

LFC Requester:	Sunny Liu
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**AGENCY BILL ANALYSIS
2021 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original **Amendment**
Correction **Substitute**

Date 2/15/2021
Bill No: HB128/a

Sponsor: Debra M. Sariñana
Christine Trujillo
Susan K. Herrera
Joy Garratt
Marian Matthews
Short Title: SCHOOL PERSONNEL
BACKGROUND & TRAINING

Agency Name and Code Number: PED-924
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY21	FY22		
N/A	N/A		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23		
N/A	N/A	N/A		

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(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						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
 Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis of Amendment: The House Education Committee (HEC) Amendment to House Bill 128 (HB128) makes several clarifying amendments to the bill including:

- when referring to “children” or “students,” instead inserting “children or students,” together, so that both classes of persons are included in the sections of the bill addressing them;
- moving a proposed definition of “child abuse” from a specific, newly proposed section of the School Personnel Act to the overall definitions section of the School Personnel Act, Section 22-10A-2 NMSA 1978;
- changing “and” to “or” in a proposed reporting requirement, so that a person making a report of child abuse to the Children, Youth or Families Department (CYFD) *or* a law enforcement agency receive required notification when either of those agencies is informed of potential child abuse, rather than both agencies;
- clarifying that all references in the bill to “volunteers” be to “school volunteers”; and
- removing language in proposed amendments to Section 22-10A-5 of the School Personnel Act, on background checks, that would limit action to that of a superintendent “of a school district,” when the definition of “superintendent” in the act is appropriately inclusive of head administrators of charter schools, regional education cooperatives (RECs), special schools, and state agencies. (See, “Technical Issues.”)

The HEC amendment also strikes the word “comments” from the proposed definition of “ethical misconduct,” so that the term includes only discriminatory actions or practices, rather than also including speech. (See, “Other Substantive Issues.”)

Synopsis: HB128 addresses the issue of ethical and sexual misconduct by educators and other school personnel, including school volunteers. It proposes several preventative and responsive measures to address the problem, including: background checks; disclosure requirements for applicants to public school employment and applicants’ prior employers; training for school staff and volunteers on recognizing and reporting instances of abuse; support for investigations of abuse; cross-agency communication among law enforcement, CYFD, and the Public Education Department (PED); and definitions of relevant terms.

FISCAL IMPLICATIONS

HB128 does not contain an appropriation.

SIGNIFICANT ISSUES

HB128 arises from the recommendations of the House Memorial 57 Taskforce Strategic Plan on Educator Ethical Misconduct. HM57 was passed in the 2019 Regular Legislative Session and required PED convene a taskforce to examine issues related to the investigation, reporting, and documentation of ethical misconduct involving moral turpitude, and to develop a strategic plan to ameliorate these concerns, with specific regard to hiring, training, and reporting practices and policies, as well as potentially related necessary legislative changes. The taskforce included representation from PED, CYFD, the New Mexico School Boards Association, the Coalition of Educational Leaders, the Attorney General's Office, the Public Schools Insurance Authority, the Albuquerque Public School District, the New Mexico PTA, the New Mexico Coalition of Sexual Assault Programs, and Cooperative Educational Services. The taskforce met three times and made a number of recommendations, including suggested legislative changes, which were reported to the Legislative Education Study Committee at its November 2020 hearing. HB128 encompasses most of those recommendations.

The bill addresses a number of issues surrounding abuse of children and students by personnel involved with the public school system, including employees, contractors and their employees, and school volunteers. The problem of sexual abuse in schools is perhaps more pervasive than is apparent; the nonprofit group, SESAME ("Stop Educator Sexual Abuse Misconduct and Exploitation") maintains a website that indicates one in 10 K-12 students is a victim of educator sexual misconduct, and just one child sex offender can harm as many as 73 victims in their lifetime. Despite decreased personal interaction, school closures, lockdowns, and distance learning practices arising from the COVID-19 global pandemic, SESAME documented 448 unique incidents of sexual misconduct perpetrated by K-12 educators and other school personnel in 2020; considering the secrecy that often surrounds these acts, the actual number of such cases is likely to be substantially greater than reported and documented cases might indicate.

