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**LEGISLATIVE EDUCATION STUDY COMMITTEE**  
**BILL ANALYSIS**  
**56th Legislature, 1st Session, 2023**

<b>Bill Number</b>	<u>HB140</u>	<b>Sponsor</b>	<u>Lente/Romero, G.A./Martinez, JA/Roybal Caballero/Allison</u>
<b>Tracking Number</b>	<u>.223438.5</u>	<b>Committee Referrals</b>	<u>HEC/HAFC</u>
<b>Short Title</b>	<u>Tribal Education Trust Fund</u>		
<b>Analyst</b>	<u>Andrews</u>	<b>Original Date</b>	<u>1/25/2023</u>
		<b>Last Updated</b>	<u>2/16/2023</u>

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**FOR THE LEGISLATIVE EDUCATION STUDY COMMITTEE**

**BILL SUMMARY**

Synopsis of Bill

House Bill 140 (HB140) would create a tribal education trust fund and would include an initial investment of \$50 million from the public education reform fund with provisions detailing how investment returns on the fund would provide consistent and stable revenue for tribal education departments.

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

The effective date of is July 1, 2023.

**FISCAL IMPACT**

HB140 appropriates \$50 million from the public education reform fund to the tribal education trust fund for expenditure in FY24. Any unexpended or unencumbered balance remaining at the end of FY24 shall not revert to the public education reform fund.

Distributions from the tribal education trust fund would be made to PED and would be either \$2.5 million or 5 percent of the average of the year-end market values of the trust fund for the preceding five calendar years, whichever is greater. PED would then distribute these funds to New Mexico tribes, nations, and pueblos via a weighted statutory formula.

According to the State Investment Council (SIC), the tribal education trust fund will provide at least \$2.5 million annually to the PED to distribute to New Mexico tribes, and depending on the returns earned on the tribal education trust fund investment’s the distribution may be expected to increase. SIC notes any increase will be wholly dependent upon returns and cannot be predicted with certainty. SIC notes HB140 does not identify a risk return/profile for the tribal education trust fund, and should specifically identify an entity that will work with the SIO on behalf of PED and New Mexico tribes to maintain a proper risk profile for the tribal education trust fund (see **Administrative Implications**).

Beginning in FY25, 90 percent of distributions from the tribal education trust fund would be allocated equally to each tribe in New Mexico and the remaining 10 percent would be proportionally allocated to tribes based on the number of students from each tribe being served in New Mexico public schools. Mandating that 90 percent of the tribal education trust fund’s direct disbursements be allocated equally among the tribes enhances each sovereign entities’ ability to build capacity within their respective communities. Larger initial base allocations also increase the ability of smaller tribes to plan, build, and deliver integrated student supports, and tribal community-based networks. The following table provides an estimate for the tribal education trust fund distribution for each tribe, nation, and pueblo based on an allocation of \$2.5 million.

**Table 1. Estimates of Tribal Education Trust Fund Distributions**

Tribe, Pueblo or Nation	FY22 Student Count	Total Appropriation	\$ 2,500,000.00
	Total	Base Amount (90% of appropriation)	Weighted Amount per Student (10% of appropriation)
Acoma	683	\$ 102,272.73	\$ 4,795.94
Cochiti	187	\$ 102,272.73	\$ 1,313.09
Isleta	606	\$ 102,272.73	\$ 4,255.26
Jemez	465	\$ 102,272.73	\$ 3,265.17
Jicarilla Apache	611	\$ 102,272.73	\$ 4,290.37
Laguna	943	\$ 102,272.73	\$ 6,621.63
Mescalero Apache	637	\$ 102,272.73	\$ 4,472.94
Nambe	170	\$ 102,272.73	\$ 1,193.72
Navajo	26,591	\$ 102,272.73	\$ 186,718.82
Ohkay Owingeh	264	\$ 102,272.73	\$ 1,853.78
Picuris	35	\$ 102,272.73	\$ 245.77
Pojoaque	63	\$ 102,272.73	\$ 442.38
San Felipe	589	\$ 102,272.73	\$ 4,135.89
San Ildefonso	99	\$ 102,272.73	\$ 695.17
Sandia	55	\$ 102,272.73	\$ 386.20
Santa Ana	168	\$ 102,272.73	\$ 1,179.68
Santa Clara	126	\$ 102,272.73	\$ 884.76
Santo Domingo	859	\$ 102,272.73	\$ 6,031.80
Taos	274	\$ 102,272.73	\$ 1,924.00
Tesuque	53	\$ 102,272.73	\$ 372.16
Zia	162	\$ 102,272.73	\$ 1,137.54
Zuni	1,963	\$ 102,272.73	\$ 13,783.95
<b>Total</b>	<b>35,603</b>	<b>\$ 2,250,000.00</b>	<b>\$ 250,000.00</b>

**SUBSTANTIVE ISSUES**

HB140 seeks to address issues raised in the consolidated *Martinez* and *Yazzie* education sufficiency lawsuit by providing funding to increase the role New Mexico’s tribes, nations, and pueblos have in the education of Native American students. The Tribal Education Alliance (TEA) notes the intent of this bill is to support tribal-based education at the community level that complements what children are learning in school. 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.

