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FISCAL IMPACT REPORT

ORIGINAL DATE 2/28/21

SPONSOR HEC LAST UPDATED _____ HB 84/HECS

SHORT TITLE Native Language Education Program Unit SB _____

ANALYST Liu

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
At-Risk Indian Education Component		\$22,118.7 - \$44,237.4	\$22,118.7 - \$44,237.4	\$44,237.4 - \$88,474.8	Recurring	General Fund
Native Language Education		\$5,654.2	\$5,654.2	\$11,308.4	Recurring	General Fund
Total		\$27,772.9 - \$49,891.6	\$27,772.9 - \$49,891.6	\$55,545.8 - \$99,783.2	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB6, HB52, HB85, HB86, HB87, HB135, SB41, SB206, SB249, SJR8
 Duplicates Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files
 Legislative Education Study Committee (LESC) Files

Responses Received From

Indian Affairs Department (IAD)
 Public Education Department (PED)
 Attorney General's Office (NMAG)

SUMMARY

Synopsis of Bill

The House Education Committee Substitute for House Bill 84 creates new components in the public school funding formula that would allow public schools and tribal governments providing Indian Education Act programs to generate additional program units. The bill also allows tribal governments to generate bilingual multicultural education program (BMEP) units for Native American language program participants.

The bill requires PED to allocate state equalization guarantee (SEG) distributions to tribal governments pursuant to intergovernmental agreements, expended at the discretion of tribal

governments and tribal education departments (TED). PED must ensure funds are used for programs that meet Native student needs, as determined by each Indian nation, tribe, or pueblo. The bill further prohibits the state from waiving or restricting the sovereign immunity of a tribe. The effective date of this bill is July 1, 2021.

FISCAL IMPLICATIONS

The bill does not make an appropriation but changes the public school funding formula to make tribal governments eligible for SEG distributions. Absent an appropriation for the SEG distribution, this bill could transfer between \$28 million of SEG funding from public schools to tribal governments, depending on participation rates in Native language and Indian Education Act programs. The bill would further allow public schools providing Indian Education Act programming to generate an additional \$22 million in new units within the funding formula, which would dilute the unit value without an appropriation.

At-Risk Indian Education. Provisions of the bill allow school districts, charter schools, and tribal governments to generate 0.15 additional at-risk units for each Native American student if the district, charter, or tribal government provides Native American public school students services, programs, or activities pursuant to the Indian Education Act. The 2020 Tribal Education Status Reports (TESR) reported approximately 32.5 thousand Native American students enrolling in public schools during FY20. At the current unit value of \$4,536.75, the cost of these units could be up to \$22.1 million if public schools provide eligible programs and an additional \$22.1 million if tribal governments also provide these services. The HAFC substitute for House Bill 2 does not include funding for this formula component, which would effectively reduce funding for schools without Native American students and increase funding for schools with Native American students and tribal governments on a recurring basis, beginning in FY22.

Native Language Education. Provisions of this bill add a new formula factor for Native language education programs that will generate units based on the product of full-time equivalent student membership in Native language education programs and a cost differential factor of 0.5. LESC notes bilingual multicultural education programs (BMEP) enroll an average of 0.344 FTE statewide, and the 2020 TESR indicated 7,246 thousand Native American students participated in BMEPs in FY20. At the average statewide full-time equivalency, about 1,247 units would be generated for Native language education programs, not counting for new student participation. At the current unit value, the cost would be \$5.7 million. The HAFC substitute for House Bill 2 does not include funding for this formula component, which would effectively reduce funding for public schools and increase funding for tribal governments.

SIGNIFICANT ISSUES

On February 14, 2019, the 1st Judicial District Court issued a final judgment and order on the consolidated *Martinez v. New Mexico* and *Yazzie v. New Mexico* education sufficiency lawsuits and found New Mexico's public education system failed to provide a constitutionally sufficient education for at-risk students, particularly English learners, Native American students, and special education students. 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.

Tribal education departments. The bill defines tribal governments as any federally recognized Indian nation, tribe, or pueblo wholly or partially in New Mexico and TEDs as each tribal government's office that oversees education programs. The bill authorizes SEG distributions for tribal governments and requires PED to allocate funds to each TED based on intergovernmental agreements.

TEDs are federally and tribally funded executive branch agencies within sovereign tribal governments. The roles and responsibilities of TEDs vary according to each tribe's government, laws, and resources. TEDs are not schools but are the primary contact for their tribal governments regarding education policy issues. TEDs may be involved in curriculum development, teacher training, grant administration, student support services, advocacy, or other education initiatives. Because TEDs are part of sovereign nations, the Indian Education Act does not place any statutory requirements on them, but includes them among entities with which PED must collaborate on matters related to identifying educational opportunities for Native American students, including transitioning to postsecondary education.

Native Language Programs. Public schools currently generate funding for bilingual multicultural education programs (BMEP), which include Native American language programs in the funding formula. Provisions of this bill create a new Native American language program in the funding formula, which may result in redundant funding streams for Native American language programs – albeit potentially for programs provided through tribal governments.

