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

Bill Number	<u>SB109</u>	Sponsor	<u>Brandt</u>
Tracking Number	<u>.223669.2</u>	Committee Referrals	<u>SEC/SJC/SFC</u>
Short Title	<u>Education Freedom Accounts</u>		
Analyst	<u>Hathaway/Estupiñan</u>	Original Date	<u>1/31/23</u>
		Last Updated	<u></u>

BILL SUMMARY

Synopsis of Bill

Senate Bill 109 (SB109) would enact the Education Freedom Account Act, which would create the education freedom account program within the Public Education Department (PED). The program would establish contracts between parents and the department to pay for private school and other eligible expenses by creating “education freedom accounts.” SB109 would also create a corresponding education freedom account fund as a nonreverting fund in the state treasury to operate the proposed program. SB109 establishes criteria for the accounts, establishes allowable uses of funds, creates administrative requirements for PED to operate the program and education freedom accounts, and requires the development of an education freedom review commission.

SB109 does not contain an effective date. If enacted, the bill would become effective June 16, 2023.

FISCAL IMPACT

SB109 appropriates \$100 million from the general fund to the proposed education freedom account fund to carry out the provisions of the Education Freedom Account Act. SB109 appropriates an additional \$580 thousand from the general fund to PED to administer the education freedom account program, both amounts for expenditure in FY24 and subsequent fiscal years. Any unexpended or unencumbered balances remaining shall not revert to the general fund.

LESC staff estimate the funds included SB109 would not be sufficient to cover the cost of education freedom accounts for all private school students. Staff estimate a cost ranging between \$108.7 million and \$367.5 million to fund the program. These figures assume every student currently enrolled in a private school would participate in the program, which is unlikely but not impossible. LESC staff also estimate PED may need funding to support administrative responsibilities at a cost of \$576 thousand.

SB109 would require PED to determine the amount each participating student is eligible to receive and for this amount to be equal to the average amount spent by school districts and charter schools

on public school students in the same grade, weighted by special education and at-risk program units, if applicable. The bill prohibits a participating student from receiving more than the student’s qualifying educational expenses, a term the bill defines (See “**Substantive Issues**”).

The lowest possible cost a student could generate would be \$5,972.69, which is the amount generated by fourth- to sixth-grade students attending schools that receive the lowest at-risk allocation. The highest cost generated by a student would be \$20,188.46, the amount generated by secondary (grades seven through 12) students that receive Class D special education services and attend a school with the highest at-risk index allocation.

[Data](#) from the National Center for Education Statistics shows in the 2018–2019 school year (most recent data available), New Mexico had 174 private schools enrolling 18,201 students. As shown in the table below, these 18 thousand students multiplied by the costs identified above result in a cost ranging between \$108.7 million to \$367.5 million.

Administrative Costs. As SB109 would require significant administrative responsibilities for PED, LEESC staff estimate an additional six FTE may be needed by the department. Six positions at an estimated cost of \$75 thousand each including a 1.28 multiplier for benefits results in an estimated cost of \$576 thousand.

Cost Estimates

	Per Student Cost	Total Assuming Full Enrollment (All Private School Students)
Low End (Grade 4-6 student, no special education units, lowest at-risk index district)	\$ 5,972.69	\$ 108,708,976.19
High End (Secondary student, Class D, in highest at-risk index district)	\$ 20,188.46	\$ 367,450,069.46
PED Staff (6 positions budgeted at \$75,000 + benefits at 1.28 multiplier)	\$ 576,000.00	

SUBSTANTIVE ISSUES

Operation of Proposed Program. The Education Freedom Account program would be created within PED and would allow the department, via signed contracts with parents of participating students, to pay for private school and other eligible expenses through “education freedom accounts.” Funds would be transferred from the created accounts by PED to qualified educational providers, as defined in SB109. Parents could make payments for the cost of education services not covered by an education freedom account, but would not be allowed to deposit personal funds into the accounts.

Per SB109, qualifying educational expenses include:

- Tuition and fees at a private elementary or secondary school;
- Tutoring services provided by a qualified person;
- Textbooks and other instructional materials, including hardware and software;
- Fees for nationally standardized assessments, advanced placement (AP) exam fees, and other assessments required by the education service provider;
- Tuition or fees for summer and after-school elementary or secondary programs;
- Public transportation to and from school; and
- Other educational charges approved by PED.

Per SB109, PED is required to approve an application for an education freedom account if:

- The parent submits an application in accordance with procedures established by the department;
- The student is deemed eligible;
- Funds are available for the program or the education freedom account; and
- The parent signs a contract with the department that agrees to various obligations including:
1) Providing an education in reading, language arts, mathematics, science, and social studies; 2) Not enrolling the student as a full-time student in a public school while participating in the program; 3) Using the funds only for qualifying education expenses; and 4) Complying with the rules and requirements of the program.

