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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/28/10  
 LAST UPDATED 02/17/10    HB 24/aHJC/aSFI#1

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SHORT TITLE Educational Opportunity for Military Children    SB \_\_\_\_\_

ANALYST Hoffmann

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to House Bill 21

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$5.2	\$5.2	\$10.4	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

LESC Files

Dale M. Vande Hey, contractor with the Department of Defense State Liaison Office

#### Responses Received From

Department of Finance and Administration (DFA)

Public Education Department (PED)

#### No Response From

Veterans' Services Department (VSD)

Department of Military Affairs (DMA)

### SUMMARY

#### Synopsis of Senate Floor Amendment #1

Senate Floor amendment number 1 makes the following changes to the bill.

- Dispute resolution, as specified in the original compact, is binding on the state.

- Section L of Article 13 “OVERSIGHT, ENFORCEMENT AND DISPUTE RESOLUTION” is restored but compliance enforcement action is qualified as “The venue for the action shall be consistent with the determination in other interstate compacts to which the state of New Mexico is a member under the laws of the state of New Mexico.”

#### Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 24 has the following effects on the compact.

- Any rule on dispute resolution that might be promulgated by the interstate commission could not impose a binding resolution on the state of New Mexico.
- Section L of Article 13 “OVERSIGHT, ENFORCEMENT AND DISPUTE RESOLUTION” is struck from the compact. This would have allowed the interstate commission to initiate legal action for both injunctive relief and damages against the state of New Mexico for alleged noncompliance with the provisions of the compact.
- Section B of Article 16 “WITHDRAWAL AND DISSOLUTION” is modified to permit the state of New Mexico to withdraw from the compact upon the enactment of a statute repealing the compact. As originally drafted, the article would have imposed a one-year delay on withdrawal even after the compact had been repealed.

#### Synopsis of Original Bill

House Bill 24 would enact the “Interstate Compact on Educational Opportunity for Military Children.” A compact, like this one, is an agreement between multiple states for cooperative regulations and enforcement of matters that cross state boundaries. The compact, already approved by 27 states, addresses educational problems, such as eligibility, enrollment, placement and graduation, that children of military families confront when transferring to new schools. The compact would give New Mexico representation on an interstate commission that is attempting to systematically facilitate timely enrollment, student record sharing, the student placement process, eligibility for participation in academic and extracurricular activities and on-time graduation. The compact also provides for a governance structure, a method of financing the created governing entity, and enforcement and compliance mechanisms.

#### **FISCAL IMPLICATIONS**

House Bill 24 makes no appropriations, yet upon membership in the compact the state would become responsible for monitoring, enforcement and reporting activities. Section 2 of House Bill 24 specifies that members of the “state military children education compact state council” shall not receive per diem and mileage or other compensation, perquisite or allowance. The Interstate Commission’s bylaws require that the volunteer members of the council would be the Secretary of the Department of Education, a superintendent of a school district with a high concentration of military children, a representative from a military installation, and a representative from the executive branch of government, and representatives from other offices and stakeholder groups the state deems appropriate.

Article 14 of the proposed compact states that the “interstate commission may levy on and

collect an annual assessment from each member state to cover the cost of the operations and activities of the interstate commission and its staff...” The current assessment formula was established by interstate commission rule in November of 2009, and is \$1 per eligible student per year. As this analysis is written, there are 173,000 eligible students in the 27 member states. The FY11 budget for the interstate commission is \$498,500, and Mr. Vande Hey from the Department of Defense reported that the interstate commission has some funding from the DoD for startup costs. Please see “SIGNIFICANT ISSUES” below.

The Interstate Commission’s report of eligible families for 2010 reports there are 5,248 children in families with parents on active military duty in New Mexico. Using the above minimum estimating technique, this would cost approximately \$5,200 in FY11.

