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LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS
56th Legislature, 2nd Session, 2024

Bill Number	<u>HB134/aHEC/aHAFC/aHF1#1</u>	Sponsor	<u>Lente/Allison/Little/Roybal Caballero/Johnson</u>
Tracking Number	<u>.226731.3</u>	Committee Referrals	<u>HEC/HAFC;SFC</u>
Short Title	<u>Tribal Education Trust Fund</u>		
Analyst	<u>Davalos</u>	Original Date	<u>1/24/2024</u>
		Last Updated	<u>2/10/2024</u>

**FOR THE INDIAN AFFAIRS COMMITTEE AND THE LEGISLATIVE EDUCATION
STUDY COMMITTEE**

BILL SUMMARY

Synopsis of HF1#1 Amendment

House floor amendment #1 to House Bill 134 (HB134/aHEC/aHAFC/aHF1#1) requires the Public Education Department (PED) to distribute annual funding from the tribal education trust fund to federally recognized New Mexico tribes, nations, and pueblos based on an equitable formula that considers the Native American student populations and tribal education capacity needs. The amendment specifies the beneficiaries of the tribal education trust fund would be New Mexico tribes and their respective students in New Mexico educational institutions. Distributions would be equal to 5 percent of the year-end market value of the fund for the preceding calendar year in FY26 through FY30, and 5 percent of the fund's five-year average market value for the preceding five years beginning in FY31 and each subsequent fiscal year. The amendment states the equitable formula would be "developed in a unanimous consensus process of consultation, collaboration and communication with New Mexico tribes."

HB134/aHEC/aHAFC/aHF1#1 also removes the \$100 thousand appropriation from the tribal education trust fund to PED that supported administrative costs such as staff salaries and expenses related to administering the tribal education trust fund.

HB134/aHEC/aHAFC/aHF1#1 would require each New Mexico tribe to report to PED their annual plan, including the tribes' annual spending report, impact assessment, and outcomes using tribally determine criteria as it relates to Section 22-23A-2 NMSA 1978 of the Indian Education Act.

Synopsis of HAFC Amendment

The House Appropriations and Finance Committee amendment to House Bill 134 (HB134/aHEC/aHAFC) removes the appropriation.

Synopsis of HEC Amendment

The House Education Committee amendment to House Bill 134 (HB134/aHEC) removes language specifying the disbursement of \$12.5 million from the tribal education trust fund to the Public Education Department (PED) but maintains a distribution of 5 percent of the average year-end market value of the fund for the preceding five calendar years. In addition, PED would implement a disbursement formula developed by the tribal education trust fund disbursement formula task force, rather than creating a disbursement formula in consultation with the task force.

The amendment also removes language specifying the number of members on the tribal education trust fund disbursement formula task force. Instead, the amendment would require the task force to be developed as a result of a convening between the Legislative Education Study Committee (LESC) and the representatives from each of the 23 sovereign Indian nations, tribes, and pueblos to put forward an equitable tribal representation on the task force. A consensus proposal on task force membership would be provided to LESC no later than September 1, 2024. LESC would transmit the proposal to PED, which would solicit and accept task force appointments.

Synopsis of Original Bill

House Bill 134 (HB134) would appropriate \$100 million to create a tribal education trust fund that would make annual distributions to each New Mexico tribe, nation, or pueblo to use for any purpose outlined in Section 22-23A-2 NMSA 1978 of the Indian Education Act or in an intergovernmental agreement (IGA) between a tribe, nation, or pueblo and the Public Education Department (PED).

HB134 would also create a tribal education trust fund task force within PED that would codify an equitable disbursement formula PED would use for the disbursement of the tribal education trust fund. HB134 stipulates the tribal education trust fund task force would be composed of 10 advisory members, including eight representatives from each Indian tribe, nation, and pueblo.

The tribal education trust fund would support New Mexico tribes, nations, and pueblos in sharing responsibility for the public education of Native American students in a manner compatible with tribal sovereignty.

The effective date of this bill is July 1, 2024.

FISCAL IMPACT

HB134/aHEC/aHAFc/aHF1#1 does not contain an appropriation. However, the House Appropriations and Finance Committee Substitute for House Bills 2 and 3 (HB2/HAFCS/aHF1#1) includes \$50 million from the general fund to the tribal education trust fund for expenditure in FY25, contingent the enactment of HB134/aHEC/aHAFc/aHF1#1.