**Tribal Remedy Framework.** The report [Pathways to Education Sovereignty: Taking a Stand for Native Children](#) presented by TEA, which builds upon the [Tribal Remedy Framework](#) by taking the recommendations made by tribal leaders and community members in response to the *Martinez* and *Yazzie* court ruling and describes how New Mexico’s tribes, nations, and pueblos can reclaim education of their children, proposes “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. HB140 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.

TEA notes that HB140 [invests in tribal capacity to provide culturally relevant programs and services for Native students](#) and is part of the tribal remedy framework.

**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. It appears the provisions in this bill that allow New Mexico tribal governments to receive distributions from the tribal education trust fund fall under one of the exclusion 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.<sup>1</sup> In addition, this bill allows PED to enter into IGAs with

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<sup>1</sup> 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-NMSC-001, ¶ 29 n.12 (rejecting challenge to statutorily conferred pension benefits because benefits are not a gratuity); *Trebar 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 a adequate consideration.”)

New Mexico tribes, nations, and pueblos; the Anti-Donation Clause does not forbid government entities from making transfers to other government entities.

**Outcomes for Native American Students.** Historically, educational outcomes for Native American students have been consistently below their non-Native peers. According to the 2021-2022 Tribal Education Status Report, proficiency rates for Native American students were considerably lower than those of students of other ethnicities:

- In reading, half as many proficient Native American students were proficient compared to the percentage of proficient Asian American students;
- In math, one-fifth of Native American students were proficient; and
- In science, just under one-third of Native American students were proficient.

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.

### **ADMINISTRATIVE IMPLICATIONS**

According to SIC, HB140 should be amended to specifically identify a risk/return profile or an entity that will work with the SIO on behalf of the PED and New Mexico tribes to maintain a proper risk profile for the tribal education trust fund. However, with HB140 as written, the State Investment Officer, with the approval of the SIC, would manage the tribal education trust fund in accordance with the Uniform Prudent Investor Act and would seek to ethically optimize risk-adjusted returns and grow the fund over time.

SIC notes that SIC does not currently have a “boilerplate” asset allocation for any fund, including the proposed tribal education trust fund, but it is a fair assumption that the new fund could/would be constructed in a manner similar to the Land Grant Permanent Fund or other funds managed by the SIC.

According to SIC, while HB140 would require additional time from investment and administrative staff at SIC, the additional resources required can be addressed through the SIO’s ordinary budgeting process.

According to PED, the department may need to hire an additional FTE to implement the provisions of HB140, and notes HB140 provides funding for this FTE.

### **TECHNICAL ISSUES**

PED notes Section 3 of HB140 appropriates \$50 million from the public education reform fund to the tribal education trust fund for expenditure in FY24 and subsequent fiscal years. However, the body of the bill only provides for expenditures and distributions from PED to the tribes, nations, and pueblos beginning in FY25. PED suggests amending Section 3 of HB140 to clarify that the moneys are appropriated for expenditure in FY 25 and subsequent years. Alternatively, the sponsor may wish to consider making distributions to tribes, nations, and pueblos available beginning in FY24.

### **OTHER SIGNIFICANT ISSUES**

In 2019, the 1<sup>st</sup> 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 low high school graduation rates, low student test proficiencies, and high 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 HB147, Indian Education Fund Distributions, which amends the Indian Education Act to designate 50 percent of funding from the Indian education fund to New Mexico tribes distributed via a weighted statutory formula.

Relates to HB148, Early Childhood Dept. Tribal Agreements, which requires the Early Childhood Education and Care Department to enter into intergovernmental agreements with Indian nations, tribes, pueblos, or tribal organizations to administer early childhood education and care programs using their own culturally and linguistically relevant standards, assessments, and evaluations.

Relates to HB149, Public Ed Dept. Native American Funding, which establishes a regular funding stream for tribal education which would flow into the tribal education trust fund.

Relates to HB198, Career Tech Funds for Indian Ed Schools, which would allow federal Bureau of Indian Education secondary schools to apply for and receive funding from the career technical education pilot.

Relates to HB280, American Indian Ed Tech Assistance Centers, which requires the Higher Education Department to establish two American Indian educational technical assistance centers to serve all American Indian students and federally recognized Indian nations, tribes, and pueblos in New Mexico.

### **SOURCES OF INFORMATION**

- LESC Files
- Indian Affairs Department
- State Investment Council
- New Mexico Attorney General
- Department of Health
- Public Education Department