

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: HB 74

52nd Legislature, 1st Session, 2015

Tracking Number: .197704.4

Short Title: Public Education Commission as Independent

Sponsor(s): Representative Christine Trujillo

Analyst: Kevin Force

Date: February 4, 2015

FOR THE LEGISLATIVE EDUCATION STUDY COMMITTEE

Bill Summary:

In order to establish the Public Education Commission (PEC) as a separate, independent entity from the Public Education Department (PED), HB 74 proposes to amend sections of the:

- *Public Education Department Act*;
- *Public School Finance Act*; and
- *Charter Schools Act*.

A section-by-section synopsis of HB 74 follows:

Section 1 amends the *Public Education Department Act* to:

- remove the PEC's administrative attachment to PED;
- stipulate that the PEC shall meet at least quarterly, *or* at the request of a majority of the members; and
- add new subsections to:
 - grant the PEC rulemaking authority, subject to approval by the Secretary of Public Education;
 - permit the PEC to employ staff, subject to the *School Personnel Act*, as needed to assist the commission in the execution of its duties, subject to appropriation by the Legislature;
 - direct the PEC to prepare an annual budget; and
 - require the PEC to report annually to the Legislature and the Governor:
 - the commission's policies and rules; and
 - any actions that the PEC took to grant, renew, or deny an application for a charter school.

Section 2 amends the *Public School Finance Act* to clarify that, for state-chartered charter schools, the state equalization guarantee (SEG) is the difference between the school's program cost and the 2.0 percent that is withheld by PED, on behalf of the PEC, for administrative services.

Sections 3 through 7 of HB 74 amend the *Charter Schools Act*.

Section 3:

- explicitly grants authority to the PEC to approve or deny applications for the establishment or renewal of state-chartered charter schools;
- requires the organizers of a proposed charter school to provide written notice of their intent to establish a school to both the commission and the local school board of the district in which the charter school is to be located;
- stipulates that no fees may be charged for the consideration of an application, either by the PEC or any other chartering authority;
- requires any member of a chartering authority to be furnished with the transcript, and other documents submitted for consideration, of a public hearing regarding charter school applications, before a decision is made on the disposition of the application; and
- requires the chartering authority to rule, in a public hearing, on an application by September 1 so long as it was submitted by the preceding June 1.

Sections 4 and 5 make minor clarifying amendments, while Section 6 strikes outdated language regarding the transfer to the PEC of a charter that a local school board granted before July 1, 2007.

Section 7:

- defines the “staff support” that the Charter Schools Division (CSD) is to provide to the PEC (limited to this section) as, “employees who are directed to perform duties as delegated to them by the commission in order to render technical assistance to charter schools and to assist the commission in the performance of its statutory duties”; and
- directs CSD to review, approve, and report to the PEC on state-chartered charter school budget matters.

Fiscal Impact:

\$1.1 million is appropriated from the General Fund to the PEC for FY 16, with unexpended or unencumbered funds reverting to the General Fund.

Fiscal Issues:

- Currently, PED, through the PEC's administrative attachment to the department, receives 2.0 percent of all state-chartered charter schools' SEG distributions to provide administrative oversight of state-chartered charter schools.
- As a consequence of this administrative attachment, PED is responsible for funding PEC meetings and member travel and per diem.
- While HB 74 makes no change to the actual distribution of SEG set-aside funding, it does clarify that PED is to withhold the 2.0 percent on behalf of the PEC.

- In addition to the set-aside withheld by PED for the commission, HB 74 appropriates \$1.1 million directly to the PEC:
 - allowing for the employment of staff, subject to the *School Personnel Act*; and
 - requiring the preparation of an annual budget.

According to PED:

- HB 74 provides the PEC with the 2.0 percent set-aside, of about \$2.3 million, in addition to the \$1.1 million appropriation, thus overfunding the PEC, to the detriment of the PED, on a recurring basis, for a three-year total of approximately \$6.9 million;
- the 2.0 percent set-aside is used by PED for activities related to the administrative support of charter schools, including:
 - support for the PEC;
 - staff and other expenses of CSD;
 - support for the General Counsel's office;
 - administrative oversight of charter school audits;
 - support for the PED reimbursement process; and
 - budget oversight;
- CSD currently leverages all divisions and bureaus at PED in order to oversee and support state-chartered charter schools;
- many of the responsibilities supported by the administrative set-aside are duties specifically reserved to the Secretary of Public Education by Article 12, Section 6 of the New Mexico Constitution;
- while the bill provides for the hiring of staff, many of the resources needed to support the efforts of the PEC are located at the department, and will remain there, as a subset of the overall support provided by PED to all public schools, including charter schools; and
- currently, the PEC is able to carry out its duties within the current budget, in a manner that funds all commission requests.

Technical Issues:

As noted in the Fiscal Impact Report offered by the Legislative Finance Committee:

- Section 1, Paragraph (G) of HB 74 directs the PEC to “employ staff,” subject to appropriation by the Legislature, while Section 7, Paragraph (A) directs the CSD to “provide staff support,” defined as employees directed to perform duties, as directed by the commission. The sponsor may wish to consider amending the bill so that staffing is the responsibility of just one party.
- Section 2, Paragraph (A) refers to the 2.0 percent withheld by PED *for the commission* (emphasis added), while Section 5, Paragraph (A) notes that the “chartering authority,” which does not include PED, may withhold the 2.0 percent. The sponsor may wish to consider clarifying which party properly withholds the 2.0 percent set-aside for program costs.
- The provisions of the bill appear to both appropriate moneys to the PEC from the General Fund, and emphasize that the moneys withheld by PED for administrative support of

charter schools is for the benefit of the PEC. The sponsor may wish to consider specifying one funding source for the commission, under the provisions of the bill.

