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LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS
56th Legislature, 1st Session, 2023

Bill Number	<u>HB149</u>	Sponsor	<u>Lente</u>
Tracking Number	<u>.223850.2</u>	Committee Referrals	<u>HEC/HAFC</u>
Short Title	<u>Public Ed Dept. Native American Funding</u>		
Analyst	<u>Andrews</u>	Original Date	<u>1/31/2023</u>
		Last Updated	<u>2/2/2023</u>

BILL SUMMARY

Synopsis of Bill

House Bill 149 (HB149) establishes annual revenue for the tribal education trust fund proposed in [HB140](#) (if enacted), or for distribution to federally recognized Indian tribes, nations, and pueblos in New Mexico. HB149 requires the Public Education Department (PED) to calculate an amount which will be used for this purpose that is equal to the voter-approved additional distribution from the land grant permanent fund (LGPF) for K-12 education, proportionate to the share of Native American students in New Mexico. HB149 provides for this amount to be included in the PED budget.

The effective date of this bill is July 1, 2025.

FISCAL IMPACT

This bill does not contain an appropriation.

HB149 requires PED to budget an amount for tribal education that is equivalent to the additional 1.25 percent distribution from the LGPF approved by voters in November 2022, proportionate to the share of Native American students. Forty percent of this LGPF additional distribution was earmarked for K-12 education, currently valued at \$96.1 million according to the New Mexico State Investment Council. As data from PED for FY23 shows Native American students make up 10.3 percent of the total student population (33,644 Native American students out of 327,562 total students), this may result in an initial appropriation of approximately \$9.9 million in FY25, based on the year-end balance of the LGPF used to determine distributions for FY24. Future allocations from the LGPF will be dependent on the year-end balance of the fund which may fluctuate.

It is important to note these figures are only inclusive of Native American students in public schools, and it appears the legislative intent of this bill is to include Native American students statewide (including private, homeschool, tribally-controlled schools, Bureau of Indian Education schools, etc.). If including all public and non-public Native American students, the proportion of Native American students will be higher than the 33.6 thousand in public schools and the initial

distribution will be higher than the approximately \$9.9 million in FY25 referenced in this analysis. As noted in the Legislative Finance Committee (LFC) analysis, the bill’s formula does not clarify whether the total number of Native American students should include individuals in nonpublic schools, despite the denominator of the ratio only including public school students.

It is also important to note that while the legislative intent of this bill is for PED to budget an amount for tribal education that is equivalent to the additional 1.25 percent distribution from the LGPF for K-12 education proportionate to the share of Native American students statewide, however, as HB149 is currently written, this is unclear (see **Technical Issues**).

SUBSTANTIVE ISSUES

HB149 seeks to address issues raised in the consolidated *Martinez* and *Yazzie* education sufficiency lawsuit by providing a dedicated revenue source for the tribal education trust fund proposed in [HB140](#) (if enacted), which provides funding to increase the role New Mexico’s tribes, nations, and pueblos have in the education of Native American students.

Tribal Remedy Framework. The report [Pathways to Education Sovereignty: Taking a Stand for Native Children](#) presented by the Tribal Education Alliance (TEA), which builds upon the [Tribal Remedy Framework](#) by taking the recommendations made by tribal leaders and community members in response to the *Martinez* and *Yazzie* court ruling and describes how New Mexico’s tribes, nations, and pueblos can reclaim education of their children, proposes “shared responsibility and increased tribal control over the schooling of Native children” as the first of three strategic solutions to address historical injustices and ensure equitable outcomes for Native American students. HB149 is in alignment with this strategic solution presented by TEA by providing annual funding for tribal education.

TEA notes that HB149 [identifies a regular revenue source for tribal education](#) as state lands generate a billion dollars each year for education in New Mexico, yet none go to tribes, and is part of the tribal remedy framework.