According to the latest PED Bilingual Multicultural Education Report, roughly 22 percent of all Native American students in New Mexico participated BMEP in FY19. Over the past 6 years of available data, Native American participants in BMEPs decreased by roughly 1,400 (17 percent) from about 8,500 students in FY14 to 7,000 students in FY19. The decline in participation outpaces the decline in the Native American student population statewide (6 percent). Meanwhile, statewide student participation in BMEPs decreased by 6,800 students (13 percent) over the same timeframe, outpacing the 6 percent decline in the state's total Native American student population over the same timeframe.

The bill would add tribal community-based programming, such as afterschool extended learning and summer school, as an eligible at-risk service and requires all at-risk services to be community-based and culturally appropriate. IAD notes schools often do not have the expertise to build or teach culturally relevant curriculum for Native students. Since the effort to eradicate Native languages in Indian boarding schools, communities have been divided because of beliefs in what languages should be taught in schools. The bill would allow indigenous languages to be integrated into public school curriculum through TEDs and would give TEDs SEG funding to implement programs. Students from tribes, nations, and pueblos would have more access to their language and culture at institutions in their communities.

PERFORMANCE IMPLICATIONS

A 2021 LFC evaluation on implementation of the Indian Education Act found Native American students continue to perform well below peers on state and national measures of achievement, despite the availability of nearly \$147 million in state and federal funds at public schools and institutions of higher education for purposes aligned to the act. The report noted a history of understaffing at PED’s Indian Education Division, difficulties with funding utilization, challenges with local collaboration, and a lack of specific, targeted outcomes have resulted in a system that has not served Native American students in a comprehensive and coordinated manner.

The LFC evaluation found Native American student enrollment in public schools fell to 32.4 thousand students in FY19, an 8.5 percent decrease over the prior 5 years. Four-year high school graduation rates for Native American students increased to 69 percent in FY19, an 11 percentage point improvement over the prior 5 years, but still 6 percentage points lower than the statewide average of 75 percent. Similarly, Native American student reading and math proficiency rates improved marginally over the same period but remained below statewide averages. The evaluation noted, however, changes in high school graduation requirements (allowing alternative demonstrations of competency) likely contributed to increased graduation rates and changes to statewide standardize assessments (PARCC) complicated measures of progress in these areas.

Students from Native American communities participating in BMEPs are assessed for proficiency in Native American languages. According to PED, these beginning-of-year assessments are developed by each tribe or by Native American leaders and educators. The languages for which data are available are Jicarilla Apache, Keres, Navajo (Diné), Tiwa, Tewa, Towa, and Zuni. From FY14 through FY19, proficiency in Native American language assessments increased from 37 percent proficient in FY14 to 47 percent proficient in FY19. Over the same timeframe, the number of students tested in Native American languages decreased by 36 percent (2,700 students). Whether the increase in proficiency is due to the effects of educational programs or a smaller sample of students participating in assessments is unclear.

ADMINISTRATIVE IMPLICATIONS

Currently, Native American students are self-reported when parents or legal guardians register the student for public school. Additionally, if a Native American student is both Hispanic and Native American, the Hispanic indicator will override the Native American indicator in PED’s STARS student data system and the student will be identified as Hispanic. If the student is identified as at least three races, including Native American, the student will be identified as multicultural in the STARS system. PED would need to develop rules on determining which students are counted as Native American and update system processes to count Native American students as part of the 3-year average of the at-risk program unit calculation.

PED enters into intergovernmental agreements (IGA) with each tribe, nation, and pueblo on an annual basis. To date, 21 of the 22 tribes in the state have an IGA with the PED; the Navajo Nation is in the process of signing an IGA. If this bill is enacted, PED would consider multi-year IGAs with each tribe, nation, and pueblo for formula funding to reduce staffing time. However, PED would be required to enter into an IGA with each tribe, nation, and pueblo each year to determine the “program cost” agreed upon by the department and each tribe, nation, or pueblo. It is assumed the IGA between PED and each tribe, nation, and pueblo would include provisions related to audits of funds, similar to the audits conducted by the PED for school districts and charter schools.

PED would be required to ensure that resources linked to Native American students are used for school-based, community-based, or tribal government-based programs that meet Native American student needs, improve their achievement, and adhere to culturally appropriate methods determined by each tribe. The department currently conducts a student needs assessment, which is a requirement under the Indian Education Act, which aligns with provisions of this bill and could be accomplished with existing agency capacity.

DUPLICATION, RELATIONSHIP

This bill relates to House Bill 6, which eliminates the Impact Aid credit in the funding formula; House Bill 52, which establishes a bilingual multicultural education advisory council; House Bill 85, which appropriates funding to TEDs for operational expenditures and planning studies; House Bill 86, which appropriates funding to tribal libraries and broadband projects; House Bill 87, which appropriates funding to Native American programs at higher education institutions; House Bill 135, which requests the development of an at-risk index in the funding formula that uses student demographic factors; Senate Bill 41, which eliminates the Impact Aid credit in the funding formula; Senate Bill 206, which appropriates funding for afterschool programs; Senate Bill 249, which eliminates the Impact Aid credit in the funding formula; Senate Joint Resolution 8, which provides an additional statewide property tax for SEG distributions.

