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FISCAL IMPACT REPORT

SPONSOR Sweetser/Dow/Zamora ORIGINAL DATE 2/13/21
/Montoya, RE LAST UPDATED 2/14/21 HB 213
 SHORT TITLE School District Special Ed Services Fund SB _____
 ANALYST Liu

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23		
	(\$0.0 - \$52,894.3)		Nonrecurring	Federal Funds

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$0.0 - (\$258,818.8)		\$0.0 - (\$258,818.8)	Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB6, HB84, HB116, HB135, HB266, SB289
 Relates to an appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files
 Legislative Education Study Committee (LESC) Files

Responses Received From

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

SUMMARY

Synopsis of Bill

House Bill 213 enacts a temporary provision requiring each school district to make monthly allocations to a special education services fund that equals

- 25 percent of the district's special education funding received through the state equalization guarantee (SEG) distribution, if the school district is operating in a hybrid model, or

- 50 percent of the district’s special education funding received through the SEG distribution, if the school district is operating remotely and not providing in-person special education services.

Money in the fund will be used to provide assistance and reimburse families who have paid out of pocket for special education services that are not provided by the school district.

The provisions of this bill would become effective on July 1, 2021, and would remain in effect until the governor terminates the statewide public health emergency declaration related to the Covid-19 pandemic.

FISCAL IMPLICATIONS

The bill does not make an appropriation but requires school districts to earmark up to 50 percent of special education funding from SEG distributions for a special education services fund. Provisions of this bill restrict uses of the fund to assisting or reimbursing families for out-of-pocket special education service costs, effectively barring the use of the funding for other purposes. The fiscal impact estimate in this analysis shows the full potential range of costs (i.e., all schools are in-person versus all schools are remote and not providing in-person special education services) and assumes the governor ends the public health emergency by the end of FY22.

Preliminary FY21 funding formula data shows the formula generated 114.1 thousand program units for special education. At the current unit value of \$4,536.75, approximately \$517.6 million of the statewide program cost (which is eventually computed to be SEG) is attributable to special education. Assuming all schools were operating remotely and not providing in-person special education services for all of FY22, the distributions to the special education services fund contemplated in this bill would total over \$258 million by the end of the fiscal year.

Provisions of this bill could impact school districts’ ability to meet expenditure requirements under federal special education law and place the state at risk of losing \$53 million in federal special education dollars. Part B of the federal Individuals with Disabilities Education Act (IDEA), which governs special education, includes a maintenance of effort (MOE) provision that requires states to maintain funding at the same level as the prior year. Locally, schools must maintain special education spending at the same level, with limited exceptions.

SIGNIFICANT ISSUES

On March 13, 2020, the governor ordered schools to close for three weeks, starting on March 16, in response to the Covid-19 pandemic. On March 27, the governor extended school closures through the remainder of the school year. Although PED provided guidance for schools to reopen in a remote or hybrid setting in September, the department limited in-person instruction to special education students, small school districts, and elementary grade levels. In January 2021, the governor authorized schools to reopen in February, and PED issued reopening guidance, which expanded reopening for secondary grade levels but required most schools to maintain hybrid models of instruction.

According to LESC, the U.S. Department of Education declined to issue waivers for IDEA requirements during Covid-19-related school closures and indicated schools must continue to provide students a free, appropriate public education, including compensatory services

(educational services determined by a student’s individualized education program). Remote learning presents many challenges for students with disabilities, who are more likely than their peers to fall behind academically, socially, and behaviorally without in-person support. PED recognized the risks online learning poses to students with disabilities by allowing school districts to provide students with disabilities in-person services in a 5-to-1 student-teacher ratio. Districts have taken advantage of this allowance unevenly, leading to disparities in services offered for students receiving special education services.

Recent declines in Covid-19 transmission and rollout of the vaccine may expedite the conclusion of the public health emergency; however, it is unclear when the governor would terminate the emergency declaration and allow school districts to return to full in-person learning environments.

Actual out-of-pocket costs for families of special education students is difficult to ascertain; however, earmarking SEG distributions into the special education services fund would effectively limit a school district’s ability to budget substantial portions of its operational revenue for other uses and likely result in reduced school expenditures. NMAG notes these reimbursements would qualify as public funds and would be subject to budget approval by PED and audit under provisions of the Audit Act. Provisions of this bill restrict reimbursements for out-of-pocket expenses to services outlined in a student’s individualized education program but do not necessarily require services to be rendered by a licensed practitioner. NMAG notes this may increase risks for abuse or litigation.

PERFORMANCE IMPLICATIONS

PED notes by the end of the 2020-2021 school year, the Covid-19 pandemic will have forced New Mexico’s schools to provide a mix of in-person and distance learning for more than an entire school year. Despite teachers’ best efforts, most research estimates students will be significantly behind where they would normally have been if able to attend full-time in-person school. A report from McKinsey & Company, for example, found students may lose between five and nine months of learning by the end of this school year. Students of color, the study found, may lose as many as 12 months of learning.

