

*SB144 has an emergency clause. If the bill receives a two-thirds vote in both chambers, it will take effect immediately on signature by the governor. If the bill passes by a simple majority, the bill will be effective June 18, 2021.

FISCAL IMPACT

The bill does not contain an appropriation.

If enacted, *SB144/aHEC would allow PSCOC to make awards to school districts and charter schools for physical hardware and educational resources for remote learning using a \$10 million annual amount set aside for the BDCP.

The bill also creates a new subsection of the Public School Capital Outlay Act allowing PSCOC to fund infrastructure to create regional education networks or a statewide education network. Funds for regional or statewide education networks would be limited to the same \$10 million set aside for the BDCP.

Given the expansion of the functions of the BDCP, the bill may dilute funding set aside for statewide broadband projects. However, in recent years, awards to construct broadband infrastructure have not reached the statutory \$10 million threshold.

Passed by Congress and signed by the president on March 11, 2021, the American Rescue Plan includes \$7 billion for the federal E-Rate program and expands the program to create flexibility for home connectivity for students and teachers. Federal E-Rate funds can cover as much as 95 percent of the cost of a broadband project funded through the BDCP (See **Substantive Issues** below). However, PSFA staff notes *SB144/aHEC/aHAFC or HB141 will need to pass to authorize the public school capital outlay council to make awards for home connectivity.

SUBSTANTIVE ISSUES

Funding for Remote Learning. *SB144/aHEC/aHAFC would expand the scope of PSFA's broadband deficiencies correction program to cover the cost of infrastructure and connectivity resources for remote learning. Since the onset of the Covid-19 pandemic, educators, administrators, and other stakeholders statewide have worked to close the digital divide by funding WiFi hotspots, personal devices, and even subsidized Internet connections. *SB144 would expand the use of the public school capital outlay fund to fund remote learning resources that could not be purchased during the pandemic using capital outlay funds.

Given a significant statewide effort by multiple stakeholders, it is unclear how many students still have insufficient Internet access. The New Mexico Homework Gap Team, a collaborative task force of the Public Education Department (PED), the Department of Information Technology (DoIT), PSFA, and several other state agencies and regional actors, noted in its December activity report the Broadband for Students initiative is now active and working to connect disconnected students. PED and DoIT have identified 20 thousand unserved students in serviceable areas and has offered projects to Internet service providers (ISPs) through an online marketplace. The public marketplace allows ISPs to compete to serve unserved locations, and potentially drives costs down.

As a result of cost-sharing and technical support from PSFA, BDCP has been widely regarded as a success. Data from PSFA suggest, for a modest state investment in broadband, schools have been able to leverage significant amounts of federal E-Rate funding to create new connections. Since the program’s inception in 2014, PSFA estimates nearly 100 percent of schools are connected to broadband Internet, and the average connection speed for New Mexico students has increased significantly over the past five years. However, due to the statutory limitations of BDCP and the federal E-Rate program, PSCOC determined the program could not be leveraged to provide direct connectivity to students to facilitate remote learning from home.

Funding and Outcomes of New Mexico Broadband Deficiency Corrections Program

	FY17	FY18	FY19	FY20	FY21 Est.
Total State Funding Awarded	\$1,286,745	\$2,861,472	\$1,673,403	\$1,789,269	\$1,832,000
Total Federal E-Rate Funding Leveraged	\$14,790,325	\$25,889,972	\$12,880,732	\$17,215,075	\$16,100,000
Number of projects	57	37	41	48	100
Percent of Schools with Broadband Connection	85%	89%	93%	97%	99.8%
Average Statewide Connection Speed (per student)	157 Kbps	245 Kbps	340 Kbps	457 Kbps	518 Kbps

Source: PSFA

Many state and federal initiatives have also provided funding and resources to expand student Internet access, raising questions about how much additional funding is necessary. PSCOC authorized \$200 thousand to contract with a broadband consulting firm to assist school districts and charter schools in identifying solutions to student connectivity issues. Additionally, DoIT was awarded a \$1.5 million grant from the U.S. Economic Development Administration to provide technical assistance for broadband development in partnership with local, tribal, and other government entities. However, it is unclear whether school districts and charter schools qualify for these funds.

The December 2020 federal Covid-19 relief package included a \$3.2 billion appropriation to fund a Federal Communications Commission (FCC) program for broadband access for low-income families. The program will provide \$50 per month to subsidize low-income households and \$75 per month to subsidize homes on tribal land. Additionally, the program would fund \$100 per household to purchase an Internet capable device. Funding will be distributed directly to ISPs to connect homes, meaning the responsibility lies with school districts and charter schools to reach out to low-income families and find solutions. The bill also included a \$1 billion appropriation to the federal tribal broadband fund to be distributed at the discretion of the National Telecommunications and Information Administration (NTIA), as well as a \$300 million appropriation for a grant program administered by NTIA to fund broadband in rural areas of the country. The program would issue grants fund partnerships between ISPs and state and local governments and would give priority to projects in rural areas of the country that reach a large number of unserved families.

Regional and Statewide Education Networks. Regional and statewide education networks can work to consolidate a state’s expertise to ensure every public school has access to a well-configured broadband network, reducing the demand for high-skill information technology officers in rural areas of the state. Evidence from two regional tech consortia in Northern and Western New Mexico suggests school districts that collaborate on connectivity and share resources and expertise successfully reduce their Internet costs and increase Internet speeds.

Provisions in *SB144/aHEC/aHAFC would allow PSCOC to fund infrastructure for regional and statewide education networks within the BDCP. However, it is unclear if PSFA has the capacity to manage a large-scale education network without additional resources. Testimony heard by LESC on September 28, 2020, from statewide education network executives in Utah and California suggests highly successful statewide education networks require significant manpower and resources to construct and maintain.