Provisions of this bill duplicate existing appropriations for Native American language programs, such as BMEP funding in the formula, Indian education fund distributions, and PED initiatives. PED allocates funds from the Indian education fund to tribes, nations, pueblos, school districts, and charter schools related to tribal language programs annually. According to the 2020 TESR, PED allocated approximately \$1.9 million in grants to tribes, nations, and pueblos for tribal language programs. Specifically, grants were awards to tribes, nations, and pueblos to develop programs in at least one of four the following priority areas: (1) college, career, and life readiness; (2) culturally and linguistically responsive education and social and emotional learning; (3) culture and identity development; and (4) increasing access to Native American language programs.

TECHNICAL ISSUES

Provisions of this bill would allow tribal governments to receive distributions from the public school fund but prohibit the state from waiving or restricting the sovereign immunity of a tribe. However, the public school fund includes distributions from the permanent school fund for common schools, which is appropriated to the SEG distribution. According to a 2012 NMAG opinion, Section 3 of Article XII of the New Mexico Constitution and the anti-donation clause prohibit the indirect or direct transfer of land grant fund distributions to private, sectarian, or denominational schools not under the exclusive control of the state. Such a scheme would circumvent the prohibitions of the enabling act and state constitution.

Although multiple court rulings and NMAG opinions have allowed distributions of the permanent school fund for various direct and indirect uses (such as supporting school construction on tribal lands or providing instructional materials to private schools), the rulings primarily affirm the state has exclusive control over any funding disbursed directly or indirectly from the permanent school fund. As such, provisions of this bill that waive the state's ability to control SEG distributions to tribal governments conflict with this constitutional requirement.

OTHER SUBSTANTIVE ISSUES

A PED analysis of a similar bill notes that traditionally state aid formulas have not had characteristics that consider classification into a racial subgroup. This is because the U.S. Supreme Court has established a doctrine of strict scrutiny around the use of race in state laws. To meet strict scrutiny, the state must demonstrate the use of race is narrowly tailored and the state has a compelling interest to consider race. As such, New Mexico would need to show a compelling state interest in linking funding to racial achievement gaps so narrowly tailored that it cannot be construed as having racial animus.

Generally, strict scrutiny also requires the state to show there is not efficacy in other race neutral proposals (i.e. that racial performance classification is a necessary addition and would significantly impact outputs of the model) and demonstrate the policy has a relationship to the numerical goals of the population (i.e. there is some relationship between a racial subgroup of students' performance and funding). The U.S. Supreme Court has only recognized policies that explicitly seek to remedy past discrimination as meeting the strict scrutiny standard, such as diversity policies in higher education. As such, many state aid formulas have relied on poverty indicators and economically disadvantaged status to address racial inequities as the two variables are strongly correlated.

A 2006 LFC evaluation recommended amending statute to allow TEDs to qualify as local education agencies (LEAs). In theory such categorization could increase the resources available to tribal education departments, including allowing them to access state equalization guarantee (SEG) formula dollars. While there are existing avenues for tribal governments to receive state funding, particularly via the Indian education fund, the Legislature has not enacted changes that would allow these entities to qualify as LEAs or receive state public education formula funds.

Doing so would require policymakers to consider a number of additional policy questions, including the extent to which state funds could duplicate existing sources of federal funds, how state funds would be distributed or expanded across 23 new LEAs, and how state content standards and accountability measures would apply to sovereign tribal governments. Additionally, including tribal governments in the funding formula would result in increased competition among school districts and charter schools for SEG allocations.

Provisions of the bill allow a school district, charter school, or tribal government to generate additional at-risk program units for Native American public school students if the public school or TED provides these students services, programs, or activities related to the systemic framework in the Indian Education Act. Although language in the bill notes these units for Native American public school students are “at-risk” program units, the computation is a fixed rate formula unrelated to any part of the current at-risk index or formula.

ALTERNATIVES

The HAFC substitute for House Bill 2 includes \$5.1 million for indigenous, multilingual, multicultural, and special education initiatives, \$3 million for Native American research and public service projects (RPSPs), and \$5.25 million for Indian education fund grants.

Additionally, House Bill 2 includes \$66 million in the base to eliminate the federal Impact Aid credit, which will substantially increase operational revenue for school districts with significant

numbers of students living on tribal land. Most Impact Aid funds, except for the additional payments for children with disabilities and construction payments, are considered general aid to the recipient school districts. These funds may be used in whatever manner the school districts choose, so long as it is in accordance with local and state requirements. Most recipients use funding for daily expenditures, but recipients may use the funds for other purposes such as capital expenditures. School districts are required by federal regulations to consult with tribal governments and parents under the Indian Policies and Procedures about how these monies are spent.

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