The PED notes that the Interstate Commission made annual assessments in FY ’09 and states contiguous to New Mexico were assessed as follows: Arizona \$10,109 (not yet paid); Colorado \$18,411 (paid); Oklahoma \$12,508 (paid); and Texas \$70,209 (not yet paid).

### **SIGNIFICANT ISSUES**

The AGO has identified the following issues.

Method of Financing. Article 14 provides for the financing of the Interstate Commission under the compact. The commission may levy and collect annual assessments from each member state to cover the cost of operation and activities of the Commission. The assessment amount is based on a formula determined by the Commission. Interstate compacts are “contracts,” Texas v. New Mexico, 482 U.S. 124, 128 (1987), and we have opined that contracts that subject the government to liability, the amount of which is uncertain at the time of the agreement, can create unconstitutional “debt.” See N.M. Attorney General Op. 00-04 (indemnification agreements create unconstitutional debt).

This is an issue because in State ex rel. Dyer v. Sims, 341 U.S. 22 (1951), involving an interstate compact to control river pollution, the United States Supreme Court refused to allow West Virginia to withdraw from its compact despite West Virginia’s argument that its compact was invalid as creating unconstitutional debt, because it required West Virginia to make a continuing appropriation for its share of salaries and administrative expenses of that commission. Thus, the legislature should be aware that it may likely be required under this compact, for the duration of the state’s membership, to make annual appropriations to finance its share of the administrative cost based on the Commission’s formula. The legislature needs to budget for this matter or set up a “special fund” to address this issue. See N.M. Att’y Gen. Op. dated February 28, 2006, 2006 WL 634421; N.M. Advisory Letter dated February 10, 2003, 2003 WL 1957573. However, the State is not irrevocably bound to continue participating in this compact. It may withdraw by repealing the compact statute pursuant to Article 16, although any repeal is not effective until a year later, and the State remains responsible for all assessments and liabilities through the effective date of withdrawal, including those obligations that extend beyond the effective date of withdrawal.

Immunizations. A potential conflict respecting deadlines for student immunizations might arise were the Commission to adopt rules regarding immunizations that would conflict with state law or rules. The compact currently itself does not present a conflict in this regard. Under Article 4 (C) of the compact, compacting states “shall give thirty days

from the date of enrollment or within such time as is reasonably determined under the rules promulgated by the Interstate Commission for students to obtain any immunizations required by the receiving state.” The Article further provides that “[f]or a series of immunizations, initial vaccinations must be obtained within thirty days or within such time as is reasonably determined under the rules promulgated by the interstate commission.” Compare NMSA 1978, Section 24-5-2 (it is unlawful for any student to enroll in public school unless he has been immunized, as required under the rules of the health services division of the health and environment department; provided, however, that if a child has begun the process of immunization he may enroll and attend school as long as the process is being accomplished in the prescribed manner); Public Education Department Rule 6.12.2.8 (B) NMAC (no student shall be enrolled in the public schools unless the student can present evidence of commencement or completion of immunization in accordance with the immunization schedule and rules and regulations of the public health division); Public Education Department Rule 6.12.2.8 (A) (6) (persons enrolling in schools who have begun the process of immunization shall have one month following the date of enrollment to complete the required immunizations or having continued the process of the required series).

The PED makes the following observations about the proposed compact.

Article 2, page 4, lines 18 – 21 uses the term “local education agency” in a manner that does not describe public schools in New Mexico. Understandably, the definition attempts to be generic; however, public schools are not “public educational institutions”. Compare, for example, Section 22-1-2 (S), (X) and (Y) NMSA 1978 in the Public School Code that defines school districts, state agency or state institution and state educational institution. Moreover, while “local education agency” is not defined in the Public School Code, “local educational agency” is used at Section 22-8B-4(T) NMSA 1978 of the Charter Schools Act in reference to special education. Section 6.31.2.7 (B)(8) NMAC of PED’s special education rule defers to the federal definition of local educational agency found at section 34 CFR 300.28 which provides:

LEA as used in this part, the term “local educational agency” means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

Article 5, Page 11, Lines 16-22 requires military students under certain circumstances to be afforded additional excused absences for deployment purposes. This implicates Sections 22-12-1 and 22-12-9 NMSA 1978 of the Compulsory School Attendance Laws which require students to enforce those provisions. See also PED rule 6.10.8 NMAC (Section 8 of that rule requires school districts to adopt written attendance policies.)