Student Funding through the SEG. The Public School Finance Act, enacted in 1974, created the state equalization guarantee (SEG) and sets out the “public school funding formula,” designed to equitably distribute state resources for operations of public school districts and charter schools. The number of units allocated for each student varies by grade, reflecting class size limits and program requirements.

ADMINISTRATIVE IMPLICATIONS

SB109 would require PED to:

- Accept applications on a rolling basis from eligible students and establish education freedom accounts for students who qualify for the program;
- Determine the amount each participating student is eligible to receive, which amount is equal to the average amount spent by school districts and charter schools on public school students in the same grade, weighted by special education and at-risk program units, if applicable; provided that a participating student shall not receive more than the student's qualifying educational expenses; and
- Make monthly deposits into each education freedom account.

After funds are deposited into a participating student's education freedom account, PED could contract for financial management services for those accounts.

Additional administrative requirements of PED would include:

- Maintaining an updated and publicly accessible list of qualified education service providers;

- Ensuring parents receive notice of allowable uses of education freedom account funds;
- Providing parents of students with disabilities with notice that participation in the program is a parental placement pursuant to the federal Individuals with Disabilities Education Act, along with an explanation of the rights that parentally placed students may possess under federal law and any applicable state laws and rules;
- Implementing a commercially viable, cost-effective and user-friendly system for processing payments for services from an education freedom account to an education service provider by electronic or online funds transfer;
- Implementing a commercially viable, cost-effective and user-friendly system as part of the same system that facilitates the electronic or online funds transfers, for parents to publicly rate, review and share information about education service providers;
- Suspending the eligibility of a parent or participating student in the event of misuse of education freedom account funds;
- Referring suspected cases of misuse of education freedom account funds to law enforcement if evidence of fraudulent use of education freedom account funds exist;
- Creating procedures to ensure that a fair process exists to determine whether a misuse of education freedom account funds has occurred;
- Creating procedures to ensure that a fair process exists to determine whether an education service provider may be barred from receiving payments from education freedom accounts; and
- Creating the "education freedom review commission" of nine voting members to assist the department in determining what expenditures meet the requirements to be considered qualifying education expenses under the act.

SB109 would require PED to compose and submit a report to the legislature and the governor by December 1 each year on the program and its participants. The bill requires that the report include:

- The number, grades and ages of participating students and where they attend school or receive other educational services;
- The geographic distribution of participating students by county; other demographic and economic data about participating students and parents;
- The number and locations of education service providers, the services they provide and the number of students they serve;
- The total amount of deposits into education freedom accounts and the cost of financial management contracts;
- The total expenditures for education service providers and the average cost of educational services being provided to participating students, by type of service and geographic region; and
- Other information requested by the legislature or governor and considered reportable by the department.

Overall, SB109 would place considerable administrative responsibilities onto PED that may require additional FTE to implement in ways that are aligned with the bill's intent.

OTHER SIGNIFICANT ISSUES

The Office of the Attorney General (NMAG) has indicated there are numerous provisions in SB109 that may present conflicts with the New Mexico Constitution. In its agency analysis,

NMAG referenced sections of the state constitution that it believes may be in conflict with the provisions of the bill. The office then references numerous legal cases that provide context for why those provisions of the bill may be in conflict with the state constitution.

Among the potential conflicts with the state constitution are:

- Article XII, Section 3 – By providing public money to private schools for educational purposes, SB109 may conflict with the constitution’s provision that, “no...funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school.”
- Article IV, Section 31 – While SB109 appropriates money to PED, it does not have absolute control over the funds, as it is required to deliver the funds to a qualifying private school. This may conflict with the constitution’s prohibition on appropriating money, “for... educational...purposes to any person, corporation, association, institution or community, not under the absolute control of the state.”
- Article IX, Section 14 – It is unclear whether the funds made available in education freedom accounts would constitute a “donation” and thereby violate the constitutional provision that the state shall not, “directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation.” Since the funds are given directly to private schools instead of the department retaining ownership of them, the office indicates the appropriation could be considered a subsidy for private schools.
- Article XII, Section 12 – If the bill were to divert funds from public schools, it may conflict with the constitutional provision requiring that the state provide a “uniform system of free public school schools sufficient for the education of, and open to, all of the children of school age in the state shall be established and maintained.”

NMAG ends its agency analysis by indicating the bill presents numerous and significant constitutional questions that are likely to produce a legal challenge.

NMAG also notes constitutional amendment in the form of a Joint Resolution could be an alternative that would avoid a number of the legal issues raised in its agency analysis.

SOURCES OF INFORMATION

- LESC Files
- Office of the Attorney General (NMAG)
- Public Education Department (PED)

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