PED would distribute annual funding from the tribal education trust fund to New Mexico tribes, nations, and pueblos beginning in FY26 in an amount equal to 5 percent of the year-end market value of the fund for the preceding calendar year in FY26 through FY30, and 5 percent of the fund's five-year average market value for the preceding five years beginning in FY31 and each subsequent fiscal year. PED would distribute these funds to New Mexico tribes, nations, and pueblos through an equitable formula that considers the Native American student populations and tribal education capacity needs.

A 5 percent distribution from the tribal education trust fund would be similar to the land grant permanent fund (LGPF), which has a distribution rate of about 6.1 percent, and the severance tax permanent fund with a distribution rate of 4.7 percent. A [report](#) by the Legislative Finance Committee noted to strengthen the state’s long-term financial stability, New Mexico can use current revenue strengths such as permanent funds, trust funds, and endowments.

SUBSTANTIVE ISSUES

HB134/aHEC/aHAFC/aHFI#1 creates the tribal education trust fund as a nonreverting fund to make annual disbursements for each federally recognized New Mexico tribe, nation, or pueblo to use for any purpose outlined in Section 22-23A-2 NMSA 1978 of the Indian Education Act or in an IGA between a New Mexico tribe, nation, or pueblo and PED. HB134/aHEC/aHAFC/aHFI#1 would also require each New Mexico tribe, nation, and pueblo to report to PED their annual plan, including the tribes’ annual spending report, impact assessment, and outcomes using tribally determine criteria as it relates to Section 22-23A-2 NMSA 1978 of the Indian Education Act.

HB134/aHEC/aHAFC/aHFI#1 would require PED to disburse 5 percent of the tribal education trust funds on July 1 each year to each New Mexico tribe, nation, or pueblo based on an equitable formula that considers the Native American student populations and tribal education capacity needs. The equitable formula would be developed by the full agreement of New Mexico tribes, nations, and pueblos by June 1, 2025. However, in the event of dispute regarding the formula, HB134/aHEC/aHAFC/aHFI#1 provides the option to appoint peacemakers. Further, New Mexico tribes, nations, and pueblos, and their respective students would be appointed the beneficiaries of the tribal education trust fund. The following table provides the number of students per tribal affiliation enrolled in pre-kindergarten to 12th grade within the second reporting period for school year 2022-2023 (SY22-23).

Native American Students per Tribal Affiliation

	Tribal Affiliation	SY22-23	
1	Acoma	685	1
2	Cochiti	189	2
3	Isleta	645	3
4	Jemez	492	4
5	Jicarilla Apache	592	5
6	Laguna	992	6
7	Mescalero Apache	663	7
8	Nambe	161	8
9	Navajo	26,677	9
10	Ohkay Owingeh	269	10
11	Picuris	34	11
12	Pojoaque	73	12
13	San Felipe	641	13
14	San Ildefonso	104	14
15	Sandia	54	15
16	Santa Ana	162	16
17	Santa Clara	137	17
18	Santo Domingo	905	18
19	Taos	255	19
20	Tesuque	51	20
21	Zia	162	21
22	Zuni	2,102	22
	Grand Total	36,045	

