

permitting, but not requiring APS to insure for after hours use of school facilities by private users.

The amendment removes the \$1 million per occurrence limit and clarifies that PSIA policy on the use of school facilities shall not intrude on the local school board's autonomy in selecting how, when and by whom the district's facilities are used.

The amendment strikes the appropriation.

SIGNIFICANT ISSUES

The New Mexico Public School Insurance Authority notes that removing the \$1 million per occurrence provision is problematic as it pertains to the Tort Claim Act. The amendment provides for NMPSIA to cover private actors (not public officials or employees). Those people do not have either the benefit of the immunities or cap on damages provided to public officials by the Tort Claim Act. NMPSIA has a duty to insure risk, including private individuals or organizations under the provisions of this bill and by removing the \$1 million cap NMPSIA could be responsible for unlimited liability for the actions of private individuals or organizations.

PROPOSED AMENDMENTS

NMPSIA suggest the following amendment for consideration by the Legislature:

Strike Senate Finance Committee Amendment #4.

Synopsis of SEC Amendment

The Senate Education Committee amendment to Senate Bill 226 adds provisions for school districts that do not participate in the New Mexico Public School Insurance Authority to establish policies regarding the private use of school facilities and gives these districts the option of insuring the district against damages related to the use of school facilities.

SIGNIFICANT ISSUES

It appears this amendment only applies to the Albuquerque Public School (APS) and by giving the district the option of insuring against damages related to the private use of school facilities while mandating the other 88 school districts to provide insurance causes a considerable inequity in how this statute is applied. Other than requiring APS to establish policies, this amendment may not be necessary unless APS is required to provide insurance as is required by all other school districts in the state.

Synopsis of the Original Bill

Senate Bill 226 appropriates \$200 thousand from the general fund to the Public School Insurance Fund to obtain insurance against claims arising from the use of school facilities by private persons.

SB226 provides for NMPSIA to promulgate rules to establish policies to be followed by participating members relating to the use of volunteers.

The bill also provides for NMPSIA to promulgate rules to establish policies to be followed by participating members relating to the use of school facilities.

The bill also provides for NMPSIA to provide insurance for participating members against bodily injury, personal injury, or property damage related to the use of school facilities by private persons.

The bill sets limits of \$1 million for each occurrence and provides that coverage will only apply if the participating member was following the policy adopted by NMPSIA.

FISCAL IMPLICATIONS

The appropriation of \$200 thousand contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2010 shall revert to the general fund.

According to the December 2008 revenue estimate, FY10 recurring revenue will only support a base expenditure level that is \$293 million, or 2.6 percent, less than the FY09 appropriation. All appropriations outside of the general appropriation act will be viewed in this declining revenue context.

The bill includes an appropriation to the PSIA fund of \$200,000 to cover the cost of this additional coverage. This amount is an estimate, but if statewide usage increases as a result of this bill, this amount may be inadequate. Also, then the Authority risk fund authorization in the General Appropriation Act would have to be increased by \$200,000.

SIGNIFICANT ISSUES

NMPSIA notes that historically, losses incurred for use of school premises by outside groups have averaged \$100,000 annually. Premiums for this additional coverage are estimated to cost between \$50,000 to \$100,000. It is difficult to accurately project the exact cost, as not all after-school use has been reported to PSIA by the districts and participation in the TULIP program has been low. There are a limited number of insurance companies interested in writing this coverage.

The bill resolves the issue of whether PSIA has the power to regulate use of school volunteers. The problem is some schools allow volunteers into schools and they obtain unsupervised access to children without making sure all volunteers are vetted through a process aimed at weeding out predators. This bill would allow PSIA to issue rules to require this.

The bill also resolves the issue of whether PSIA can insure against claims related to use of school facilities by private persons. It limits liability to \$1 million per occurrence and there is no coverage unless a PSIA member is following PSIA policy with respect to use of school facilities by private persons. Currently, schools may allow building use by outside groups and coverage is provided in one of two ways: (1) the school district is named as an additional insured on the user's policy, (i.e., Boy Scouts, Lions Club) or (2) limited additional premises liability insurance is provided through NMPSIA and billed to the user (called TULIP, or Tenant User Liability Insurance Policy). Examples of TULIP purchasers are private individuals requesting to use school facilities for wedding receptions or pot luck dinners.

Of concern is whether the cost of insurance for the use of school buildings after hours should be paid out of taxpayer money or should it be paid by the outside private users?

PERFORMANCE IMPLICATIONS

PSIA must amend its Memorandum of Coverage (MOC). Public hearings must be held to amend PSIA's Rules and Regulations with respect to policies governing volunteers and use of school facilities by private persons. This additional work would be absorbed by current staff. An estimate of \$5,000 is included in operating budget to cover any legal expenses involved in the Rule change and MOC change.

TECHNICAL ISSUES

The Attorney General's Office notes that subsections E and F require PSIA to promulgate a rule that establishes certain policies. However, under the State Rules Act [Chapter 14, Article 4 NMSA 1978], a rule is, among other things, "a statement of policy". What makes the referenced subsections unclear is that the bill makes policies—instead of the rule itself—to be distributed and posted. It should be the rule that is the document that is posted and disseminated since, pursuant to the State Rules Act, a rule *must be adopted* if an agency's requirements are intended "to affect persons not members or employees of such issuing agency."

PA/mt:mc