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FISCAL IMPACT REPORT

ORIGINAL DATE 02/24/21
 SPONSOR Sedillo Lopez LAST UPDATED 03/17/21 HB _____
 SHORT TITLE Limited English Access to State Programs SB 368/aSHPAC
 ANALYST Gaussoin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Plan Development		Indeterminate but Minimal		Indeterminate but Minimal	Nonrecurring	General Fund
Implementation (staff costs)			\$2,323.2	\$2,323.2	Recurring	Various
Implementation (equipment, etc.)			Indeterminate	Indeterminate	Nonrecurring	Various

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB225. Conflicts with SB112.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Finance and Administration (DFA)
 Department of Health (DOH)
 Environment Department (NMED)
 Taxation and Revenue Department (TRD)
 Attorney General (NMAG)
 Department of Transportation (NMDOT)
 Indian Affairs Department (IAD)
 Aging and Long-Term Services Department (ALTSD)
 State Personnel Office (SPO)

SUMMARY

Synopsis of SHPAC Amendment

The Senate Health and Public Affairs Committee amendment to Senate Bill 368 modifies language in the bill to require state department secretaries to provide “meaningful” access to state programs for people with limited English proficiency, rather than the “full” access that was in the original bill. In addition, it strikes a provision that would have required the Legislative

Finance Committee and Department of Finance and Administration to withhold approval of budget adjustment requests from departments that failed to produce an annual report on language access services.

A number of agencies provided analysis for the bill after the fiscal impact report was prepared on the unamended legislation. This report has been updated throughout and changes are underscored.

Synopsis of Original Bill

Senate Bill 368 amends the Executive Reorganization Act, Section 9-1-5 NMSA 1978, to require the secretary of each department to implement a plan to ensure those with limited English proficiency have full access to state services. The plan must include an annual assessment of need and how the department will meet those needs, including through the use of interpretation and translation services and bilingual staffing, and an assessment of costs, including the provision of competitive salaries for multilingual staff.

Agencies must submit annual reports on the language program to the governor and Legislative Finance Committee, and the Department of Finance and Administration and LFC would be prohibited from granting budget adjustment authority to any department that does not submit the annual report.

SB368 would also change a provision of the Executive Reorganization Act that requires department's to study how to improve services to "residents," as opposed to "citizens" as currently written in statute.

The effective date of SB368 is July 1, 2021.

FISCAL IMPLICATIONS

The initial costs for implementing SB368 are likely minimal; agencies should be able to absorb the cost of assessing need and developing a plan. Estimating impact beyond that is difficult because SB368 sets no threshold for determining what languages must be accessible. Federal law, which trickles down to many state agencies, sets the threshold at specific levels for elections, public benefits, the Affordable Care Act, and other areas based largely on the number or proportion of those with limited English proficiency that use the service.

In its analysis of the original bill, DOH noted a critical element of SB368 was its use of "full access," as opposed to "reasonable steps" provide for in federal law. The language in SB368 has been amended to "meaningful access," echoing language used by the U.S. Department of Justice, but agencies remain unsure of the requirements under SB368/aSHPAC beyond those in federal law, and it remains unclear what languages must be accessible, what materials must be translated, what services require translators, and how to assess associated costs.

From NMDOT:

In its role as a state agency, the NMDOT makes available information and many operational materials to the public. If the variety of ways that the NMDOT provides access and information to the public constitute "state program" functions, then the fiscal toll would be much larger than if the term were narrowly applied only to those programs

involving specifically focused public service. Overall, without understanding what SB 368 intends to incorporate into “state programs,” the actual fiscal impact is unclear.

Agency Estimates. TRD anticipates broad impact from SB368 as amended at a potential cost of \$189 thousand a year for staff and \$5,000 in start-up costs for equipment:

Additional staff for training, along with personnel to administer the program, are required. Alternately, TRD may need to consider hiring a third-party to perform interpretation and translation services in all languages.

The bill does not limit languages and it does not limit print. TRD divisions will have to make changes to processes, hire staff in its two call centers, make changes to TRD’s website, and hire staff that interact with the public in its field offices. ...