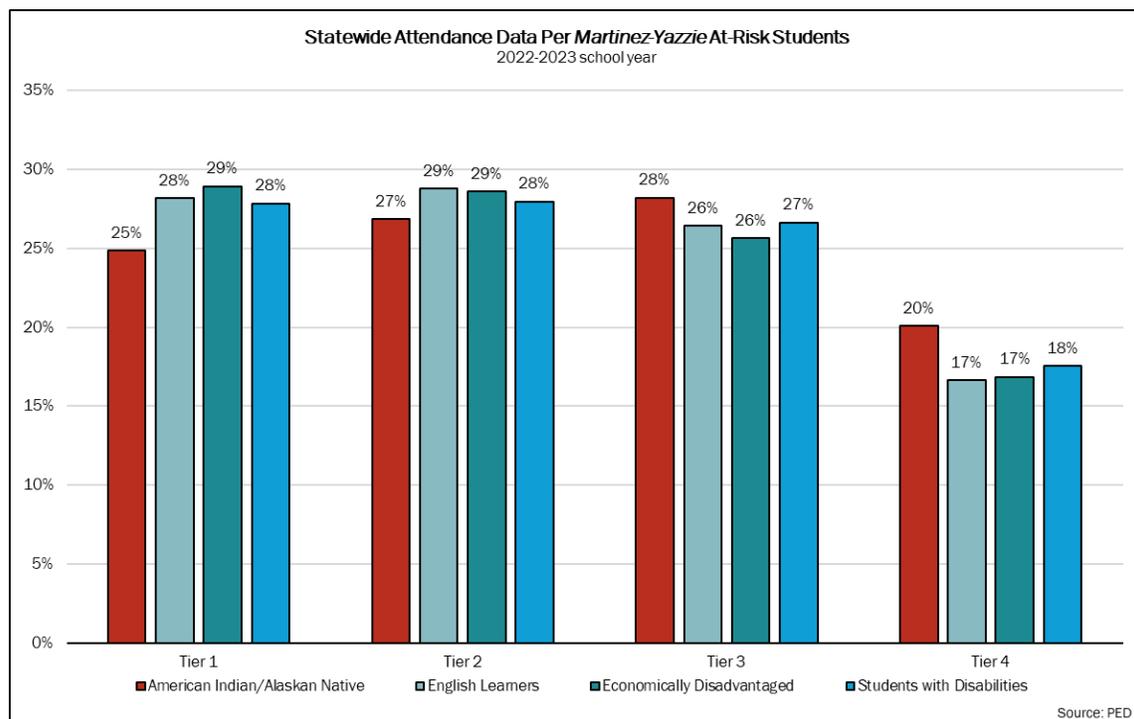
Source: PED

HB134/aHEC/aHAFC/aHFI#1 seeks to address issues raised in the consolidated *Martinez-Yazzie* education sufficiency lawsuit by providing consistent and predictable funding to increase the role New Mexico’s tribes, nations, and pueblos have in the education of Native American students. Increasing the role New Mexico’s tribes, nations, and pueblos have in the education of Native American students may lead to improved academic outcomes for Native American students as [research](#) has demonstrated the educational benefits of culturally based education.

Outcomes for Native American Students. Historically, educational outcomes for Native American students have been consistently below their non-Native peers. FY23 proficiency rates for Native American students were considerably lower than those of students of other ethnicities:

- In reading, 23 percent of Native American students scored proficient;
- In math, 13 percent of Native American students scored proficient; and
- In science, 20 percent of Native American students scored proficient.

Additionally, LESC [research](#) regarding student attendance found noticeable differences between at-risk students, as defined in the *Martinez-Yazzie* lawsuit, and the overall student populations in public schools. Consistent school attendance is intrinsically linked to student wellbeing and academic success—including school readiness, greater grade level retention, student engagement, academic achievements, and graduation rates. The table below shows the percentage of students who were deemed absent or chronically absent using the [PED tier system](#)¹, comparing Native American students to the other at-risk students. In contrast, for the 2022-2023 school year, Native American students were more likely to be chronically absent² compared to other at-risk students.



¹ **Tier 1:** Students who have missed less than 5% of classes for any reason. **Tier 2:** Students who are missing 5% or more but less than 10% of classes or school days for any reason. **Tier 3:** Students who are considered chronically absent and missing 10% or more but less than 20% of classes or school days for any reason. **Tier 4:** Students who are considered excessively absent and missing 20% or more of classes or school days for any reason.

² New Mexico state law defines chronic absenteeism as missing 10 percent or more of school days each academic year.

Available research suggests that incorporating Native American languages and cultures into academic settings can improve educational engagement and outcomes, including improved retention, graduation rates, college attendance rates, and standardized test scores.

Tribal Remedy Framework³. The Tribal Education Alliance produced the report, [Pathways to Education Sovereignty: Taking a Stand for Native Children](#) that builds upon the [Tribal Remedy Framework](#) by taking the recommendations made by tribal leaders and community members in response to the *Martinez-Yazzie* court ruling. The report describes how New Mexico’s tribes, nations, and pueblos can reclaim education of their children by proposing “shared responsibility and increased tribal control over the schooling of Native children” as the first of three strategic solutions to address historical injustices and ensure equitable outcomes for Native American students. HB134/aHEC/aHAFC/aHFI#1 is in alignment with this strategic solution presented by TEA by providing for capacity building within tribal education departments through recurring state funding for tribal education departments. As noted by TEA, a tribal education trust fund is a part of the tribal remedy framework that invests in strengthening tribal capacity to support Native American students and the schools that serve them.

Anti-Donation Clause. Provisions of this bill would allow New Mexico tribal governments to receive distributions from the tribal education trust fund while respecting the sovereign immunity and decision-making of a tribe to determine how funds will be used. While Section 14 of Article IX of the New Mexico Constitution, known as the Anti-Donation Clause, prohibits the state from making donations in aid of any person, association, or public or private corporation, there are four judicially recognized exclusions to the Anti-Donation Clause. These [include](#): 1) The donee is an arm of the state; 2) For revenue bond and lease financing; 3) If the donor [state] receives value; or 4) For just compensation. The provisions in this bill allow New Mexico tribal governments to receive distributions from the tribal education trust fund fall under one of the exclusions in which the donor [state] receives value. Multiple court rulings have determined that where a state entity receives value in exchange for funding, the state as not “pledge[d] its credit or ma[de] any donation to or in ad of [another] person...” This analysis sounds in contract law, where the receipt of consideration separates binding contracts from non-binding, donative promises.⁴ In addition, this bill allows PED to enter into IGAs with New Mexico tribes, nations, and pueblos; the Anti-Donation Clause does not forbid government entities from making transfers to other government entities.

