

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the Legislature. LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

## FISCAL IMPACT REPORT

<b>SPONSOR</b> <u>Brandt</u>	<b>LAST UPDATED</b> _____
	<b>ORIGINAL DATE</b> <u>1/31/23</u>
<b>SHORT TITLE</b> <u>Education Freedom Accounts</u>	<b>BILL NUMBER</b> <u>Senate Bill 109</u>
	<b>ANALYST</b> <u>J. Torres</u>

### APPROPRIATION\* (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY23	FY24		
	\$100,580.0	Recurring	General

Parentheses ( ) indicate expenditure decreases.  
 \*Amounts reflect most recent analysis of this legislation.

Relates to Senate Bill 113

### Sources of Information

LFC Files

Responses Received From  
 New Mexico Attorney General (NMAG)  
 Public Education Department (PED)

No Response Received  
 Regional Education Cooperative  
 Albuquerque Public Schools (APS)

## SUMMARY

### Synopsis of Senate Bill 109

Senate Bill 109 appropriates \$100 million to a to-be-created education freedom account fund to pay private school tuition and \$580 thousand to the fund to be appropriated to the Public Education Department to administer the program.

Sections 1 and 2 include the name and definitions.

Section 3 permits PED to pay private schools for qualifying educational expenses on behalf of enrolled students through funds deposited in individual educational freedom accounts. It would do so after contracting with a student’s parents as to how the money was to be used.

Section 4 governs the freedom account application process.

Section 5 requires PED to perform various duties, investigate the misuse of funds, and create a disqualification process for service providers, parents, and students. PED has discretion to perform other tasks, such as contracting with private administrators, adopting rules, and requiring surety bonds.

Section 6 allows the department to create an application process for educational service providers. It also defines the relationship between the providers and the state.

Section 7 requires public schools to provide records when a student transfers to a private school.

Section 8 creates the nine-member education freedom review commission comprising five parents and four licensed educators. The commission determines qualifying educational expenses, provides recommendations, and plays a role in determining providers. The PED secretary appoints the commission.

Section 9 requires the department provide an annual report to the Legislature and governor by December 1 of each year.

Section 10 creates the education freedom account fund in the state treasury.

Section 11 appropriates the funding.

Section 12 contains a severability provision.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

## FISCAL IMPLICATIONS

The bill's appropriation of \$100.58 million is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of FY24 shall not revert to the general fund.

## SIGNIFICANT ISSUES

NMAG states:

New Mexico Constitution Article XII, Section 3, provides, “No ... funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school.” The bill's purpose in providing public money for private school education appears to conflict with this Constitutional provision on its face.

When interpreting Article XII, Section 3, *Moses v. Ruszkowski*, 2019-NMSC-003, 458 P.3d 406, held that using public funds to lend textbooks to private school students did not violate the provision. The Moses Court based its interpretation on the U.S. Supreme Court's interpretation of the First Amendment Free Exercise Clause in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). 2019-NMSC-003, ¶¶ 17, 46. The New Mexico Court did not articulate a clear rule, but held that loaning secular textbooks to private school students was permissible because it created a public benefit and “[a]ny benefit to private schools is purely incidental.” *Id.* ¶ 46.

NMAG also notes the bill’s potential conflict with the New Mexico Constitution’s Article IV, Section 31, Anti-Donation Clause, which forbids the appropriation of public money for educational purposes that are not under the absolute control of the state.

NMAG also raises concerns about potential violations of the New Mexico and U.S. Establishment Clause because the bill authorizes the state to fund private religious schools. Senate Bill 109 may be subject to an establishment challenge based on its language and purpose.

A proposed constitutional amendment to Article XII, Section 3, which would have allowed state funding of private schools, died during the 2022 legislative session.<sup>1</sup>

PED states:

The provisions of SB109 may violate the anti-donation clause of the New Mexico Constitution. Article 9, Section 14 of the constitution – the “anti-donation clause” – generally prohibits states, counties, school districts, and municipalities from making any donation or financial provision for any person or private enterprise, but provides for certain exceptions.

Article 4, Section 31 of the New Mexico Constitution also bars any appropriation for any charitable, *educational*, or other benevolent purpose to any person, corporation, association, institution or community, not under the absolute control of the state.

While the provisions of SB109 create an intermediary recipient, in the form of the Education Freedom Account Fund, the moneys held therein could still be disbursed to a private school not under the total control of the state, and thus would violate Article IV, Section 31.

## ADMINISTRATIVE IMPLICATIONS

NMAG expresses concern that Senate Bill 109 could face various legal challenges, posing an administrative and financial burden to the Public Education Department and NMAG

## TECHNICAL ISSUES

Due to the public/private nature of Senate Bill 109, administrative oversight of appropriated funding may be difficult.

PED states:

Section 3 Subsection H of the bill specifies that PED “shall revert unexpended or unencumbered balances every two years unless it waives the reversion of a specific education freedom account for extenuating circumstances.” The fund to which the dollars revert is not specified, but presumably would be the Education Freedom Account Fund. Also, it is not clear that the unexpended or unencumbered balances are those of a student’s specific education freedom account.

JT/al/hg/mg

---

<sup>1</sup> See Senate Joint Resolution 14.