Other State agencies offer publications in Spanish and Vietnamese and have Spanish versions of their websites. TRD could draw from these resources to make changes to information distributions media, in conjunction with hiring staff. TRD has previously published bulletins in Spanish at a cost of 19 cents per word. These costs may be different for changes to forms and other publications. TRD’s GenTax system version 12, to which TRD is currently upgrading, supports languages other than English.

Lastly, wage increases for new and existing bilingual and multilingual staff should be considered. Currently, the Audit and Compliance Division (ACD), which houses TRD’s tax call center, has 29 employees receiving multi-lingual pay, at a cost of \$6,032 per year. Hiring bilingual staff should be accompanied by monetary remuneration. Currently, state employees who are bilingual can earn an additional 10 cents per hour. To attract staff with bilingual skills, it would be beneficial to revise employee compensation for this skill.

NMED, which reports it already pays for translation and interpretation services for proposed rules, hearings, and permit publications and employs one full-time Spanish translator, estimates the cost of additional staff and services for SB368/aSHPAC would be \$77 thousand a year. This figure includes expanding the department’s existing 20-cents-per-hour salary differential for multilingual personnel to additional staff. The department notes the bill would likely necessitate expanding translation efforts to a broader range of languages, including Vietnamese and Diné.

IAD does not cite a specific figure for its estimate but notes it, and its sister agencies, “must consider” translation into the eight indigenous languages of New Mexico at an unknown costs. ALTSD also notes New Mexico indigenous languages but set its estimated additional costs at a relatively low \$15 thousand a year to cover the cost of providing its existing 10-cents-per-hour pay differential for multilingual staff to a larger group of employees.

DOH did not submit analysis of the amended bill but anticipated \$812.5 thousand a year in additional costs for the original legislation: \$188,493 a year for 3 FTE for a significant increase in the translation of reports, informational materials, websites, and other communications and \$624 thousand to meet the bill’s requirement for competitive salaries for multilingual staff by providing a \$1-an-hour salary differential for approximately 300 frontline staff (public health nurses, clerks, Women Infant Children staff, etc.).

Similarly, DFA did not revise its analysis for the amended bill, but its analysis of the original bill concluded implementation would cost an additional \$22 thousand to \$36 thousand a year. DFA assumed larger agencies would have a limited increase in costs because most already must comply with federal rules, while smaller departments would incur higher costs related to website development, printing, staffing, and contracting with interpreters. However, DFA noted if the needs assessment concludes language access must include a broader range of languages, finding available interpreters at a reasonable cost might be difficult.

Statewide Impact. Even the more modest projections multiplied by some two dozen, mostly public-facing cabinet departments would add up to a substantial cost to state government. Assuming no costs for FY22 – SB368/aSHPAC has an effective date but no deadline for implementing expanded language access services – and using an average of the estimates of recurring costs provided by the agencies that submitted analysis (\$193.6 thousand, implementation of the language access could cost \$2.323 million,¹ with resources coming from a mix of state and federal funds.

Potential for Limited Impact. Nonetheless, supporters of the bill argue costs would be minimal because language access is already guided by federal law, including Title VI of the Civil Rights Act. They note the U.S. Department of Justice requires departments that receive federal assistance to develop a plan and take steps to ensure those with limited English proficiency have “meaningful access” to services as guided by a four-factor test for determining the populations with language needs. Further, they suggest SB368 would save the state money because its requirement for centralize review by the executive could lead to agencies sharing resources.

Competitive Salaries for Multilingual Staff. As with other provisions in the bill, agencies interpret the requirement that multilingual staff be paid “competitive” salaries differently, with some agencies assuming an existing differential would have to be paid to more employees, some assuming the rate would have to be increased, and some assuming a higher rate would have to be paid to a larger group of employees. Notably, agencies pay different differentials based on agreements with employee unions; NMED reports its collective bargaining agreement requires 20 cents more per hour and DOH, ALTSD, and TRD say they pay an additional 10 cents an hour. From SPO analysis of the unamended bill:

SB368 requires state departments to develop a competitive salary structure for employees with multilingual proficiencies. The State Personnel Office respectfully suggests that there is already enough flexibility within state government’s existing salary structures to allow for appropriate placement and compensation of bilingual or multilingual employees. No new salary structure is necessary. In the rare case where the existing salary structure will not accommodate an employee who brings additional language skills to the table, the State Personnel Office recommends creating a new multilingual multiple component of pay (MCOP) or a multilingual pay differential to provide the employee with additional compensation.