The primary problem the bill seeks to curtail is the practice colloquially known as "passing the trash," where a school employee who has been accused of or disciplined for abuse of a student or child leaves their current place of employment to move to a new area and new employer that are unaware of the offense they have committed or allegations of abuse levied against them. The bill requires disclosure by prospective school employees or volunteers of all prior employment by schools or employment that involved unsupervised contact with children, as well any instances or allegations of child abuse, and any separation from employment related to such instances or allegations. The bill likewise requires similar disclosure of an applicant's history, within 30 days, by a prospective employee's relevant prior employers. The bill protects from liability former employers who report such information in good faith. These measures are based upon "SESAME" laws that have been enacted in a number of other jurisdictions, including Pennsylvania, Connecticut, New Jersey, Nevada, and Maryland.

Relatedly, the bill makes the administration of background checks more explicitly related to ethical and sexual misconduct by school personnel, and adds a number of definitions to the School Personnel Act to enhance that relationship, including definitions for "contractor," "moral turpitude," "school volunteer," and "unsupervised contact with children." Significantly, definitions for new terms "ethical misconduct" and "sexual misconduct" include reference to any

sexual offense prohibited by the Criminal Code and the Sexual Exploitations of Children Act, and encompasses behaviors that might not be immediately criminal, but that can be characterized as “grooming behaviors” that are reasonably apparent to result in inappropriate sexual contact with a child. The bill encompasses additional flexibility in this established relationship between illicit behavior and background checks by explicitly permitting the department to add any other behavior to the definition of “ethical misconduct” through rulemaking. HB128 also requires PED maintain a list, updated monthly, of the names of persons reported to the department for convictions or allegations of ethical misconduct, as defined by the bill, and provide this list to a school governing authority upon request.

HB128 would also require local school boards adopt policies providing for the tracking and coordination of reports of child abuse made by school personnel, contractors, and volunteers, while protecting the identity of victims of abuse, and provides for the department to take licensure action against licensed school personnel who fail to report child abuse, neglect, or ethical misconduct as required. The bill would also require all school personnel, including volunteers and contractors and their employees, to complete training in the detection and reporting of child abuse and neglect, to include ethical misconduct and professional responsibilities. The department is directed to develop or adopt these required training programs and coordinate with public schools, the Human Services Department (HSD), the Department of Health (DOH), the Early Childhood Educational and Care Department (ECECD), and CYFD, as well as to promulgate rules for the administration of the required training.

The School Personnel Act currently requires a superintendent investigate all allegations of ethical misconduct by any school employee who resigns, is discharged or terminated, or otherwise leaves employment after an allegation of abuse has been made against them. HB128 allows a superintendent to designate a representative to act on their behalf in this investigation, and explicitly defines “designated representative” to include a regional education cooperative. This measure may relieve some administrative and financial burden upon poorer or rural school districts that may lack necessary or helpful resources to execute this duty.

The bill also amends the School Personnel Act so that superintendents, state agency administrators, and local school boards or school governing authorities would no longer be prohibited from disclosing to the public reasons for termination actions taken against school personnel, and likewise permits a record to be made of termination proceedings and related appeals, currently prohibited under the act. Further, under the proposed amendments to the act, records of arbitration proceedings under appeals to termination decisions can now be deemed an official transcript of such proceedings.

The universal duty to report reasonable suspicions of child abuse, contained in the Children’s Code, would be explicitly expanded by the bill to include physical, emotional, psychological, or sexual abuse perpetrated by adults other than a parent, guardian, or custodian; currently, that duty to report is limited to suspected abuse by an adult in a custodial relationship with a child. When an alleged perpetrator is school personnel, or a volunteer or contractor, a report is also to be made to the PED. HB128 enhances interagency communication by requiring law enforcement and CYFD to transmit a report to PED within 48 hours of receiving such a report, when an alleged perpetrator is school personnel or volunteer, or a contractor.

HB128 does not contain an appropriation. The House Memorial 57 Taskforce Strategic Plan included a recommendation that the legal and regulatory requirements of the plan be supported by sufficient appropriation. Some taskforce members representing school districts raised

concerns that certain expanded requirements related to tracking reports of child abuse and training in recognizing and reporting abuse might increase expenses to school districts and charter schools.