Two 2020 LFC evaluation reports reviewed the state’s education system during the Covid-19 pandemic and found lower student engagement with remote learning, disparities in student access to educational technology, and limited assessment of student performance. The reports found middle and high school students were failing remote classes at high rates, teachers could not find or reach approximately 1-in-5 students, and social isolation posed serious mental health risk to students and families. The reports found 47 percent of special education teachers were working remotely and in-person learning varied substantially by district.

ADMINISTRATIVE IMPLICATIONS

Provisions of this bill would require school districts to establish a special education services fund and establish new accounts and documentation processes to reimburse families from operational revenues. PED would need to promulgate regulations on allowable reimbursements and develop audit and budget approval procedures for fund transactions.

PED notes the bill could alter the budgeting process by requiring that school districts allocate a portion of their state special education funds for a restricted purpose, thus decreasing the flexibility

of the school districts in designing their budgets related to special education. This would impact school districts' MOE in terms of budgeting and expenditures, placing school districts and the department at increased risk of MOE noncompliance related to eligibility and compliance standards for MOE. Additionally, there is no certainty the allocated funds would be expended on the restricted purpose outlined in the bill. PED notes the bill does not contain an oversight, compliance, or monitoring component.

RELATIONSHIP

This bill relates to the SEG distribution appropriation in the General Appropriation Act. The bill also relates to House Bill 6, which removes formula credits in the funding formula for specific uses; House Bill 84, which transfers SEG funding to tribal education departments; House Bill 116, which includes ancillary personnel within the three-tiered licensure system; House Bill 135, which changes the at-risk index to include special education variables; House Bill 266, which changes requirements for special education teacher licensure; and Senate Bill 289, which creates a special education division within PED.

TECHNICAL ISSUES

NMAG notes the bill does not define the term “family.” A strict interpretation of the term might limit those able to submit for reimbursement to a student’s own parents or immediate family members, which raises issues for students who may be in the care of a nonfamily member. Alternatively, a broad interpretation could include in-laws, other blood relatives, etc., which raises the potential for fraudulent reimbursements to be sought by family members who are not the student’s parent or legal guardian or who are otherwise not financially responsible for the student.

NMAG notes the bill does not define “hybrid model.” The sponsor may wish to include a definition for clarity. Additionally, it is unclear whether the term “provide assistance” is different from “reimbursement” regarding uses of the special education services fund.

The bill’s provisions apply to school districts but not state-chartered charter schools. Section 22-1-2 NMSA defines a school district as an area of land established as a political subdivision of the state for the administration of public schools and segregated geographically for taxation and bonding purposes.

OTHER SUBSTANTIVE 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, English learner, Native American, 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 districts spent funds provided in a way that efficiently and effectively met the needs of at-risk students.

In FY21, the New Mexico Center on Law and Poverty, representing the *Yazzie* plaintiffs in the *Martinez-Yazzie* lawsuit, filed a new motion requesting further relief in the lawsuit for essential technology to at-risk students. The motion noted the state failed to provide students (particularly Native American students and students in rural districts) with reliable access to digital devices, high-speed Internet, and funding for district technical support and requested the court order the state to provide immediate funding for these purposes.

PED notes federal provisions relating to a free and appropriate public education (FAPE) and existing legal standards under federal and state laws could be negatively impacted for determination of when equitable relief, including reimbursement, is appropriate. The allocation of state special education funds, as set out in the bill, would potentially conflict with standards for reimbursement in existing law, IDEA, and state special education laws and rules, including with the processes for resolving issues related to the provision of FAPE.

Moreover, IDEA and state laws also include provisions related to when there is a concern a student is not being provided with FAPE. There are existing processes in place that allow for families who believe their student was not offered or provided with FAPE due to restrictions on in-person learning to seek and recover reimbursement for out-of-pocket expenses for special education services. Currently, these processes include individualized education program (IEP) meetings, mediation, state complaints, and due-process hearings. If reimbursement is considered appropriate under existing standards in the IDEA and state special education rules, the school district currently has the flexibility to use IDEA funds for this purpose.

Currently, IDEA and state special education rules contain a comprehensive administrative system for determining what special education services are required. In addition, there is a body of case law that has interpreted the standards for FAPE and the remedies appropriate for the failure to provide FAPE. PED notes this bill could negatively impact the detailed system that determines what special education services are required. The existing laws and rules require consideration of additional factors before an award of reimbursement is considered appropriate, which include among other things (1) review of the student's IEP, (2) communications with the parents, (3) what was offered and provided to the student in the form of remote special education and related services, (4) whether the parent accepted or rejected those services, and (5) whether what the school district offered did or could have provided FAPE to the student.

PED notes the bill could create a parallel right to reimbursement that could possibly only benefit some students. There is a concern the students who benefit from provision of this bill would be those from families who have more resources (income, insurance, etc) to enable them to secure private services for their children.

A 2015 U.S. Government Accountability Office report found some states and school district leaders reported the MOE requirement dampens innovation in special education. For example, school districts have no incentive to look for efficiencies in spending because they cannot actually reduce the amount of money they spend from year to year. Also noted in the report, there is no incentive to make short-term increases in spending – such as to launch a new initiative – because that increase will be required to be maintained annually. Thus, the MOE requirement for school districts has the potential to discourage innovation and efficiencies in special education.