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LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS
55th Legislature, 1st Session, 2021

Bill Number	<u>HB222/HAFCS</u>	Sponsor	<u>H AFC</u>
Tracking Number	<u>.220279.1</u>	Committee Referrals	<u>HEC/H AFC</u>
Short Title	<u>Special Education Ombud Act</u>		
Analyst	<u>Juliani</u>	Original Date	<u>3/3/2021</u>
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BILL SUMMARY

Synopsis of Bill

The House Appropriations and Finance Committee substitute for House Bill 222 (HB222/HAFCS) enacts a new law, known as the Special Education Ombud Act, establishing and providing duties for the Office of the State Special Education Ombud. The bill also amends the Developmental Disabilities Act, placing the Office of the State Special Education Ombud within the Developmental Disabilities Planning Council (DDPC).

FISCAL IMPACT

HB222/HAFCS does not contain an appropriation. The bill would entail costs to hire staff for the Office of the State Special Education Ombud, but it is unclear how many individual FTE this office would require to fulfill the provisions of the bill.

However, the Senate Finance Committee substitute for Senate Bill 377 as amended by H AFC includes a \$250 thousand appropriation to the DDPC from the general fund for FY22 for a statewide special education ombuds program, contingent on enactment of House Bill 222 or similar legislation of the first session of the fifty-fifth Legislature. Any unexpended balance of the appropriations remaining at the end of FY22 would revert to the general fund.

SUBSTANTIVE ISSUES

The Role of An Ombudsman. An ombudsman, or what the bill calls an “ombud,” is a designated neutral facilitator with authority and responsibility to provide confidential and impartial assistance in resolving grievances and disputes. Often known also as an advocate or mediator, an ombudsman investigates complaints, reports findings, and mediates fair settlements among individuals, groups of individuals, institutions, or organizations. Ombudsman offices have been established in numerous state, local, and federal governments, as well academic organizations and businesses as an independent and impartial organization to assist in obtaining resolution of conflicts or complaints.

State-Level Ombudsman Offices. Many states have in statute Children’s Ombudsman Offices, also known as Office of the Child Advocate, to represent the health and welfare of children. According to the National Conference of State Legislatures, 22 states have established a Children’s Ombudsman/Office of the Child Advocate to assist in providing oversight of children’s services. Another five states have a statewide ombudsman program that addresses the concerns of all governmental agencies, including children’s services.

The purpose, responsibilities, and duties of the Children’s Ombudsman Office vary by state, but in general, include:

- Investigating complaints from citizens and families related to government services for children and families;
- Providing a system accountability by recommending system wide improvements to benefit children and families;
- Protecting the interests and rights of children and families; and
- Monitoring programs, placements, and departments responsible for providing children's services.

Currently, New Mexico has one state level ombudsman office, pursuant to Section 28-17 NMSA 1978. Housed in the New Mexico Aging and Long-Term Services Department, this office is charged with helping residents of the state’s nursing homes and assisted living facilities by advocating for their rights, investigating complaints, and helping to resolve concerns. But none dedicated solely to the needs and concerns of children or students.

Special Education in New Mexico. In the consolidated *Martinez-Yazzie* education sufficiency lawsuit, the 1st Judicial District Court ruled the state failed to provide quality programs targeted to meet the specific needs of at-risk students, defined as economically disadvantaged students, English learners, Native American students, and students with disabilities. In New Mexico, 16.6 percent, or 57,417 public school students, were identified as having learning disabilities in 2020, higher than the national rate of 13.8 percent. Persistent gaps exist in academic outcomes between students with disabilities and their peers throughout the state. In FY19, the most recent year of statewide standardized testing, 12 percent of students with disabilities scored proficient in reading and 8 percent in math, compared with 34 percent and 20 percent, respectively, of general education students.

PED Oversight and Other Supports. PED’s Special Education Bureau provides fiscal oversight and support to assist school districts and charter schools in ensuring services are provided to students with disabilities. Much of this oversight involves technical assistance to help school districts and charter schools remain in fiscal and programmatic compliance in serving students with disabilities, support in providing behavioral intervention and mental health services, meeting personnel shortages, and building capacity to improve the delivery of student services. In 2020, PED hired a parent liaison, refined the alternative dispute process, established a parent training information center, and developed an autism portal on its website.

PED has noted the need for urgent action to better support students with disabilities, indicating, in particular, the necessity for more support from general education teachers, more timely student evaluations, more special education teachers, improved communication with parents, and a rejection of seclusion and restraint as behavior interventions. Nevertheless, problems persist in ensuring services for students with disabilities are reaching these students.

Concerns of Advocates and Parents. Advocates and parents have raised a series of concerns related to the services available to students with disabilities. Parents have described the state’s special education system as adversarial, lacking accountability, and in need of greater collaboration. The advocacy group, Disability Rights New Mexico, noted a fundamental failure of teachers and school administrators to understand students’ disabilities, citing a lack of training on how specific disabilities affect student learning. Parents have recounted their experiences trying to ensure their child receives appropriate services and encountering minimal oversight and roadblocks that prevent or delay delivery of these services as specified in the child’s individualized education plan (IEP).

