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FISCAL IMPACT REPORT

ORIGINAL DATE 1/28/2021

SPONSOR Lente LAST UPDATED 1/31/2021 HB 85

SHORT TITLE Yazzie Lawsuit Response Funding SB _____

ANALYST Liu

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY21	FY22		
	\$22,700.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$81.1	\$81.1	\$162.2	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB6, HB52, HB84, HB86, HB87, HB135, SB41
 Duplicates Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Legislative Education Study Committee (LESC) Files

Responses Received From

Indian Affairs Department (IAD)
 Early Childhood Education and Care Department (ECECD)
 Department of Cultural Affairs (DCA)
 Public School Facilities Authority (PSFA)
 Higher Education Department (HED)
 University of New Mexico (UNM)
 Public Education Department (PED)
 Department of Information Technology (DoIT)

Other Responses

Tribal Education Alliance (TEA) – a coalition of tribal education leaders, experts, and advocates, including the Santa Fe Indian School Leadership Institute and the University of New Mexico Native American Budget and Policy Institute.

SUMMARY

Synopsis of Bill

House Bill 85 appropriates \$21.7 million from the general fund to IAD for the purpose of distributing grants to each of the 19 pueblos and the Jicarilla Apache Nation, Mescalero Apache Tribe, and Navajo Nation as such:

- \$5.75 million to develop and implement education blueprints and governance structures to serve New Mexico's American Indian students;
- \$3.4 million to develop early childhood culturally and linguistically relevant curricula, assessment tools, construction plans, and program evaluation instruments;
- \$5.75 million to develop and staff culturally and linguistically relevant after-school and community-based summer school programs; and
- \$3.4 million to create, develop, and staff tribal IT departments to increase support network operations and high speed Internet access for tribal institutions.

The bill also appropriates \$1 million from the general fund to UNM's school of architecture to develop an IT study and infrastructure plan for tribal communities and institutions.

FISCAL IMPLICATIONS

The appropriation of \$22.7 million in this bill is a recurring expense to the general fund. Although the bill does not specify future appropriations, establishing a new grant program could create an expectation the program will continue in future fiscal years, therefore this cost is scored as recurring. Additionally, IAD notes provisions of this bill would require the department to employ an additional FTE at \$81.1 thousand per year to administer the grants. The bill would revert any unexpended or unencumbered balance remaining at the end of FY23 to the general fund.

Provisions of this bill would effectively allocate \$950 thousand to each nation, tribe, and pueblo (Navajo Nation would receive \$1.8 million) and \$1 million to UNM. PED currently provides grants from the Indian education fund (IEF) to New Mexico tribal and pueblo departments of education (TED). In FY21, PED awarded \$2.2 million from IEF to TEDs, with grants ranging between \$77 thousand and \$200 thousand for each TED. PED establishes criteria and alignment with the Indian Education Act and agency goals to administer funding to tribal departments of education. According to LESC, approximately \$1.1 million from IEF grants in FY20 were unspent. TEA notes FY20 IEF grants were awarded mid-year and one third of grant allocations remained unspent because many TEDs lacked the administrative infrastructure to enable a quick ramp-up in spending.

Substantial federal aid and proposed state appropriations for FY22 align or overlap with some appropriations within this bill, particularly for items relating to the expansion of tribal IT infrastructure, extended learning time programs, and support for at-risk student populations (See Alternatives).

SIGNIFICANT ISSUES

On February 14, 2019, the 1st Judicial District Court issued a final judgment and order on the consolidated *Martinez v. New Mexico* and *Yazzie v. New Mexico* education sufficiency lawsuits,

and found that New Mexico's public education system failed to provide a constitutionally sufficient education for at-risk students, particularly English language learners, Native American students, and special education students. 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.

DoIT notes the bill provides for the creation of IT departments at the various tribal entities and it is not clear, once established, how operations will be sustained. DoIT also notes the bill appears to violate Article 4, Sec. 16 of the New Mexico Constitution, as the subjects of the bill are not clearly expressed in the title. According to the department, New Mexico tribes, nations and pueblos have no liability under the *Martinez-Yazzie* lawsuit. DoIT notes early childhood education programs and summer school programs are not required under the state Constitution and growing tribal information technology and creating a state-wide comprehensive IT development plan for tribal communities is arguably outside the scope of the lawsuit.