ADMINISTRATIVE IMPLICATIONS

³ The Tribal Remedy Framework has been endorsed by the [All Pueblo Council of Governors](#), the [Jicarilla Apache Nation](#), the [Mescalero Apache Tribe](#), and the [Navajo Nation](#).

⁴ See *White v. Board of Educ. of Silver City*, 1938-NMSC-009, ¶ 31 (rejecting challenge because board of education “will get value received for every dollar put into the enterprise” of a bond issue to build a school to join state and local schools); *City of Gallup v. N.M. State Park & Recreation Comm’n*, 1974-NMSC-084, ¶ 9 (rejecting an anti-donation claim because, under agreement, state would receive title to 640 acres in Red Rock State Park, \$1.5M for construction, and maintenance and operation of the park for the life of lease contract with Gallup); *Pierce v. State*, 1996-NMSC001, ¶ 29 n.12 (rejecting challenge to statutorily conferred pension benefits because benefits are not a gratuity); *Treloar v. County of Chaves*, 2001-NMCA-074, ¶ 32 (rejecting challenge to severance benefits because “severance pay is deemed to be in the nature of wages that have been earned”); *State ex rel. Office of State Eng’r, et al. v. Lewis, et al.*, 2007NMCA-008, ¶ 51 (rejecting challenge to Pecos River rights settlement because, in exchange for funds, State received land and water rights, as well as settlement of claims in suit); cf. *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (Browning, J.) (“The Court does not believe that the Anti-Donation Clause is implicated when there is true consideration—money exchanged for real product. . . The Court does not believe it should evaluate whether the agreement was a good or bad deal under the Anti-Donation Clause, but merely check for adequate consideration.”)

HB134/aHEC/aHAFC/aHFI#1 would require logistical reporting between agencies from the following:

- **State Investment Council** HB134/aHEC/aHAFC/aHFI#1 would require a state investment officer to report quarterly each year to LESC, SIC, and any other appropriate interim committees on the investments made pursuant of the tribal education trust fund. However, according to SIC, the agency may need more direction regarding both a risk and return profile and an identifiable point of contact for the state investment officer for consultation. Considering the substantial differences in resources and beneficiaries between the tribal education trust fund and the LGPF, SIC suggests the trust fund may need to be invested with a different risk and return profile.
- **New Mexico Tribes.** New Mexico tribes would report to PED their annual plan, including the tribes' annual spending report, impact assessment, and outcomes using tribally determine criteria as it relates to Section 22-23A-2 NMSA 1978 of the Indian Education Act.
- **Public Education Department.** PED would report to LESC, any other appropriate interim committee, and the New Mexico tribes the total disbursements made pursuant to the tribal education trust fund for the previous fiscal year, a summary of tribal reports received, and a projection of available disbursements pursuant to the tribal education trust fund.

OTHER SIGNIFICANT ISSUES

Martinez-Yazzie Education Sufficiency Lawsuit. In 2019, the 1st Judicial Court issued a final judgement and order in the consolidated *Martinez-Yazzie* education sufficiency lawsuit, finding New Mexico's public education system failed to provide a constitutionally sufficient and adequate education for at-risk students, defined as English language learners, Native American students, students with disabilities, and students from low-income families. The court pointed to high school graduation rates, student test proficiencies, and college remediation rates as indicators of how the state is not meeting its constitutional obligation to ensure all students are college, career, and civics ready. 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.

RELATED BILLS

Relates to HB39, Yazzie Lawsuit Educational Funding, which would appropriate \$27.6 million to public postsecondary institutions and tribal colleges for educator workforce and school leadership development, culturally responsive health and wellness programs, cultural and curricular programs, and Indigenous college access initiatives.

Relates to HB135, Indian Education Fund Distributions, which amends the Indian Education Act to designate funds from the Indian education fund to New Mexico tribes distributed via an equitable formula that considers tribal needs and tribal size and includes both a base amount and a student count element.

SOURCES OF INFORMATION

- LESC Files
- State Investment Council (SIC)
- Indian Affairs Department (IAD)
- Public Education Department (PED)

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