Advocates and parents have offered a range of solutions, including more robust professional development, a more proactive PED role in building an infrastructure at the state level to support teachers in understanding students’ disabilities and providing appropriate strategies to serve students more effectively, employing more behavioral health professionals, eliminating the use of restraint and seclusion and the use of law enforcement or school resource officers as means of behavior management, and providing more meaningful transition services to support students’ post-secondary aspirations.

The Office of the State Special Education Ombud. HB222/HAFCS also amends Section 28-16A-5 NMSA 1978, known as the Developmental Disabilities Act, placing the Office of the State Special Education Ombud under the oversight of the state’s Developmental Disabilities Planning Council (DDPC). However, housing the office of the special education ombudsman within and under the oversight of the DDPC may call into question the neutrality and impartiality with which ombudsmen are typically expected to function.

Internal Structure: Developmental Disabilities Planning Council. DDPC is New Mexico’s statewide council created by the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, whose members are appointed by the governor and are charged with advocating for people with developmental disabilities. DDPC’s purpose is to identify the most pressing needs of people with developmental disabilities and develop innovative and cost-effective ways to meet these needs in ways that uphold the value of people with developmental disabilities.

HB222/HFACs authorizes DDPC to appoint the state special education ombudsman, who will head the office and supervise staff. The bill allows the state ombudsman to contract for services to assist the office in conducting its duties and allows DDPC to promulgate rules in accordance with the State Rules Act to carry out the provisions of the bill.

Duties of the Office. The duties of the Office of the State Special Education Ombud include:

- Identify, investigate, and resolve concerns pertaining to special education filed with the office by parents;
- Assist students and parents in protecting the educational rights of students, including assisting students and parents in IEP meetings or other proceedings pursuant to federal Individuals with Disabilities Education Act (IDEA);
- Inform students and parents about special education resources in their community;
- Ensure that students and parents have regular and timely access to the services provided through the office and that they receive timely responses from the office;
- Identify any patterns of concerns that emerge regarding special education services and educational rights and recommend strategies for improvement to PED;

- Collaborate with PED to ensure that all dispute resolution processes are available to students and parents, including the special education parent liaison, mediation, facilitated IEP meetings, state complaint and investigations, and due process hearings;
- Collaborate with the parent training information centers and protection and advocacy agencies to identify and report systemic issues to PED;
- Ensure office staff, contractors and volunteers are trained in appropriate laws, rules, and policies regarding special education, investigative techniques, and dispute resolution;
- Develop procedures for the certification of staff ombudsmen;
- Analyze, comment on, and monitor the development and implementation of federal and state laws, rules, policies and actions pertaining to students' rights with respect to the adequacy of special education services;
- Recommend changes to laws, rules, policies, and actions pertaining to the special educational rights of students;
- Facilitate public comment on proposed laws, rules, policies, and actions; and
- Provide information to public and private agencies, legislators, and other persons regarding the problems and concerns of special education services and make recommendations related to those problems and concerns.

Additionally, the Office of the State Special Education Ombud is to prepare an annual report that includes actions taken by the office; student and parental concerns, resolutions, and effectiveness of the resolution processes; recommendations for improving the quality of special education services and protecting students' educational rights; and policy, regulatory, and legislative recommendations to solve concerns, improve processes, improve quality of services, protect students' rights, and remove barriers to services.

Access to Student Records, Confidentiality, and Conflicts of Interest. HB222/HAFCS requires PED, a school district, or school to provide, on consent from the student or student's parent, the Office of the State Special Education Ombud access to student educational records to carry out the office's responsibilities. All student files and records maintained by the office, including student identity, are confidential and are not subject to the provisions of the Inspection of Public Records Act.

Analysis from the OAG indicated Section 6 of HB 222/HAFCS, granting the Office access "to the student's educational records from the [NMPED], a school district or a public school as necessary to carry out the [O]office's responsibilities," potentially violates the Family Educational Rights and Privacy Act, also known as the Buckley Amendment, protecting the privacy of a student's "education records" as defined in the Act.

LESC contacted the OAG for clarification regarding its concerns over confidentiality of a student's education records as defined in the FERPA. The OAG recognized Section 6 of HB222/HAFCS specifically states, "Upon request and with consent from the student or the student's parent, the office shall have access to the student's educational records..." and indicated its assertion above was merely a cautionary statement on the need for consent before access to student records can be granted, not an assertion of any illegality in the proposed bill.

HB222/HAFCS requires the DDPC to ensure no conflicts of interest exist for any person or their immediate family members involved in designating an ombudsman, nor for any employee or contractor of the office. Anyone serving as an ombudsman is prohibited from having an ownership or investment interest in, be employed by or manage, or receive any compensation from a public school providing special education services.

Notification. HB222/HAFCS requires every public school providing special education services to post a notice about the Office of the State Special Education Ombud containing a brief description of the office’s services provided and contact information in the school and on its website, if applicable. The bill also mandates every school providing special education services to distribute information regarding the office at the beginning of every school year, in addition to prior to the first IEP meeting of each school year.