Tribal education departments. IAD and TEA both note the bill is part of TEA's tribal remedy framework, which was developed collectively by tribal communities and indigenous education experts and endorsed by New Mexico's 23 nations, tribes and pueblos to address the findings of the *Martinez-Yazzie* lawsuit. PED notes much of the educational infrastructure proposed in the bill could assist in improving student academic achievement for Native American students. However, many of the proposed actions would be directed at TEDs, and it is unclear whether they would impact Native American students in the public school setting.

TEDs are federally and tribally funded executive branch agencies within sovereign tribal governments. The roles and responsibilities of TEDs vary according to each tribe's government, laws, and resources. TEDs are not schools but are the primary contact for their tribal governments regarding education policy issues. TEDs may be involved in curriculum development, teacher training, grant administration, student support services, advocacy, or other education initiatives. Because TEDs are part of sovereign nations, the Indian Education Act does not place any statutory requirements on them, but includes them among entities with which PED must collaborate on matters related to identifying educational opportunities for Native American students, including transitioning to postsecondary education. TEA notes most TEDs operate Head Start programs, Native language programs, a tribal library, summer school and social support services.

Culturally responsive instruction. TEA notes the bill harnesses the unique knowledge and experience of tribal communities to make education more accessible and relevant for Native students. IAD notes this bill encourages tribes to exercise sovereignty by identifying for themselves how to meet the needs of their Native American children. Tribal communities are most familiar with their history, language and culture and their lived experiences enrich the pedagogies for tribal education departments and support the development of early childhood education, culturally and linguistically relevant curriculum, and community-based education.

Culturally responsive teaching is an approach that encourages the use of teaching strategies, content, and materials that are relevant to students' diverse cultural, ethnic, and linguistic backgrounds. The approach is described in a 2017 article from the Institute of Education Sciences as “a pedagogy that empowers students intellectually, socially, emotionally, and politically by using cultural references to impart knowledge, skills, and attitudes.” Culturally responsive instruction can help educators address barriers that cause disparities in student achievement and design instruction to be mindful of those barriers, in order to mitigate the effects of negative cultural stereotypes on student performance.

Research on culturally responsive teaching is inconclusive, with a lack of experimental or quasi-experimental research. While a number of studies have examined the approach, only two looked at the impact on student outcomes, and neither established a conclusive relationship. However, this does not mean that culturally responsive teaching is not valuable – only that it has not been adequately evaluated yet.

Culturally responsive teaching is often discussed in the context of instructional best practices. While the impact on student outcomes is not conclusive, some practices of culturally responsive teaching have been shown to be effective in communicating high expectations to all students, regardless of race or cultural background. These include using a variety of visual aids that reflect students' backgrounds, using some words in students' heritage languages, and identifying students' current knowledge before instruction.

Extended learning time. In response to the findings of the *Martinez-Yazzie* lawsuit, the state invested heavily in two evidence-based programs – K-5 Plus extended school year and extended learning time programs (ELTP). Despite enough funding to serve about half of all elementary school students in K-5 Plus and nearly 40 percent of all students in ELTPs, only 11 percent of eligible students participated in K-5 Plus and 25 percent participated in ELTP in FY20. TEA notes during FY20, fewer than half of the districts with a sizable Native American student population offered extended learning. Given substantial undersubscription in K-5 Plus and ELTP, tribal entities could work with school districts or charter schools to provide programming from these existing state funding sources.

ECECD notes provisions of this bill will strengthen early childhood programs in pueblos, tribes and the Navajo Nation by developing early childhood culturally and linguistically relevant curriculum, materials and assessment tools.

In FY21, PED, IAD, and ECECD developed and implemented a request for application for early childhood education, culturally and linguistically responsive instruction, and facilities development. The IAD received a \$1 million interagency transfer from PED for this specific initiative. Through this process, each tribe, nation, and pueblo in the state was able to determine how funds would be used to meet each tribal government's local, unique educational needs.

Education technology access. A March 2020 PSFA survey of school officials indicated 21.8 percent of students did not have access to Internet service at home and 31.9 percent of students did not have access to their own devices, such as a computer or smartphone. PSFA also found that 55 percent of students in Bureau of Indian Education (BIE) schools did not have access to the Internet, and 50 percent did not have access to their own device at home.

TEA notes over half of rural tribal families lack access to broadband, and most have no Internet subscription. According to 2018 U.S. Census data, over 40 percent of families in the majority Native American school districts of Central Consolidated, Gallup-McKinley and Cuba Independent do not have access to a computer or similar device. TEA notes for many Native students, tribal libraries are the primary source of technology access and support.

In the summer of 2020, LFC estimated 66.2 thousand, or 21 percent, of students in public schools did not have an Internet subscription (assuming 1.5 children per household, approximately 44.1 thousand households). Of the 66.2 thousand students, approximately:

- 19 thousand students (or 12 thousand households) live in areas with existing broadband infrastructure but no household Internet subscription, likely due to the monthly cost. In response to the Covid-19 public health emergency, many Internet service providers offered low-cost broadband to families during the pandemic—some as low as \$10 per month—and PSFA deployed an online quote portal for schools and districts to easily shop for quotes. Using a high-end estimate of \$30 per month for subsidized Internet service, providing one year of broadband service to 12 thousand households would cost \$4.3 million each year.
- 45.8 thousand students live in areas outside of current broadband reach but can access basic cell service for texting, file sharing, and low-resolution video streaming. (See maps of 3G, 4G and LTE coverage at <https://nmbbmapping.org/mapping/>). While not as fast as broadband, residential cellular hotspots can provide Internet access that is immediately available to students without any additional infrastructure build-out. Providing each student with a hotspot and a year's data subscription would cost approximately \$300, or \$13.7 million statewide each year.
- 1,410 students live both outside of adequate cell and broadband coverage. For these students, satellite Internet is still an option but can be slow and cost-prohibitive. A household connection for satellite Internet can cost \$1,200 per year, or \$1.1 million statewide each year.

In FY21, the New Mexico Center on Law and Poverty, representing the *Yazzie* plaintiffs in the *Martinez-Yazzie* education sufficiency lawsuit, filed a new motion requesting further relief in the lawsuit for essential technology to at-risk students. The motion noted the state failed to provide students (particularly Native American students and students in rural districts) with reliable access to digital devices, high-speed Internet, and funding for district technical support while students were learning in remote settings and requested an order compelling the state to provide immediate funding for these purposes.

To assist in closing the digital divide, PED purchased and distributed wireless technology devices and equipment in FY20: 700 residential hotspots (Navajo Nation); 101 CradlePoint fixed and mobile hotspots for teacherages, chapter houses, inside buildings, buses, and indoor antennas (all tribes, nations, and pueblos); and 6,282 Chromebooks (all tribes, nations, pueblos, and schools with a significant Native American student population).

PERFORMANCE IMPLICATIONS

The bill does not outline specific performance measures for accountability. IAD notes New Mexico nations, tribes, and pueblos affected by this bill could possibly develop performance measures in coordination with the department. The court ruled that New Mexico's education system was insufficient, in the *Martinez-Yazzie* lawsuit, based on lower PARCC test scores, lower high school graduation rates, and higher college remediation rates for Native American students

in public schools. The state has limited evidence on whether appropriations in this bill will directly improve these performance outcomes.

A 2021 LFC evaluation on implementation of the Indian Education Act found Native American students continue to perform well below peers on state and national measures of achievement, despite the availability of nearly \$147 million in state and federal funds at public schools and institutions of higher education for purposes aligned to the act. The report noted a history of understaffing at PED's Indian Education Division, difficulties with funding utilization, challenges with local collaboration, and a lack of specific, targeted outcomes have resulted in a system that has not served Native American students in a comprehensive and coordinated manner.

The LFC evaluation found Native American student enrollment in public schools fell to 32.4 thousand students in FY19, an 8.5 percent decrease over the prior 5 years. Four-year high school graduation rates for Native American students increased to 69 percent in FY19, an 11 percentage point improvement over the prior 5 years, but still 6 percentage points lower than the statewide average of 75 percent. Similarly, Native American student reading and math proficiency rates improved marginally over the same period but remained below statewide averages. The evaluation noted, however, changes in high school graduation requirements (allowing alternative demonstrations of competency) likely contributed to increased graduation rates and changes to statewide standardize assessments (PARCC) complicated measures of progress in these areas.

HED notes allocations in this bill support recruitment and retention of Native American teachers; expand teacher licensure programs in bilingual and multicultural education, culturally and linguistically relevant curriculum development; and teacher professional development. Court findings in the *Martinez-Yazzie* lawsuit indicate 2 percent of all teachers in New Mexico identify as Native American.

Two 2020 LFC evaluations on remote learning and school reopening found lower student engagement and lost learning time from school closures. The reports noted the lack of access to devices and Internet for at-risk students could further widen the achievement gap this year. A 2020 LFC presentation on broadband found many students lacking computers or Internet connectivity during school closures lived within Impact Aid districts, and highlighted the need to target additional resources to these areas, particularly with the substantial amount of federal aid and growth in local school cash balances.

TEA notes before the pandemic, Native American students in New Mexico were a third more likely to be chronically absent from school than white students. Native American students, along with other students of color, are more likely to suffer from considerable learning loss due to school closures caused by the Covid-19 pandemic.

ADMINISTRATIVE IMPLICATIONS

PED notes building capacity at TEDs is essential to ensuring tribes, nations, and pueblos have the personnel needed to meet the provisions of the bill. All tribes, nations, and pueblos in New Mexico have a TED; however, the size and overall operation of the TED can range from one individual director to over 100 employees focused specifically on tribal education.

IAD would administer appropriations in this bill in a similar way as capital outlay and tribal infrastructure projects are administered on a reimbursement basis. The department noted an

additional accountant position will support the department's capacity to oversee these appropriations. The position would be responsible for administering the funding,; monitoring each project's progress; and assisting tribes in completing reporting procedures. However, even without this additional position, the department would partner with other state agencies and identify other short term solutions to ensure appropriations are disbursed efficiently.

PSFA notes the bill does not distinguish between Bureau of Indian Affairs schools or all public schools located on tribal lands. If the appropriation to conduct needs assessments of early childhood facilities and the development of construction plans for early childhood facilities includes public schools on tribal lands, the assessments and the development of construction plans shall require consultation with the PSFA to ensure compliance with statewide adequacy standards.

UNM indicates the Indigenous Design and Planning Institute (IDPI) would subcontract services to graduate students, faculty, affiliate faculty, and outside specialists as appropriate to complete:

- tribal case studies (\$150 thousand),
- inventories of local technology infrastructure (\$200 thousand),
- a survey of existing facilities and operational IT staff (\$400 thousand),
- an age-cohort demographic study (\$150 thousand), and
- writing and dissemination of a report (\$100 thousand).

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill relates to House Bill 6, which eliminates the Impact Aid credit in the funding formula; House Bill 52, which establishes a bilingual multicultural education advisory council; House Bill 84, which creates a native language education program factor in the funding formula; House Bill 86, which appropriates funding to tribal libraries and broadband projects; House Bill 87, which appropriates funding to Native American programs at higher education institutions; House Bill 135, which includes a Native American demographic factor in the at-risk index of the funding formula; and Senate Bill 41, which eliminates the Impact Aid credit in the funding formula.

This bill also duplicates the Indian education fund and indigenous initiative appropriations in the General Appropriation Act.

TECHNICAL ISSUES

Provisions of this bill revert any unexpended or unencumbered balance at the end of FY23 to the general fund rather than FY22, effectively extending the appropriation over two fiscal years. Extending appropriations beyond FY22 restricts the Legislature's ability to prioritize funding, forecast revenue availability, and meet obligations of establishing a balanced budget.

OTHER SUBSTANTIVE ISSUES

DCA notes the bill assumes every pueblo has a library able to provide after school and summer programs. The pueblos of Nambé, Picuris, and Taos, currently do not have a developing or established tribal library. The bill further creates jurisdictional and coordination issues with the New Mexico State Library (NMSL), and the rural libraries fund as funds are distributed to NMSL from other funding sources for the same purposes as outlined in this bill.

According to PED, NMSL serves and supports at least 18 tribal libraries through its tribal libraries program. The program provides continuing educational opportunities, funding, leadership, and consulting services to library directors and staff that serve tribes, nations, and pueblos across the state. Typically, tribal libraries do all the things traditional libraries do; however, they often play a more active and involved role in the cultural and language preservation for their tribal communities.

