

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: HB 207

52nd Legislature, 2nd Session, 2016

Tracking Number: .202792.3

Short Title: Equal Educational Access Scholarship Act

Sponsor(s): Representatives Jane E. Powdrell-Culbert and David E. Adkins

Analyst: David Craig

Date: February 2, 2016

Bill Summary:

HB 207 creates the *Equal Opportunity Scholarship Act* to provide for tuition scholarship organizations (TSOs) to grant scholarships to low-income students to attend a New Mexico nonpublic elementary, middle, or secondary school, requires the Public Education Department (PED) to withhold state equalization guarantee (SEG) amounts from school districts and charter schools who have students withdraw pursuant to the *Equal Opportunity Scholarship Act* and allows up to \$5.0 million to be claimed in both income tax and corporate income tax credits for contributions to TSOs.

Fiscal Impact:

HB 207 does not make an appropriation.

Data is not available for the amount of students that would be eligible to attend a nonpublic school under the provisions of HB 207, making an estimate of the fiscal impact difficult. However, according to PED's 2014-2015 student nutrition data, there are currently 192,786 students eligible for free and reduced-fee lunch, or 57.4 percent of the student enrollment. If these students sought to withdraw from public schools to seek educational scholarships, PED would have to withdraw approximately \$6,416.56 per student from the corresponding public school. If all of these students withdrew, nearly \$1.24 billion would remain undistributed from the SEG and would be distributed back to the General Fund.

Alternatively, if both the full amounts of the individual and corporate income tax credits were taken in each fiscal year, up to \$5.0 million in revenue per year may not be collected in the General Fund. The \$5.0 million impact to the General Fund could be realized without a reversion of SEG funds to the General Fund, because there is no relationship between the tax credits sought from TRD and amounts withheld from public school's SEG. In addition, the nature of student mobility and prior year funding makes withdrawing SEG funds in the current year a challenge to administer, as eligible students may withdraw from one school district and reduce current year SEG when they attended a different school district in the prior year.

PED analyses from similar bills from previous years have noted that bills like do not tie its associated tax credits to the successful distribution of scholarships, but instead to the donations to TSOs to create those scholarships and this could have unpredictable and substantial impact on the General Fund dependent on the capacity and willingness of nonpublic schools to accept

scholarship recipients. PED has also indicated in the past that similar provisions to those contained in HB 207 will result in significant expenditures and potential full-time-equivalents (FTEs) related to administrative services for developing the method of qualifying for, reporting on, and accounting for and/or auditing TSOs and their scholarships.

The Taxation and Revenue Department (TRD) notes that forms, instructions, and documentation must be developed; requisite certificates must be designed and produced; and significant effort to update and upgrade IT systems and software is necessary. TRD estimates that up to three additional FTE will be required to capture, record, and manage the certificates and reports for this program.

At a Glance:

- HB 207 may allow some low-income students access to nonpublic schools they could not otherwise attend.
- HB 207 may have fiscal impact to the state's revenues.
- HB 207 will decrease school district and charter school funding.
- HB 207 may result in budget uncertainty for public schools.

Detailed Bill Provisions:

Effective July 1, 2016, and applicable for tax years beginning on or after January 1, 2017, HB 207 creates the *Equal Opportunity Scholarship Act* to provide for the creation, oversight and certification of TSOs. Under the provisions of HB 207, TSOs receive contributions from individuals and corporations to grant educational scholarship awards to New Mexico public school students who qualify for the federal free and reduced-fee lunch program. The educational scholarship awards will offset tuition costs of attending nonpublic schools that are chosen by the student's parents. Contributing individuals and corporations are allowed an equal educational access scholarship tax credit. TSOs distribute scholarship payments as checks mailed to a qualifying school each semester, and checks require dual endorsement by both the student's parent and the qualifying school.

