services Department.

Early Childhood Education and Care System		
FY21 State Agency	Program	Age Range
ECECD	NM Head Start Collaboration Office	prenatal through age 4
ECECD	Childcare Assistance	3 weeks through age 13
ECECD	Home Visiting	prenatal through age 4
ECECD	Prekindergarten	ages 3 through 4
ECECD	Family, Infant, and Toddlers	birth through age 3
ECECD	Home Visiting	prenatal through age 4
PED	Prekindergarten at Public Schools	age 4
PED	K-5 Plus	ages 5 through 8
PED	Services for Developmentally Delayed Students	ages 3 through 4

Source: LFC and LESC Analysis

New Mexico has already demonstrated a significant investment in early childhood education programs by growing funding from \$136 million in FY12 to \$448 million in FY21, an increase of 229 percent. This increase does not include federal funding, which allows New Mexico to serve additional children through early childcare programs. This 229 percent increase, along with \$73 million from federal early childhood Head Start and Early Head Start, allowed the state to serve nearly 80 percent of 4-year-olds in FY20. However, LFC notes the state has struggled with coordination and delivery of these services due to rapid growth. For example, the availability of childcare and prekindergarten for 3- and 4-year-olds is regionally inconsistent, with oversaturation in some communities and a lack of access in others. Oversaturation of early childhood educational services can have several negative effects, including the return of federal Head Start dollars as a result of student migration from Head Start to state-funded programs, such as prekindergarten.

**Early Childhood Workforce Limitations.** Inconsistencies among early childhood professional licensure requirements, education requirements, and compensations pose a challenge as New Mexico consolidates and expands early childhood educational services. Such inconsistencies can create an environment in which programs compete for highly qualified early childhood educational service providers. Expansion of early childhood educational services should not outpace the development of a high-qualified early childhood workforce. Based on HJR1/HECS/aSFC language narrowly defining “early childhood educational” as nonsectarian and nondenominational education for children, funds generated would not be available to use for workforce development.

**RELATED BILLS**

Senate Joint Resolution 1, which increases the distribution from the LGPF to provide for teacher salaries and instruction purposes as provided by law.

**SOURCES OF INFORMATION**

- LESC Files
- LFC Files
- Office of Attorney General
- Children, Youth, and Families Department
- State Land Office
- State Investment Council

**EH/mb**

**LAND GRANT PERMANENT FUND**  
**FUND BALANCE AND INCOME DISTRIBUTION SUMMARY FOR THE FISCAL YEAR ENDED June 30, 2020**  
**Unaudited --Through 6/30/20**

	July 1, 2019		INCOME	Net Earnings and	ENDING BAL	
INSTITUTIONS	BEGINNING BAL	% OF FUND	DISTRIBUTION	Contributions	June 30, 2020	% OF FUND
COMMON SCHOOLS	\$15,990,437,459.75	85.657%	(\$673,464,813.74)	\$1,031,937,983.84	\$16,348,910,629.81	86.127%
UNIVERSITY OF N.M.	\$233,187,609.23	1.249%	(\$9,629,654.90)	\$4,667,724.76	228,225,679.09	1.202%
UNM SALINE LANDS	\$8,131,955.87	0.044%	(\$334,269.02)	\$77,099.04	7,874,785.89	0.041%
NM STATE UNIVERSITY	\$72,651,971.33	0.389%	(\$2,979,812.64)	\$359,384.38	70,031,543.07	0.369%
WESTERN NM UNIV	\$4,297,376.77	0.023%	(\$176,625.95)	\$40,597.92	4,161,348.74	0.022%
N.M. HIGHLANDS UNIV	\$4,275,744.34	0.023%	(\$175,740.18)	\$40,560.10	4,140,564.26	0.022%
NO. NM COLLEGE	\$3,486,199.02	0.019%	(\$143,412.40)	\$39,264.40	3,382,051.02	0.018%
EASTERN NM	\$13,308,937.98	0.071%	(\$545,433.72)	\$48,259.86	12,811,764.12	0.067%
NM INST. MINING &	\$32,962,985.43	0.177%	(\$1,354,463.88)	\$297,073.63	31,905,595.18	0.168%
N.M. MILITARY	\$551,854,458.21	2.956%	(\$22,850,357.37)	\$13,731,493.89	542,735,594.73	2.859%
NM BOYS SCHOOL	\$924,747.83	0.005%	(\$37,865.57)	\$1,617.70	888,499.96	0.005%
DHI MINERS HOSPITAL	\$152,641,149.55	0.818%	(\$6,269,788.23)	\$1,246,674.85	147,618,036.17	0.778%
N.M. STATE HOSPITAL	\$62,475,028.94	0.335%	(\$2,627,216.94)	\$3,378,778.63	63,226,590.63	0.333%
NM STATE	\$333,340,991.85	1.786%	(\$13,784,275.89)	\$8,023,133.31	327,579,849.27	1.726%
NM SCHOOL FOR THE	\$330,017,341.40	1.768%	(\$13,636,919.47)	\$6,847,213.17	323,227,635.10	1.703%
SCH. FOR VISUALLY	\$329,353,304.88	1.764%	(\$13,609,784.47)	\$6,848,582.05	322,592,102.46	1.699%
CHAR. PENAL &	\$135,318,988.39	0.725%	(\$5,556,064.34)	\$980,331.06	130,743,255.11	0.689%
WATER RESERVOIR	\$169,898,862.06	0.910%	(\$6,968,761.94)	\$888,459.36	163,818,559.48	0.863%
IMPROVE RIO GRANDE	\$37,930,847.03	0.203%	(\$1,556,192.09)	\$216,513.67	36,591,168.61	0.193%
PUBLIC BLDGS. CAP.	\$201,289,793.36	1.078%	(\$8,538,919.86)	\$18,804,606.73	211,555,480.23	1.114%
CARRIE TINGLEY	\$233,165.09	0.001%	(\$9,547.40)	\$407.88	\$224,025.57	0.001%
	<b>\$18,668,018,918.31</b>	<b>100%</b>	<b>(\$784,249,920)</b>		<b>\$18,982,244,758.50</b>	<b>100%</b>

Source: SIC