¹ This figure falls within the fiscal impact range estimated for the original bill of \$864 thousand to \$6.3 million. The bottom of the range was based on DFA’s estimate of \$36 thousand a year multiplied by 24 cabinet departments. The top of the range was based on DOH’s total estimate of \$812.5 thousand multiplied by seven “large” cabinet departments added to DFA’s \$36 thousand estimate multiplied by 17 “small” cabinet departments.

SIGNIFICANT ISSUES

Agencies raise numerous concerns with what they consider a lack of clarity with certain provisions of SB368/aSHPAC. SPO suggests the bill’s use of “state programs” and “limited English proficiency” are particularly problematic, and NMDOT suggests the bill be amended to add definitions of those two terms. From SPO:

It is unclear what constitutes a “state program.” Does SB368 require state departments to create a language access plan only for “state programs” providing critical services to New Mexico residents? Or does it require a language access plan for every state agency activity – for example, for the State Personnel Office’s job application process or trainings for state employees? It is also unclear what constitutes “limited proficiency in English.” Does this legislation require a language access plan improving access to state programs for every person, no matter the person’s primary language? In other words, does it require improved access in dozens of different languages? And does it also require an access plan for people with functional illiteracy?

From NMDOT:

SB 368 also does not define “limited English proficiency.” In the absence of definition, it is unclear not only what constitutes “limited English proficiency,” but also what it means to provide full access to individuals with “limited English proficiency.” A generally accepted definition, including one adopted by certain federal programs, defines “limited English proficiency” as someone who does not use English as their primary language, and as a result has difficulty communicating in English. Whether this definition mirrors the legislative intent of SB 368 is unknown. Moreover, SB 368 is unclear whether there is a distinction between written and spoken language access, and sign language. Similarly, SB 368 does not identify whether there are certain minimum standards to apply in order to assess which populations of persons with limited English proficiency should the NMDOT or other state agencies focus on. Without understanding what SB 368 intends to incorporate into “limited English proficiency,” the actual fiscal impact is uncertain.

NMED says the bill’s lack of deadlines for its provisions make it difficult for agencies to plan and execute the assessments needed to create the required plan. NMED finds the lack of a definition for “meaningful access” troublesome:

Presumably, this would mean that agencies would provide translation, interpretation, or bilingual staff for each of its interactions with all individuals, which may include staff and the public. However, without specifics, this could vary agency by agency. Further, placement of these requirements in the Executive Reorganization Act is problematic. SB368 creates a non-discretionary duty which would require a party to seek a Writ of Mandamus in order to compel an agency that is not meeting its meaningful access responsibilities. However, a Writ of Mandamus is an extraordinary measure, and without further statutory direction, it is unlikely that a party could adequately demonstrate a clear and non-discretionary duty based on SB368’s current language. In other words, agencies do not have enough clear direction based on the current language to know for certain what they are required to do.

Existing Federal Standards. The U.S. Department of Health and Human Services, which sets the thresholds for language access for most public assistance clients, has four factors for determining if a state must accommodate a language other than English: the number or

proportion of those with limited English proficiency likely to be encountered, the frequency of those encounters, the importance of the benefit, and the resources available to the state provider of those services and the costs of interpretation or translation services. The Affordable Care Act requires providers to translate materials if more than 10 percent of the population living in the service area is literate and speaks the same non-English language.

Under federal rules, county election officials must provide access to ballots, voting instructions, online voting information, voter registration information, and other communications in a language other than English if more than 10 thousand people or 5 percent of all citizens speak the other language (or 5 percent of all residents on an Indian reservation) and the county has a higher illiteracy rate than the national average.

Based on data from the U.S. Department of Justice Civil Rights Division, New Mexico agencies receiving federal assistance should translate materials into Spanish, Vietnamese, Chinese, and Diné.² Anecdotal information suggests not all state agencies that receive federal funds are meeting this standard, although notably, federal guidance takes into consideration available resources for providing those language access services.