PERFORMANCE IMPLICATIONS

When PED receives a report of suspected child abuse, as required under the proposed amendments to the Children's Code, the bill requires the department to notify the person making the report of its receipt, within five days, that the report is being investigated. Mailing notification within five days is sufficient compliance with this requirement.

ADMINISTRATIVE IMPLICATIONS

HB128 requires PED to maintain a list of the names of all persons reported to the department for convictions and allegations of ethical misconduct, to be updated monthly and provided to school governing authorities upon request.

The bill directs the department to develop or adopt training programs to be made available to every public school, to promulgate rules for the administration of the training program, and to coordinate with appropriate staff in public schools, HSD, DOH, CYFD, and ECECD. The department is to consult with the federal Centers for Disease Control and Prevention in the development and adoption of these rules, which minimally are to include training for reporting requirements, trauma-informed instruction, identification of indicators of likely abuse and inappropriate behavior, ethical misconduct, professional responsibility, investigations and procedures, and relevant definitions.

PED is permitted to add, via rulemaking, additional prohibited behaviors to the list of those behaviors encompassed by the defined term, "ethical misconduct," in the School Personnel Act.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

HB128, as amended by HEC, (HB128a/HEC) would clarify that the protections proposed by the bill extend not merely to children *or* students, but to all public school students, regardless of specific age. This would address potential situations where a victim of prohibited activities is a student, but may have reached the age of consent or their majority. The extension of protections to such individuals is appropriate; even though a student may no longer be a "child," the power dynamic between a student and adult school personnel is nevertheless such that a student of greater age is still in an inferior position to a potential perpetrator of abuse, and entitled to these safeguards from possible predators.

Moving the proposed definition of "child abuse" in HB128a/HEC from the proposed new section of the School Personnel Act to the definitions section would make that definition applicable throughout the current version of the act, and to any future amendments of the act.

Removing the unnecessarily restrictive reference to superintendents "of a school district" in the amended bill clarifies the appropriate duty to investigate allegations of child abuse extends to leaders of all public and state educational institutions, rather than merely the leaders of traditional local school districts.

OTHER SUBSTANTIVE ISSUES

Removing the reference to “discriminatory *comments*” from the proposed definition of “ethical misconduct” in HB128a/HEC would limit potential punitive measures against alleged abusers to those triggered by definitive actions, rather than words, which may or may not be argued to fall under the protection of the First Amendment to the United States Constitution, and Article 2, Section 17 of the Constitution of New Mexico. Further, discriminatory verbiage may still be barred or regulated under 6.60.9 NMAC, Licensure Requirements, Code of Ethical Responsibility of the Educator Profession. That Part of the Administrative Code bars discrimination on many of the bases included in the proposed definition of “ethical misconduct,” albeit not specifically for age, pregnancy, gender identity, citizenship, or domestic abuse reporting status. The Code of Ethical Responsibility does, however, ban the harassment of students, and the creation of a hostile school environment, via sexual references, references directed at gender-specific students, or any other verbal conduct. The Code also bans on- or off-campus conduct that is abusive, indecent, profane, boisterous, or otherwise disorderly and tending to disturb the peace, and likewise prohibits any written or spoken words in school or at school events that demonstrate a bias against a person or group on the basis of race, religion, culture, ethnicity, sexual preference, sexuality, or physical disability. It is important to note, however, that the provisions of the Code of Ethical Responsibility apply only to licensed school personnel, while most of the provisions of HB128a/HEC apply to licensed and unlicensed school personnel, contractors, and school volunteers.

As noted above, HB128 proposes several changes to records retention and disclosure provisions under the School Personnel Act: permitting superintendents, state agency administrators, and local school boards and governing authorities, to disclose the reasons for terminations of school personnel to the public; permitting records to be made of termination proceedings and related appeals and arbitrations; and deeming such records to be official transcripts of termination appeals proceedings and arbitrations. Because these proposed amendments affect privacy considerations that can have profound effect upon employment prospects, the sponsors may wish to consider limiting these proposed amendments only to cases where terminations and related appeals result from alleged or proven sexual or ethical misconduct, or other instances of abuse.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS