

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website (www.nmlegis.gov) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 1/20/19
LAST UPDATED 2/16/19 **HB** 45/aHF1#1/aHF1#2

SPONSOR Stapleton

SHORT TITLE Instructional Material Definitions & Funding **SB** _____

ANALYST Liu

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		
(\$0.0 - \$273.2)	(\$0.0 - \$273.2)	(\$0.0 - \$273.2)	Recurring	Instructional Material Adoption Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Fiscal Implications				

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HB 170
 Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)
 Public Education Department (PED)
 Public School Facilities Authority (PSFA)

SUMMARY

Synopsis of HF1#2 Amendment

The House Floor #2 amendment adds a new section to the bill, authorizing PED to make allocations for instructional materials for private school students under the following conditions:

- Sufficient funds are made available to school districts and state institutions to provide

each student with instructional materials that meet curricular requirements,

- Students attending a public school are able to take these instructional materials home on a daily basis,
- School districts and charter schools certify funding for instructional materials is sufficient,
- Per-student allocations to private school students do not exceed the per-student allocation for public school students, and
- Private schools receiving instructional materials funding must not discriminate based on race, religion, color, national origin, ancestry, gender, sexual orientation, gender identity, physical disability, or mental disability.

Synopsis of HFI#1 Amendment

The House Floor #1 amendment changes references to the federal No Child Left Behind Act of 2001 to the new federal Every Student Succeeds Act. The amendment also changes references to the second reporting date to the first reporting date.

Synopsis of Original Bill

House Bill 45 amends the Instructional Materials Law to expand the definition of instructional materials that school districts and charter schools can purchase. The new instructional material definition includes original source material from primary sources and electronic content resources that support digital learning. The bill requires PED to include kindergarten students in the eligible student population entitled to instructional materials and to use the estimated second reporting date student membership, rather than the first reporting date, of the next year to determine the instructional materials distribution. The bill removes the waiver granted to instructional materials purchased from the multiple list and makes adoption of the multiple list optional, but still allows school districts or state institutions to use up to 25 percent of their instructional material allocations for other classroom materials. Lastly, the bill eliminates language referencing private schools, updates statutory terms, repeals the reading materials fund, and shifts PED reporting requirements to include the Legislature or governor. **The HFI#2 amendment includes a provision for private school instructional material funding.**

FISCAL IMPLICATIONS

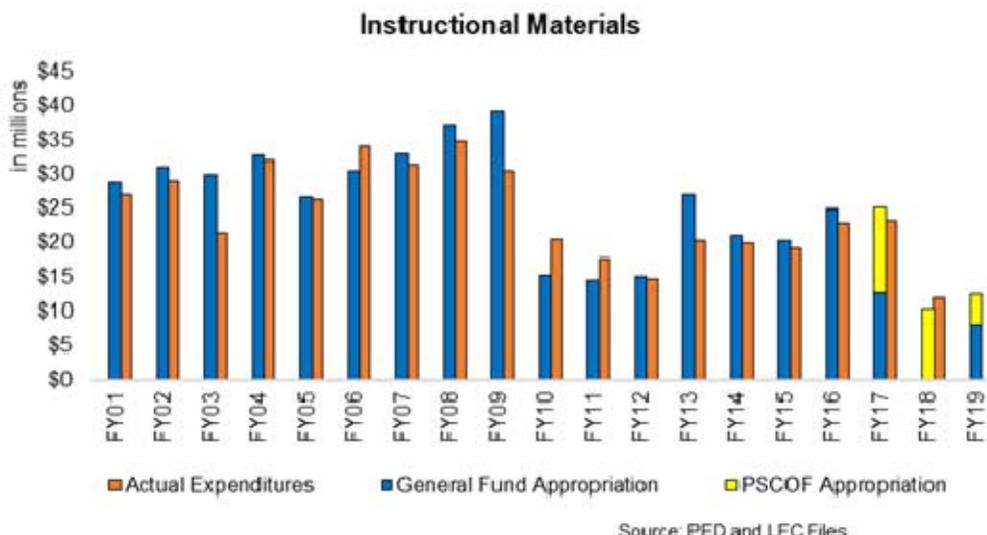
According to PED, the statutory instructional material review process currently requires that publishers submit a processing fee for their materials to be reviewed by level two and level three-A teachers and scored for alignment with state academic content and performance standards. Scored and approved materials are then placed on a multiple list, and schools must spend 50 percent of their instructional material fund allocation on items on the list. Processing fees submitted by publishers for inclusion on the adopted multiple list entirely fund the review process of instructional materials. PED notes removing the 50 percent spending requirement on instructional materials from the multiple list would remove the incentive for publishers to be included on the list and potentially eliminate the source of funding that allows for the review and ranking of the basal materials.

In FY19, PED requested a budget adjustment to use \$273.2 thousand from the instructional material adoption fund for the 2019 summer instructional material review institute, authorizing the expenditure of fees from publishers and other donations. In FY18, PED requested authority

for \$220.5 thousand from the fund for the same purpose. If publishers do not pay the fee to have materials reviewed for the multiple list, the state will see reduced revenue from this funding source.

The state review and adoption process is intended to provide for economies of scale given that fees paid by the publishers support the review process and the state enters into a six year agreement that requires publishers to provide materials at the same price for all schools and lowest price across states. PED notes this type of instructional material review process would be costly for individual districts to undertake without a funding source. PED indicates the provisions of this bill will result in higher purchasing costs for instructional materials because it impacts the state’s ability to enter into price agreements with publishers and increases costs for shipping and delivery of materials, which currently is conducted through a book depository in Albuquerque.

PSFA notes Section 22-24-1 NMSA 1978 of the Public School Capital Outlay Act authorizes the Legislature to appropriate up to \$25 million of the public school capital outlay fund (PSCOF) to the instructional material fund or to the transportation distribution of the public school fund from FY18 to FY22. The General Appropriation Act of 2018 included \$4.5 million from PSCOF for instructional materials. The FY20 executive and LFC recommendation do not include use of PSCOF for instructional materials.



Since FY01, instructional material expenditures have typically been in line with appropriations; however, fund balances for instructional materials have grown in recent years, which school districts note is due to the practice of saving funds to pay for large adoption cycles.

In FY16, the last year in which private schools received an allocation for instructional materials, \$1 million was appropriated to 110 private schools serving approximately 18 thousand students. In FY17, PED redistributed \$5.1 million of available instructional material funding, originally budgeted for private schools, to the public schools after the Supreme Court ruled in *Moses v. Skandera* that public dollars for instructional materials could not be given to private schools in 2015.

SIGNIFICANT ISSUES

NMAG notes, on December 13, 2018, the New Mexico Supreme Court overturned its own decision prohibiting payment of public funds for instructional material at private schools in *Moses v. Ruszkowski*. The *Ruszkowski* case reconsidered *Moses v. Skandera*, a New Mexico Supreme Court decision in 2015 that found the state constitution prohibited use of public dollars for instructional materials used at private schools or for their students. The *Moses* case was vacated and remanded to New Mexico by the U.S. Supreme Court for consideration in light of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, in which the U.S. Supreme Court ruled a state could not deny a public benefit to an otherwise eligible recipient solely on account of its religious status. According to NMAG, the December 2018 decision in *Ruszkowski* held that the New Mexico Constitution does not prohibit using the instructional material fund to support private schools and their students so long as the instructional materials in question are not religious.

The bill removes all language referencing “private schools.” This includes removing private school students from being entitled to the free use of instructional materials, ceasing from allocating instructional material funds to private schools, and prohibits PED from paying the in-state depository on behalf of private schools for instructional materials. PED notes this would make the state non-compliant with the New Mexico Supreme Court ruling in *Moses v. Ruszkowski* which concluded the textbook loan program established by the Instructional Material Law (IML) does not violate the New Mexico Constitution and requires the state to “reinstate the provisions of the IML that allow private school students to participate in the textbook loan program.” **The HFI#2 amendment includes a provision for private school instructional material funding.**

Current law requires public school districts, charter schools, and private schools to use 50 percent of their instructional materials allocation to purchase instructional material included on the “multiple list,” which is a written list of instructional materials approved by PED. Generally, each summer PED holds a summer institute, in which textbook vendors pay the department to have their materials reviewed. PED effectively provides stipends to educators to review these materials to ensure they meet current state content standards prior to adopting any materials to place on the multiple list.

Under current law, school districts and charter schools are able to use the remaining 50 percent to purchase instructional material that is not included on the multiple list, including the ability to use up to 25 percent of this amount to purchase other classroom materials that are not included in the definition of “instructional materials.” Private schools are able to use the remaining 50 percent for items that are not on the multiple list so long as funds are not spent for religious, sectarian or nonsecular materials and purchases must be made through an in-state depository.

Changes proposed in the bill would allow school districts and charter schools to use their entire instructional material allocation to purchase anything included in the definition of instructional material, whether adopted and placed on the multiple list or not. Up to 25 percent of the instructional material allocation could still be used for other classroom materials.

PED notes the bill allows districts to spend instructional material funding on materials that may not be aligned with New Mexico academic standards, research-based effectiveness, cultural relevance, and other high-quality indicators. School districts would no longer be required to

purchase or even reference the list of adopted materials. As a result, publishers will not need to submit materials to be included on the multiple list, and materials will not be reviewed for alignment to state standards. PED notes this reduction of access to vetted instructional materials can create an equity issue for students.

In the consolidated *Yazzie v. New Mexico* and *Martinez v. New Mexico* education sufficiency lawsuit, the court ordered the state to “take immediate steps to ensure that New Mexico schools have the resources necessary to give at-risk students the opportunity to obtain a uniform and sufficient education that prepares them for college and career.” The court found PED “failed to meet its supervisory and audit functions to assure that the money that is provided has been spent so as to most efficiently achieve the needs of providing at-risk students with the programs and services needed for them to obtain an adequate education.”

The New Mexico Indian Education Act requires “culturally relevant instructional materials for American Indian students enrolled in public schools.” As part of the PED review of instructional materials, teachers review the materials for cultural relevance. PED notes removing the incentive for a review process and multiple list makes it less likely districts will provide schools and at-risk students with high-quality culturally relevant instructional materials and increase the risk that schools will fail to comply with the Indian Education Act.

Annual reports submitted by school districts to PED for FY18 show about 31 percent of instructional material expenditures are for non-adopted materials. In FY17 PED received and approved two waivers from school districts requesting to exceed the 50 percent limit for purchasing non-adopted instructional materials. No waivers were received or approved in FY18 or FY19.

Recent revisions to instructional material rule 6.75.2.9 NMAC state, “off-cycle reviews and adoptions of new instructional material may occur at any time the department deems necessary, based on educational need.” If districts want to purchase instructional material that are not included on the adopted multiple list or as new instructional materials are introduced, PED has a means to review and adopt them so that districts do not exceed the 50 percent limitation for purchasing non-adopted materials.

The agreements require the publishers to provide their materials through the book depository in Albuquerque, saving them from enormous shipping and freight costs. These agreements make free materials available by publishers to all districts and charter schools based not on the amount purchased but, rather, on the amount of teachers utilizing the materials. The agreements also require the publishers to make the adopted instructional materials available at the six New Mexico Regional Review Centers for teachers, administrators, and college of education students to review for their local adoption process. Not having these materials available at the Regional Review Centers will restrict access to aligned instructional materials for districts, charter schools, and state supported schools.

The bill adds “...original source material from primary sources...” and “...content resources, excluding electronic devices and hardware, that support digital learning formats and educational programs” to the definition of instructional material. PED notes open educational resource materials that may or may not be aligned to state standards could be accessed without restriction because open source is cost free. In addition, the use of “original source material” could be in violation with copyright law or other laws if the material is not in the public domain. The

current statutory definition of instructional material includes “educational media” which broadly encompasses text, graphics, audio and visual content delivered through various means or technologies including “digital learning formats.”

The approved multiple list currently includes many digital options. In order to expand digital formats to be included on the multiple list, creators and publishers of this digital content need to be encouraged by districts, administrators, and teachers to participate in the adoption process so that all districts, charters, and state supported schools may benefit. Current statute and rule allows for publishers to submit instructional material for adoption at any time and thus, as new cutting edge material is developed, it can be submitted for adoption to the multiple list through the “other adoptions” process defined in NMAC.

ADMINISTRATIVE IMPLICATIONS

PED notes the bill removes “forty-day” and replaces it with “second reporting date.” The second reporting date is “December 1 or the first working day in December.” Districts and charters are given 10 working days to submit their data, thus the raw data may not be available until the third week of December. Generally, it takes several weeks before the data is certified and available to input into allocation tables. The department indicates the timeline proposed in the bill to compute the final allocation “no later than January 15” using the second reporting date will be extremely difficult to complete. **The HFI#1 Amendment changes references to the second reporting date to the first reporting date.**

PED notes the bill impacts all school districts, but particularly medium to small-sized districts and charter schools, who may lack the administrative capacity to review materials and depend on the multiple list and rankings for guidance in selecting instructional materials that align with the state standards. Additionally, publisher agreements make the adopted instructional materials available at the six New Mexico Regional Review Centers for teachers, administrators, and college of education students to review for their local adoption process. Not having these adopted materials available at the Regional Review Centers will restrict access to aligned instructional materials for districts, charter schools, and state supported schools.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The bill conflicts with House Bill 170, which proposes the same amendments as House Bill 45 but uses the first reporting date instead of the second reporting date. **The HFI#1 Amendment changes references to the second reporting date to the first reporting date.**

TECHNICAL ISSUES

NMAG suggests including in the title of the bill a sentence to notify legislators that House Bill 45 eliminates references to private schools in the Instructional Material Law.

OTHER SUBSTANTIVE ISSUES

A 2016 study by Harvard University showed the effects of selecting high quality instructional materials were substantial, particularly for math. The study found in fourth and fifth grade math classrooms, a standard deviation in textbook effectiveness was equivalent to 0.1 standard deviations in achievement at the student level. That means that if all schools switched to a top

quartile textbook, student achievement would rise overall by roughly 3.6 percentile points. The study cited the What Works Clearinghouse, which contains multiple evaluations of elementary school math textbooks and software, with effect sizes ranging from -2 percentile points to 17 percentile points.

SL/sb/al