Access Rights. Language access is required by federal law as part of its efforts to protect against discrimination based on national origin. In addition, the New Mexico Constitution specifically protects the use of Spanish. The Public Health Division reported in its analysis of the original bill the Department of Health strives, not always successfully, to ensure its services are accessible to all New Mexicans:

[Department effort] includes providing resources and services for those who have limited English proficiency, such as materials translated into other languages and the availability of interpretation. However, given resource limitations, not every document or resource has been converted into other languages.

Nevertheless, PHD noted access is an issue of justice for certain populations:

Current literature suggests that linguistic justice is a form of empowerment to previously subjugated populations and that increased language services not only improve social determinants of health but improve health equity.³ By providing state services in languages previously unavailable, ostensibly more community members of color could participate in state agencies and enjoy greater economic status. [SB368 also] relates to antidiscrimination law, which was enacted to dismantle discrimination in public and private sectors in areas including employment, education, housing, public accommodation, voting and other class-structured systems. Lastly, Titles VI and VII of the Civil Rights Act of 1964 provide for anti-discrimination based on several factors and more courts are leveraging this law toward language equity.⁴

Further, access is a health issue, PHD argued:

The health impact of [SB368] could favorably impact the nearly 40% of New Mexico community members who currently speak a language other than English.⁵ Additionally,

² www.lep.gov/maps/lma2014/Final

³ *The Civil Rights of Health*, uclalawreview.org 2020

⁴ AmericanCivilLibertiesUnion.org

⁵ <https://www.nmhealth.org/about/asd/ohe/>

providing language services in languages other than English may reduce the impact of the social determinants of health by increasing health equity and advancing civil rights for minority populations.⁶

TRD also suggests the public benefits from improved access:

Accommodating State services and programs for individuals with limited English proficiency will increase public participation and knowledge. This measure has the potential to increase taxpayer participation, compliance and access to taxpayer benefits.

PERFORMANCE IMPLICATIONS

PHD reports SB368 aligns with its goals of expanding access, ensuring safe healthcare environments, and pursuing organizational excellence but might not be achievable with existing resources. In addition, the agency reports, “SB368 would further address the FY21-23 DOH Strategic Plan values of ensuring accountability, communication, and respect.”

NMED notes meeting the language access requirements of the bill could significantly slow agency processes:

For instance, NMED’s procedures often involve complex technical evidence that amounts to thousands of pages of information and testimony. Often NMED translates some of this information into Spanish, based on its assessment of the range of public participation. On occasion, NMED has used contractors to provide Diné and Vietnamese translations. However, if NMED were required to translate all documents into Spanish and other applicable languages, this would significantly slow the administrative process.

ADMINISTRATIVE IMPLICATIONS

SPO reports it will need to work with departments to rewrite the requirements for relevant job postings to include a language-proficiency preference and would have to “create a multilingual MCOP or pay differential, which would likely require a change to the State Personnel Board Rules.”

Advocates for the bill argue uniform requirements for language access services could improve agency administration by reducing ad hoc provision of translation and interpretation services, resulting in more efficient delivery of services. PHD seems to agree, including in its analysis of administrative impacts “enhanced processes for identifying material and services that needs translation, and a system for managing an increase in translation service requests.”

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB368 relates to HB225, which would clarify requirements for publishing Spanish-language legal notices and advertisements, and conflicts with SB112, which would also amend the Executive Reorganization Act.

⁶ *The Civil Rights of Health*

TECHNICAL ISSUES

NMDOT indicates the provisions of SB368/aSHPAC might be inappropriate in the Executive Reorganization Act.

The purpose of the Act is to provide a structure for the executive branch of state government. The Act provides limited guidance and context regarding budget and presentation before the legislature. SB 368, on the other hand, provides a detailed inclusion of operational mandates tied to one particular focal point that does not appear to correlate with any other part of the Act. For this reason, SB 368 might be more appropriately placed within another section of the NMSA.

In addition, the lack of concrete parameters on how to define the need for a specific language means SB368 is open to interpretation by those who must implement it. In addition, the bill includes an effective date but no deadline for implementing services, making it possible the legislation would never result in broader language access, as intended.

Further, SB368 assigns its responsibilities to secretaries, which would not capture all state agencies if that is the intent of the sponsor. For example, the Department of Military Affairs is led by an adjutant general. The Executive Reorganization Act specifies that secretaries are the lead administrator for departments but distinguishes departments from other units of government, such as administratively attached agencies and adjunct agencies.

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