The Utah Education and Telehealth Network (UETN) was codified as an administrative arm of the University of Utah. UETN has an annual budget of \$53 million funded primarily through appropriations from the Utah State Legislature but also leverages federal E-Rate funds and other available grant funding. Staff at UETN conduct statewide needs assessments and engineer and maintain the network, but the state does not own the fiber, instead leasing the infrastructure from private ISPs.

Executives from California’s network, known commonly as “CENIC,” explained the network began as a collaboration among institutions of higher education in California, growing to encompass public schools and libraries in more recent years. Funding for CENIC comes from membership and service fees from individual “segments” of the network, including public schools, community colleges, California State University, University of California, and other offices connected to the network. Additionally, CENIC engages with private ISPs to execute new infrastructure projects funded by state and federal grant programs. Statewide education networks leverage economies of scale to improve access, fill gaps in technical expertise, and cut costs.

The Martinez and Yazzie Consolidated Lawsuit. The most recent plaintiff filing in the ongoing *Martinez-Yazzie* lawsuit argues at-risk students continue to lack access to technology and connectivity infrastructure, which they argue equates to a lack of access to a sufficient education during the Covid-19 pandemic. According to the plaintiffs, students in high needs areas of the state lack critical internet infrastructure and cellular service, requiring significant infrastructural investments that cannot be solved by piecemeal appropriations and uncoordinated state agencies.

Attorneys for the *Yazzie* plaintiffs specifically explain the state’s efforts, including the use of federal Governor’s Emergency Education Relief funds, the state’s efforts to expand broadband, and technical support provided to individual school districts, constitute a “patchwork” effort without a comprehensive systematic framework to target support to at-risk students. According to the plaintiffs, internet infrastructure development requires long term planning, coordination between multiple state agencies, targeted investments, and tribal consultation. The plaintiffs argue the state is best poised to conduct these functions, but it has not yet meaningfully done so.

While *SB144/aHEC/aHAFC devotes additional resources for student connectivity and internet infrastructure, it may not do so in a way that meets the plaintiffs’ expectations that the system be carefully designed and well-coordinated to target resources to areas of the state with the greatest need.

ADMINISTRATIVE IMPLICATIONS

Section 22-24-4.5 NMSA 1978 requires PSFA and PSCOC to adopt minimum adequacy standards for education technology infrastructure. If enacted, *SB144/aHEC/aHAFC may require PSFA and PSCOC to revisit the statewide adequacy standards, the minimum standards a school must meet to

be considered adequate for students' education, and author additional standards for effective educational technology infrastructure.

OTHER SIGNIFICANT ISSUES

The BDCP falls under an exception within the Public School Capital Outlay Act that allows dollars from the public school capital outlay fund to be used to make noncapital expenditures. Subsection B of Section 22-24-4 NMSA 1978 states “except as provided in subsections G and I through Q of this section, money in the fund may be used only for capital expenditures deemed necessary by the council for an adequate educational program.” The BDCP falls squarely within this exception under subsection M, which states “up to ten million dollars (\$10,000,000) of the fund may be expended each year for an education technology infrastructure deficiency corrections initiative pursuant to Section 22-24-4.5 NMSA 1978; provided that funding allocated pursuant to this section shall be expended within three years of its allocation.”

The Zuni Capital Outlay Lawsuit. *SB144/aHEC/aHAFC amends the Public School Capital Outlay Act, a section of law recently found by the 11th Judicial District Court to be unconstitutional. In December 2020, the court issued a ruling in the *Zuni* lawsuit, finding the Public School Capital Outlay Act, along with the Public School Capital Improvements Act, have exacerbated “gross disparities” between property-wealthy and property-poor school districts. The plaintiff school districts, now including only Gallup-McKinley County and Zuni, argue the school districts' lack of taxable property makes it impossible for the districts to fund “outside-of-adequacy” spaces freely available to property-wealthy school districts with enough local revenue to construct them independent of the PSCOC awards project.

The 11th Judicial District Court ruling, however, leaves policymakers without a clear understanding of why the systems were found unconstitutional. The ruling did not cite specific evidence of disparities in the capital outlay funding system and instead adopted wholesale the plaintiff's findings of fact, which contained inaccuracies and inconsistencies. Further, the court did not review appropriations and changes made to the capital outlay system during the 2019 and 2020 legislative sessions attempting to create greater equity. The Legislature has attempted to address the plaintiffs concerns by amending the state- and local-match calculation and appropriating \$53 million for outside-of-adequacy spaces in school districts receiving federal Impact Aid for Native American students, but these efforts were not mentioned in the district court's eight-page ruling.

On January 28, 2021, the Legislature and PSCOC's recent actions were submitted as new evidence in the lawsuit, along with a motion to reconsider and a request for a stay of judgment. The court will deliberate the motion; after the court's decision, the state will have an additional 30 days to decide whether it will appeal the ruling to a higher court. The Office of the Attorney General does not believe that the language in the judge's decision and order prohibit PSCOC and PSFA from awarding funds and continuing construction projects pursuant to the Public School Capital Outlay Act and Public School Capital Improvements Act, but pending a decision on the state's motion to reconsider, the Legislature will need to continue to focus on policy options and statutory changes that continue to provide for increased equity in the capital outlay system.

RELATED BILLS

Related to HB86, Native American Library, Internet, and Education, which makes several appropriations to New Mexico tribes, pueblos, and nations for Internet connectivity equipment.

Related to HB141, Ed Infrastructure Technology Definition, which also amends the definition of “education technology infrastructure” in the Public School Capital Outlay Act to include physical hardware and services for remote learning.

SOURCES OF INFORMATION

- LESC Files

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