Article 6, Page 11, Lines 25 to Page 12 gives much deference to special powers of attorney as sufficient for enrolling a child “and all other actions requiring parental participation and consent.” There may well be custody orders pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act that will have to be considered in lieu of a power of attorney. [See, 40-10A-101 NMSA 1978 and 40-10B-1 NMSA 1978 of the Kinship Guardianship Act]

Article 9, Page 19, Lines 19-24 also permits the commission to direct, through its rule, what data is to be collected concerning the educational transition of the children of military families under the Compact. This implicates the federal Family Educational Rights and Privacy Act (“FERPA”) (20 U.S. Code. Section 1232g; 34 CFR Part 99) in that FERPA prohibits personally identifiable student information from disclosure or redisclosure except under one of 9 enumerated exceptions. If the data is merely directory, disclosure is not prohibited.

Article 10, Page 21, Line 9 authorizes the Commission to purchase bonds. It is not clear the type of bonds referred to and the extent the state would be exposed to investment risks.

Article 14, Page 31, Lines 13-16 permits the Commission to assess an annual allocation on member states based on a formula pursuant to a rule it adopts which is binding upon all member states. This provision implicates Article IV, Section 30 of the New Mexico Constitution, which provides in part “...money shall be paid out of the treasury only upon appropriations made by the legislature.”

The LFC analyst notes that the compact gives the interstate commission the authority to promulgate rules in accordance with the Model State Administrative Procedure Act, and these rules will be binding on the state unless they are beyond the scope of the compact. The PED has rulemaking authority for public education, and it is not clear how two bodies with overlapping rulemaking authority might work effectively together.

Article 13 states that the interstate commission will issue a rule providing for both mediation and binding resolution for disputes. It also gives the interstate commission the power to take the state to federal court if necessary in order to enforce compliance with the compact, and the interstate commission may seek in both injunctive relief and damages.

## **PERFORMANCE IMPLICATIONS**

Creating another education policy authority in New Mexico could have unintended downstream consequences. The legislature passes the state of New Mexico’s budget with agency agreements on performance measures that conform with the state’s performance based budgeting guidelines. The National School Board Association made the comment quoted below.

“NSBA believes that states have the full authority for determining education policy and the framework for the delivery of educational services to its students, including entering into agreements with other states. While the compact is designed to address perceived inequities facing children of military families, in a highly mobile society such as ours, other families could also be affected.

Of broader concern is the use of an interstate compact to affect policy changes rather than to use the traditional federal legislative and regulatory process. While not illegal or impractical, this non-traditional approach to address federal education policy is unique and therefore requires greater explanation as to its effectiveness.”

## **ADMINISTRATIVE IMPLICATIONS**

According to the DFA, the PED and the Department of Health would likely have to amend rules

relating to childhood immunizations.

**RELATIONSHIP**

House Bill 24 relates to House Bill 21 “School Priority for Certain Students”. House Bill 21 amends the open enrollment section of the Public School Code by mandating that students whose parents are active duty members of the armed forces be given first priority in school enrollment.

**ALTERNATIVES**

Mr. Vande Hey, on behalf of the Department of Defense, reports that other states have approached this issue by passing memorials or forming task forces rather than enacting the Interstate Compact on Educational Opportunity for Military Children.

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

According to Mr. Vande Hey, if the Interstate Commission does not succeed in joining all states in the Interstate Compact on Educational Opportunity for Military Children, Congress might compel the objectives of the compact by a federal mandate.

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