Cases of Noncompliance. HB222/HAFCS requires DDPC to report to PED any incidences when a school district or charter school fails to comply with the provisions of the Special Education Ombud Act. The Office of the State Special Education Ombud must collaborate with PED to address concerns and to identify further appropriate actions to be taken in response to the report, which may include a corrective action plan or any other administrative action PED is authorized to take to ensure students receive the free and appropriate public education required by the *Individuals with Disabilities Education Act* and state law. The office must provide a letter to the concerned person explaining the actions PED will take in response.

The bill holds DDPC is to ensure adequate legal counsel is available and able to provide legal services to the Office of State Ombud. The OAG’s analysis of the original bill indicated its office currently provides legal counsel services to DDPC and expressed some uncertainty if the bill’s intent was for the OAG to provide counsel to or if the DDPC is to procure outside counsel services for the State Ombudsman.

ADMINISTRATIVE IMPLICATIONS

HB222/HAFCS would require significant collaboration between PED and the Office of the Special Education Ombud, including:

- the Office would collaborate with PED to ensure all dispute resolution processes are available to students and parents, including the special education parent liaison, mediation, facilitated IEP meetings, state complaint, and investigations and due process hearings;
- the Office would report systemic special education issues to PED;
- the Office would have access to the student’s educational records from PED, upon approved request and consent from the student or student’s parent;
- the DDPC would be required to report to PED the noncompliance of public school personnel or a contractor or volunteer of a school district or charter school who fails to comply with the provisions of this proposed act; and
- the Office would be required to collaborate with PED to access processes and resources to address special education services concerns and to identify further appropriate actions to be taken in response to the Office’s annual report.

OTHER SIGNIFICANT ISSUES

The United States Ombudsman Association has established a series of best practices to guide the work of ombudsmen. These guidelines include the following:

- An ombudsman should be independent – free from outside control or influence;
- An ombudsman should be impartial – treat all parties without favor or prejudice;

- An ombudsman should control confidentiality – having the privilege either to keep information related to a complaint or investigation confidential or to release such information; and
- An ombudsman should create a credible review process of complaints

According to PED’s analysis of the original bill, the department’s recent work to improve education for students with disabilities has included the following:

- In 2020, PED created the Special Education Working Group, which included partnering with the DDPC, the Early Childhood Education and Care Department (ECECD), Disability Rights New Mexico, legislators, regional educational cooperatives, Native American disability law experts, parents, teachers, and administrators. The Special Education Working Group was tasked with building transformative strategies to support students with disabilities and focused on the following topics pertaining to students with disabilities: behavioral needs, family advocacy and support, initial evaluation, educator training and support, and PED’s role within this structure.
- PED’s strategic plan highlights the department’s commitment to students with disabilities by focusing on job-embedded professional development, special education training for teachers to ensure they are prepared to support students with disabilities in the general education setting, increased family support and advocacy assistance, compliance monitoring and technical assistance, and improved data systems.
- PED’s Special Education Division (SED) is charged with leading the department’s efforts to provide a comprehensive state compliance, monitoring, dispute resolution structure, and professional development system for local educational agencies (LEAs) in their work with students with disabilities, some of which is similar to the provisions in HB222/HFACS tasked to the Office. For instance, the SED has established systems to ensure that IDEA, Part B requirements are based on data review and monitoring. Specifically, if an LEA reports data to the STARS system and the reported data does not align with IDEA, Part B or state requirements, then the LEA will receive a message that an error has been identified related to the data submission. The LEA is required to address the issues related to that data submission.
- PED’s Office of General Counsel (OGC) administers the dispute resolution process for mediation, state complaints, and due process hearings governed by the processes and requirements set forth in 6.31.2.13 of the New Mexico Administrative Code. PED contracts with independent mediators, state complaint investigators, and due process hearing officers who assist in conducting the required dispute resolution processes. The SED, in collaboration with the OGC, monitor the outcomes and implementation of the dispute resolution processes, as well as facilitate IEP meetings, provide mediation services, and hold due process hearings.

ECECD’s analysis of the original bill indicated the department administers the Child Care, Home Visiting, Head Start and New Mexico pre-kindergarten programs serving children from birth to five years of age, many of whom have a disability, delay, or established condition, or may have need to be referred for special education services. For preschool children, services are provided through an individualized education program and collaboration with local public schools and the child care provider or pre-kindergarten program is crucial. According to the ECECD’s analysis, the Special Education Ombudsman can serve as a resource to provide information and support to parents, children, and educators regarding special education rights and services.

RELATED BILLS

Relates to Senate Bill 346, Special Ed Ombud Act which establishes the Office of the State Special Education Ombud.

Relates to Senate Bill 289, Special Ed Division of Ed Dept., which creates a new Special Education Division and assistant secretary for special education within PED;

Relates to Senate Bill 319, School-Use of Restraint, which creates requirements for schools to follow in using restraint, while also prohibiting schools' use of seclusion.

SOURCES OF INFORMATION

- LESC Files
- Office of the Attorney General (OAG)
- Early Childhood Education and Care Department (ECECD)
- Public Education Department (PED)

RJ/mb