According to the latest PED Bilingual Multicultural Education Report, roughly 22 percent of all Native American students in New Mexico participated in bilingual multicultural education programs (BMEP) in FY19. Over the past 6 years of available data, Native American participants in BMEPs decreased by roughly 1,400 (17 percent) from about 8,500 students in FY14 to 7,000 students in FY19. The decline in participation outpaces the decline in Native American student population statewide (6 percent). Meanwhile, statewide student participation in BMEPs decreased by 6,800 students (13 percent) over the same timeframe, outpacing the 6 percent decline in the state's total Native American student population over the same timeframe.

Students from Native American communities participating in BMEPs are assessed for proficiency in Native American languages. According to PED, these beginning-of-year assessments are developed by each tribe or by Native American leaders and educators. The languages for which data are available are Jicarilla Apache, Keres, Navajo (Diné), Tiwa, Tewa, Towa, and Zuni. From FY14 through FY19, proficiency in Native American language assessments increased from 37 percent proficient in FY14 to 47 percent proficient in FY19. Over the same timeframe, the number of students tested in Native American languages decreased by 36 percent (2,700 students). Whether the increase in proficiency is due to the effects of educational programs or a smaller sample of students participating in assessments is unclear. TEA notes Native American language instruction in public schools is often relegated to 30-minute classes offered twice a week, with students having to choose between attending a language or another class.

ALTERNATIVES

The executive's FY22 budget recommendation includes \$30 million (\$15 million over two years) and the LFC's recommendation includes \$4 million for the tribal remedy framework, which would be used to support education efforts in the state's tribal communities. The appropriation would support implementation of the tribal remedy framework, support tribal sovereignty, and provide resources for locally determined needs. The executive and LFC FY22 budget recommendations also include \$4.6 million for indigenous, multilingual, multicultural, and special education initiatives and \$5.25 million for Indian education fund grants.

The executive and LFC FY22 budget recommendations for public school support include \$52 million to eliminate the federal Impact Aid credit, which will substantially increase operational revenue for school districts with significant numbers of students living on tribal land. Most Impact Aid funds, except for the additional payments for children with disabilities and construction payments, are considered general aid to the recipient school districts. These funds may be used in whatever manner the school districts choose, so long as it is in accordance with local and state requirements. Most recipients use funding for daily expenditures, but recipients may use the funds for other purposes such as capital expenditures. School districts are required by federal regulations to consult with tribal governments and parents under the Indian Policies and Procedures about how these monies are spent.

Federal aid from the Coronavirus Aid, Relief, and Economic Security (CARES) Act and Consolidation Appropriations Act (CAA) of 2021 will provide New Mexico schools over \$520 million by early 2021 to address pandemic-related costs, such as expanding educational technology, and provide services to support high-need student populations. According to PED, New Mexico has budgeted nearly \$46 million from federal CARES Act funds to provide students access to education technology in response to school closures in FY20 and FY21. Additionally, the governor directed \$2.9 million of CARES Act coronavirus relief funds to Cochiti Pueblo for broadband infrastructure.

The federal CAA includes \$3.2 billion to subsidize home Internet for low income families nationally by \$50 per month for most households or up to \$75 per month for households on tribal land. Initial estimates suggest New Mexico's portion of this funding could be \$16 million, equivalent to a \$75 Internet subscription for 213 thousand households. The CAA also includes \$1 billion in grants to tribes to build out broadband infrastructure, at least a portion of which will be available to tribes and pueblos in New Mexico.

Tribal education departments may want to consider that tribal schools and libraries are eligible for federal E-rate funding, which provides on average 80 percent to 90 percent of the cost to upgrade broadband infrastructure and related services. While tribal schools are not covered under PSFA's broadband deficiencies correction program, the PSFA broadband team assisted and coordinated the development of two successful broadband partnerships – Middle Rio Grande and Jemez-Zia – that took advantage of E-rate funding and improved broadband connectivity for six pueblos. According to PSFA, further expansion and upgrades are needed for a functional network. In addition, tribal libraries are also currently eligible for broadband infrastructure funding from the New Mexico State Library, in collaboration with the Department of Information Technology and PSFA, through the broadband for libraries program funded by the library broadband infrastructure fund.

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