Substantive Issues:

The provisions of HB 74:

- establish the PEC as a freestanding commission, able to seek funding from the Legislature;
- expressly grant the PEC rulemaking authority to carry out its duties, pursuant to the *Charter Schools Act*, but make the promulgation of rules contingent upon the approval of the Secretary of Public Education; and
- require the PEC to report annually to both the Governor and the Legislature on:
 - the commissions policies and rules; and
 - any actions the commission takes to grant, renew, or deny applications for a charter school.

PED notes that:

- HB 74 effectively creates a new and unnecessary state agency, in contravention to the Governor's commitment to smaller, more efficient government;
- the state constitution reserves to the Secretary of Public Education administrative and regulatory powers and duties, including all functions relating to the distribution of school funds and financial accounting for public schools, as provided by law,¹ potentially creating a conflict with the PEC where the commission attempts to execute provisions of the *Charter Schools Act* that are within the purview of the secretary;
- the current administrative attachment of the PEC to the department is consistent with best practices recommended by the National Association of Charter School Authorizers (NACSA); and
- implementation of HB 74 would necessarily include a gap in performance, as new staff hired for the PEC would require training in order to provide the necessary oversight and support.

Background:

The Legislative Education Study Committee (LESC) has maintained an interest in the PEC ever since the creation of the commission in 2003. Especially during the 2012 interim, the committee began to focus on the matters presented by HB 74 when the Chair and one of the members of the PEC presented a report to the LESL recommending some changes in the role and authority of the commission.

The report and commissioners' testimony focused on the role of the PEC as a chartering authority, with particular attention to appeals of the PEC's decisions. The PEC, this testimony explained, makes its decisions based on a thorough review of material and the recommendations of the CSD, which is under the control of the Secretary of Public Education. An applicant or

¹ See Article 12, Section 6(D), New Mexico Constitution.

charter school that objects to a PEC decision may appeal to the Secretary, creating a circuitous process, unlike the more appropriate appeal routes employed in other states.

A related issue, this testimony continued, is that the PEC bases its decisions in part on the members' understanding of certain terms used in law but not defined, such as "minimum educational standards" and "material violation" – terms that the Secretary defined differently in overturning three PEC decisions the PEC had made in 2010. This circumstance creates the dilemma of trying to abide by law without benefit of regulatory or other guidance from PED. The PEC has also been hampered by limited staffing and frequent turnover in the position of Director of the CSD, this testimony added.

Given these conditions, the commissioners requested that the LESC support legislation to make the PEC "an independent body with the authority to carry out all statutory duties and responsibilities, rule-making authority in the matter of charter schools, operational control of a dedicated staff sufficient to support the work of the Commission, and a line-item budget sufficient to accommodate the Commission's duties and responsibilities." The report and testimony also requested that law be amended to remove the Secretary of Public Education from the appeals process and suggested some alternative appeal routes.

During the 2013 Regular Legislative Session, the LESC endorsed and the Legislature passed HB 392, *Public Education Commission as Independent*, but it was ultimately vetoed by the Governor. While HB 392 contained many of the same provisions as the current HB 74, it also restructured the charter schools appeal process in several respects, largely removing the Secretary of Public Education from that process. Specifically, HB 392:

- stipulated that an absence of a ruling by the PEC on a charter application would constitute a final denial of the charter, which an applicant might then appeal;
- made a denial of an application by a local school board appealable to the PEC;
- directed that a final decision of the PEC might be appealed to the district court;
- permitted the PEC, on its own motion, to review a local school board's decision to grant or renew a charter to determine:
 - if the decision was arbitrary and capricious; or
 - the establishment or operation of the charter would:
 - violate state or federal civil rights laws;
 - violate any court order; or
 - threaten the health and safety of students in the district; and
- required the PEC, within 60 days, to review a local board's decision to deny, suspend, or revoke a charter when it received a notice of appeal from an applicant or governing body, and allowed the PEC to grant the appellant a charter, as a state-chartered charter school, if the commission found the local board's decision to be arbitrary or capricious, unsupported by evidence or in violation of law.

The Governor ultimately vetoed HB 392, citing in House Executive Message No. 38 concerns about:

- removal of the Secretary of Public Education from the chartering process potentially undermining separation of powers;
- interference with the secretary's ability to carry out the secretary's managerial and administrative duties, pursuant Section 9-24-8, NMSA 1979;² and
- the provisions making the PEC's lack of a ruling on a charter or appeal a de facto final decision, thus creating for the commission a sort of "pocket veto" of applications.

During the 2015 interim, the Legislative Education Study Committee's Charter School's Subcommittee reexamined the issues giving rise to HB 392 in light of its review of the *Charter Schools Act*. Attempting to address the Governor's concerns about that bill, among its other provisions, current HB 74:

- retains the secretary's role in the chartering and chartering appeals processes, consequently obviating the issue of the PEC's "pocket veto";
- makes any rules promulgated by the PEC contingent upon the secretary's approval; and
- requires annual reports by the PEC on its activities to both the Legislature and the Governor.

Committee Referrals:

HEC/HGEIC

Related Bills:

HB 19 *Charter School Educational Tech Equipment* (Identical to SB 8)

HB 253 *Charter School Facility 4 Year Plans*

HJR 4 *Board of Education & Superintendent, CA*

SB 8 *Charter School Education Tech Equipment* (Identical to HB 19)

SB 128 *Public School Capital Outlay Building Needs*

SB 130 *Public School Lease Purchase Act Definitions*

SB 148 *Charter School Responsibilities*

SB 236 *Charter School Lease Approval*

SB 257 *Charter Schools & Public Audit Changes*

SB 273 *Charter School Governance*

² "It is the secretary's duty to manage all operations of the department and to administer and enforce the laws with which he or the department is charged."