HB 207 requires PED to certify a TSO after verifying documentation related to:

- the TSOs status as a federal tax exempt organization;
- its intent to award educational scholarships;
- awards being funded from contributions the TSO receives in the prior or current calendar year, or anticipates receiving in the current calendar year;
- at least 90 percent of contributions received during a calendar year being awarded;
- the average annual scholarship award to eligible students not exceeding 80 percent of a three-year rolling average of the final unit value multiplied by the quotient of the prior year's final membership units divided by the prior year's total membership used in the calculation of the final unit value;
- the TSO distributing the scholarship payments each semester;
- the educational scholarships being portable and used at any qualified school provided the scholarship is prorated;
- criminal background checks on all TSO staff and board members; and
- the TSO having in place systems of financial accountability, including an independent annual audit.

TSOs are required to provide to PED names and verification of eligible students who received scholarships to enroll in a nonpublic school for the new school year or semester. TSOs are required to ensure that nonpublic schools participating in the program:

- are in compliance with all health and safety laws or rules that apply to schools;
- do not discriminate in admissions on the basis of race, color, or national origin;
- ensure that every school employee with unsupervised access to students has undergone a background check;
- has no paid staff or board members who are also board or staff members of the TSO;
- gives enrollment preferences to eligible students who were enrolled in the prior year and their siblings;
- is a qualified school that fills available spots using a random selection process in instances where there are more applications than positions available to enroll.

TSOs must also report the following to TRD its name and address; the total number and dollar amount of all contributions and all educational scholarship awards issued during the prior calendar year; and the total number and dollar amount of educational scholarship awards issued during the prior calendar year. TSOs are required to provide a contribution receipt to each individual and corporate contributor. TSOs must also account for all copies of contribution receipts by maintaining a list by sequential number of the receipts identifying who the receipt was issued to, the amount and date of the contribution, and any other information deemed necessary by TRD.

PED is required to administer the *Equal Opportunity Scholarship Act* and to provide to TRD the name of each TSO after it completes the PED certification process. PED is also required to deduct a portion of a school district's or charter school's SEG equal to the factor of the prior year final unit value multiplied by the quotient of the prior year final membership units divided by the prior year total membership if a eligible student receiving an educational scholarship withdraws from that school district or charter school prior to the start of the school year. PED may not distribute these funds and is required to revert any remaining funds to the General Fund at the end of the fiscal year. PED is also required to deny, suspend or revoke the certification of a tuition scholarship organization if PED determines the organization has intentionally or substantially failed to comply with the requirements of the *Equal Educational Scholarship Act*, and notify TRD of any denial, suspension, or revocation.

The remaining sections of HB 207 allow contributing individuals or corporations to take an income tax credit for contributions to a tuition scholarship organization for up to 80 percent of total contributions, but not exceeding the lesser of \$10,000 or 50 percent of a taxpayer's total income tax liability for a taxable year, with a three-year carryover of any excess contribution amounts. Other provisions limit the maximum annual aggregate amount of equal opportunity scholarship income and corporate income tax credits to \$5.0 million, require applications for tax credits to be considered in the order received by TRD and require amounts over the limit shall be ordered by date of receipt and paid before any new tax credits are applied in the subsequent tax year.

Taxpayers must submit an application for the educational access scholarship tax credit on a form and in the manner provided by TRD, and TRD is required to develop a contribution receipt that request information needed by TRD to determine if a credit may be allowed. TRD is allowed to charge a fee not to exceed \$0.50 per copy to TSOs for the contribution receipts. HB 207 also sets up limitations on when a tax credit for a contribution may be

taken. TRD is required to compile two annual reports each for the individual and corporate tax credits present the reports to the Legislature's Revenue Stabilization and Tax Policy Committee and the Legislative Finance Committee (LFC).

Substantive Issues:

HB 207 indicates that only a qualified school may accept educational scholarship, and defines a qualified school as a nonpublic elementary, middle or secondary school located in New Mexico to which a parent has chosen to send an eligible student. HB 207 also requires schools comply with health and safety nondiscrimination and certain background check requirements. However, HB 207 does not provide a definition of nonpublic school, which may lead to questions regarding whether private, religious schools or other schools such as tribal schools would qualify. If the nonpublic schools include religious schools, the Legislature may wish to consider whether HB 207 complies with state constitutional prohibitions against the use of public funds or public support for private interests.¹ In addition, public schools are not considered a qualified school eligible to receive an educational scholarship, indicating that if a parent wanted to send a child to another public school the provisions of HB 207 would not apply.