Anti-Donation Clause. Provisions of this bill would allow New Mexico tribal governments to receive distributions from the tribal education trust fund while respecting the sovereign immunity and decision-making of a tribe to determine how funds will be used. While Section 14 of Article IX of the New Mexico Constitution, known as the Anti-Donation Clause, prohibits the state from making donations in aid of any person, association, or public or private corporation, there are four judicially recognized exclusions to the Anti-Donation Clause. These [include](#): 1) The donee is an arm of the state; 2) For revenue bond and lease financing; 3) If the donor [state] receives value; or 4) For just compensation. It appears the provisions in this bill that allow New Mexico tribal governments to receive distributions from the tribal education trust fund fall under one of the exclusion in which the donor [state] receives value. Multiple court rulings have determined that where a state entity receives value in exchange for funding, the state as not “pledge[d] its credit or ma[de] any donation to or in ad of [another] person...” This analysis sounds in contract law, where the receipt of consideration separates binding contracts from non-binding, donative promises.¹

¹ See *White v. Board of Educ. of Silver City*, 1938-NMSC-009, ¶ 31 (rejecting challenge because board of education “will get value received for every dollar put into the enterprise” of a bond issue to build a school to join state and local schools); *City of Gallup v. N.M. State Park & Recreation Comm’n*, 1974-NMSC-084, ¶ 9 (rejecting an anti-donation claim because, under agreement, state would receive title to 640 acres in Red Rock State Park, \$1.5M for construction, and maintenance and operation of the park for the life of lease contract with Gallup); *Pierce v. State*, 1996-NMSC001, ¶ 29 n.12 (rejecting challenge to statutorily conferred pension benefits because benefits are not a gratuity); *Treloar v.*

Outcomes for Native American Students. Historically, educational outcomes for Native American students have been consistently below their non-Native peers. According to the 2021-2022 Tribal Education Status Report, proficiency rates for Native American students were considerably lower than those of students of other ethnicities:

- In reading, half as many proficient Native American students were proficient compared to the percentage of proficient Asian American students;
- In math, one-fifth of Native American students were proficient; and
- In science, just under one-third of Native American students were proficient.

Research suggests that incorporating Native American languages and cultures into academic settings can improve educational engagement and outcomes, including improved retention, graduation rates, college attendance rates, and standardized test scores.

TECHNICAL ISSUES

The sponsor may want to clarify the formula on page 2 by changing “forty percent of additional distribution” to “K-12 additional distribution,” otherwise, HB149 can be interpreted as applying the 40 percent multiplier twice.

As noted in the LFC analysis, HB149 does not clarify whether the total number of Native American students should include individuals served in nonpublic schools, despite the denominator of the ratio only including public school students.

OTHER SIGNIFICANT ISSUES

In 2019, the 1st Judicial Court issued a final judgement and order in the consolidated *Martinez-Yazzie* education sufficiency lawsuit, finding New Mexico’s public education system failed to provide a constitutionally sufficient and adequate education for at-risk students, defined as English language learners, Native American students, students with disabilities, and students from low-income families. The court pointed to low high school graduation rates, low student test proficiencies, and high college remediation rates as indicators of how the state is not meeting its constitutional obligation to ensure all students are college, career, and civics ready. 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.

County of Chaves, 2001-NMCA-074, ¶ 32 (rejecting challenge to severance benefits because “severance pay is deemed to be in the nature of wages that have been earned”); State ex rel. Office of State Eng’r, et al. v. Lewis, et al., 2007NMCA-008, ¶ 51 (rejecting challenge to Pecos River rights settlement because, in exchange for funds, State received land and water rights, as well as settlement of claims in suit); cf. City of Raton v. Ark. River Power Auth., 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (Browning, J.) (“The Court does not believe that the Anti-Donation Clause is implicated when there is true consideration—money exchanged for real product. . . . The Court does not believe it should evaluate whether the agreement was a good or bad deal under the Anti-Donation Clause, but merely check for adequate consideration.”)

RELATED BILLS

Relates to HB140, Tribal Education Trust Fund, which creates a tribal education trust fund and provides a \$50 million initial investment with provisions detailing how investment returns on the fund would provide stable and consistent revenue for tribal education departments.

Relates to HB147, Indian Education Fund Distributions, which amends the Indian Education Act to designate 50 percent of funding from the Indian education fund to New Mexico tribes distributed via a weighted statutory formula.

Relates to HB148, Early Childhood Dept. Tribal Agreements, which requires the Early Childhood Education and Care Department to enter into intergovernmental agreements with Indian nations, tribes, pueblos, or tribal organizations to administer early childhood education and care programs using their own culturally and linguistically relevant standards, assessments, and evaluations.

SOURCES OF INFORMATION

- LESC Files
- New Mexico Attorney General
- Indian Affairs Department

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