In addition, provisions of HB 207 withdraw a portion of school district's or state-chartered charter school's SEG for each eligible student who withdrew from the public school to attend a nonpublic school. This portion of the SEG is to be retained by PED and reverted to the General Fund. Currently, many rural school districts are experiencing declining membership, impacting their operational funds. If these schools also have their SEG withheld, it is likely to increase an existing need for emergency supplemental funding. This would place PED in the position of reverting funds designated for the purpose of providing the state's share of the cost of an educational program to the General Fund at the same time increasing its supplemental funding to school districts for not having enough funds to provide an educational program. Though the proceeds of the educational scholarship award are portable between nonpublic schools, public schools would not be the recipient of any proportionate remaining educational scholarship award for a student that re-enrolls in a public school.

HB 207 requires PED to certify a TSO based on proposed criteria, much of which is historical in nature. For example, it is unclear how PED would certify documentation related to at least 90 percent of contributions received during a calendar year being awarded; the average annual scholarship award to eligible students not exceeding a maximum amount; the TSO distributing the scholarship payments each semester; the educational scholarships being portable; and the TSO having in place systems of financial accountability, including an independent annual audit for a TSO not yet in operation. In addition the certification process in HB 207 does not provide for a frequency of certification or recertification.

Provisions of HB 207 raise other questions about how the certification and administration of the *Equal Opportunity Scholarship Act* would be performed by PED. For example, HB 207 does not specify how often or what frequency PED is to certify or recertify a TSO. HB 207 also does not indicate any due process for a TSO that has its certification denied, renewed, or suspended; does not provide PED criteria for denial, revocation, or suspension; and does not indicate whether a TSO whose certification was denied, revoked, or suspended may reapply for certification.

Some of the requirements of HB 207 also raise questions about how a TSO will be organized. For example, the TSO is required to have a criminal background check for all board members

¹ See Article 4, Section 31; Article 9, Section 14; and Article 12, Section 3 of the New Mexico constitution.

conducted prior to certification, but the provisions of HB 207 do not require a TSO to have a board of directors. Similarly, the duties of the TSO appear to require significant oversight duties related to ensuring participating schools are in compliance with health and safety laws or rules, do not discriminate on the basis of race, color or national origin and that every school employee with unsupervised access to students has a background check. It is unclear how much staff a TSO would require to oversee and certify that qualified schools meet these requirements, or how the cost of this certification process would be balanced against other provisions of HB 207 that require a TSO to award 90 percent of all contributions received during a calendar year.

HB 207 requires TRD to compile and present two annual reports each for the individual and corporate tax credits present the reports to the Legislature's Revenue Stabilization and Tax Policy Committee and LFC. However, a similar annual report requirement is not made of PED to LESC. If LESC were to receive an annual report on the administration of the *Equal Opportunity Scholarship Act*, it may help monitor impacts to the public school funding formula and make recommendations for the state's education finance system.

HB 207 requires TRD to develop a contribution receipt that requests all of the information to determine if a credit may be allowed, and TRD may charge a TSO up to \$0.50 per copy. In contrast, other provisions of HB 207 indicate that TRD shall provide contribution receipts to a TSO after PED certification is complete. It is unclear whether TRD must provide contribution receipts if the TSO is unwilling to pay the fee.

In past analyses of similar bills, PED has noted that HB 207 defines an eligible student using household incomes qualifying for federal free and reduced-price lunches; however, new federal nutrition programs, including community eligibility provisions, are directly certified through SNAP/TANF and no longer require school verification of income.

The TRD analysis indicates that HB 207 does not address what TRD should do if the tuition scholarship loses its certification. TRD also indicates that a contribution receipt provided by the contributor would not be sufficient to contain all the information needed to determine if a credit may be allowed because some of the information is not readily available to the contributor. TRD also suggests references to auditor be changed to independent public auditor.

Technical Issues:

On page 5, lines 19 through 24 it is unclear whether the average annual scholarship award calculation is to be calculated on the three-year rolling average of the final unit value, or the three-year average of the product of the final unit value multiplied by the quotient of the prior year's final membership units divided by the final year's total membership.