LFC Requester:	

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO
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(Analysis must be uploaded as a PDF)

SECTION I: GENERAL INFORMATION

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

Date Prepared: ____________ *Check all that apply:*
Bill Number: *S266-341* Original _*x* Correction __
Amendment __ Substitute __

Sponsor: Sen. Muñoz
Short Title: HIGHER ED. AGREEMENT APPROVAL & REVIEW

Agency Name and Code Number: DFA-341
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis ( ) indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis ( ) indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
FTE	$0	$47.315	$48.261	$95.576	Recurring	General Fund
DFA Legal	$0	$32.776	$33.432	$66.208	Recurring	General Fund

Legal Support	$0.0	$60.0	$0	$60.0	Non-recurring	General Fund
TOTAL	$0	140.091	$81.693	$221.784		

*Assumes 2% increase in wages for from legislative action annually. Assumes an average 115 hours for DFA legal support annually.
(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:

Senate Bill 266 (SB266) aims to enhance accountability and financial oversight in higher education institutions and community colleges in New Mexico by establishing review and approval processes for certain agreements with administrators, creating reporting requirements, and providing for civil actions in cases of fiduciary duty breaches. Key provisions include:

- **Definitions:**
  - Defines key terms such as "administrator," "board of regents," "community college," "employment agreement," "indemnification," "performance or incentive compensation agreement," "qualifying agreement," "release of liability," "retention agreement," "separation agreement," "settlement agreement," "severance compensation," "state educational institution," and "total compensation."
- **Review and Approval of Qualifying Agreements:**
  - Requires state educational institutions and community colleges to submit qualifying agreements for administrators to the State Board of Finance for review if the agreement exceeds five years or includes total compensation exceeding ten times that of the lowest-compensated full-time employee.
  - The State Board of Finance must review the agreements within 30 days and either approve them, request modifications or reject them.
  - The Attorney General must also review agreements with release of liability or indemnification terms.
- **Consequences for Non-Compliance:**
  - Qualifying agreements executed without the required reviews are null and void.
  - Approval by the State Board of Finance does not preclude the Attorney General from taking action for breaches of fiduciary duty.

- **Reporting Requirements:**

    - State educational institutions and community colleges must submit annual reports to the Attorney General and the Secretary of Higher Education detailing administrators' compensation and the lowest-compensated full-time employee's compensation.

    - The State Board of Finance must submit annual reports to the Attorney General and the Secretary of Higher Education on the number and types of qualifying agreements reviewed, including details of the agreements and the determinations made.

- **Civil Cause of Action for Breach of Fiduciary Duty:**

    - Establishes that members of boards of regents, community college boards, and administrators owe fiduciary duties to their institutions.

    - The Attorney General can bring a cause of action against individuals who breach these duties.

    - Courts can provide various remedies, including injunctions, performance orders, reimbursement of defense costs, impounding public funds, and other appropriate relief.

- **Effective Date:**

    - The provisions of the act will take effect on July 1, 2025.

FISCAL IMPLICATIONS

Overall, while SB266 aims to promote financial stability and accountability, it may result in increased administrative and legal costs for compliance and enforcement. The exact fiscal impact would depend on the volume of qualifying agreements and the extent of legal actions taken. Based on the provisions outlined in SB266, the Department of Finance and Administration anticipates SB266's potential fiscal impacts could include:

- **Administrative Costs:**

    - State educational institutions and community colleges may incur additional administrative costs to prepare and submit qualifying agreements for review by the State Board of Finance and the Attorney General.

    - The State Board of Finance and the Attorney General's office may require additional resources to review and process the qualifying agreements within the specified timeframes.

        - Given the additional oversight and reporting requirements imposed on the

Board of Finance by SB 266, Board of Finance staff estimate the need for additional legal support and an FTE.

- SB266 defines qualifying agreements as "employment agreement, performance or incentive compensation agreement, retention agreement, separation agreement or settlement agreement, including a proposed qualifying agreement or an amended qualifying agreement or any financial instrument."

    - The Board of Finance estimates a total of seven institutions offering 4-year degree programs, with between 11 and 17 branch campuses. There are 16 community colleges in the state. The number of administrators for which a qualifying agreement exists is unknown, but assuming that each 4-year institution and all community colleges (23 total) have an average of five positions with qualifying agreements, there could be up to 115 positions for which the Board of Finance and the Attorney General would ultimately need to review, approve, modify, or reject qualifying agreements.

- Again, the number of agreements/amended agreements reviewed on an annual basis is unknown but could be substantial. Thus, the Board of Finance anticipates the need for an additional 956 work hours or 0.5 FTE for a total of $47,315 annually, beginning in FY26.

- **Legal Costs:**

    - The Board and the Department of Finance and Administration have undergone or are currently undergoing rulemaking related to other matters that require specific expertise and outside counsel. The Board estimates that an additional $60,000 in outside counsel fees ($437.50 per hr. x ~137 hrs.) for FY 2026 is needed to promulgate rules related to SB 266.

        - Additionally, depending upon the volume of agreement/amended agreements requiring review on an annual basis, the Board and DFA anticipate between 30 and 240 hours of additional legal review at an average of $312.15 per hour ($9,364.5 - $74,916).

    - There may be increased legal costs associated with the potential for civil actions brought by the Attorney General against board members or administrators for breaches of fiduciary duty.

        - Institutions may need to secure independent counsel for board members involved in fiduciary duty actions, leading to additional legal expenses.

- **Potential Savings:**

    - SB266 could potentially lead to cost savings and prevent financial losses, waste, or abuse within state educational institutions and community colleges by ensuring that qualifying agreements are fiscally prudent and do not contain excessive financial benefits.

SIGNIFICANT ISSUES

- Aiding and Abetting Claims:
    - SB266 creates fiduciary duties for boards of regents, community college boards, and administrators. Under New Mexico law, fiduciaries are required to act with the utmost good faith, trust, confidence, and candor toward the beneficiaries. SB226 includes a duty of care and administration, a duty of good faith, and a duty of undivided loyalty.
        - These new fiduciary duties may create third-party liability for regents, board members, administrators, Board of Finance staff, and Attorney General staff.
        - New Mexico law recognizes third-party tort liability for aiding and abetting a breach of fiduciary duty. To state such a claim, a plaintiff is only required to prove a fiduciary if the plaintiff breached a duty owed to the plaintiff, the defendant knew of the duty, and the defendant provided substantial assistance or encouragement to the fiduciary.
            - SB266 does not prohibit the Attorney General from taking action for breach of fiduciary duties after the State Board of Finance has approved an agreement.
            - To the extent the Attorney General's office takes action against based on an agreement approved by the Board of Finance, other regents, Board of Finance Staff, and Attorney General staff may become open to third-party (i.e., students and/or professors) aiding and abetting claims.

PERFORMANCE IMPLICATIONS
N/A

ADMINISTRATIVE IMPLICATIONS

- SB266 introduces several administrative implications for state educational institutions, community colleges, the State Board of Finance, and the Attorney General's office. Here are the key administrative implications:
    - Submission and Review of Qualifying Agreements:
        - State educational institutions and community colleges must submit qualifying agreements for administrators to the State Board of Finance for review if the agreements exceed five years or include total compensation

exceeding ten times that of the lowest-compensated full-time employee.

    - Agreements with release of liability or indemnification terms must also be submitted to the Attorney General for review.

- Review Process:

    - The State Board of Finance must review and either approve request modifications or reject the qualifying agreements within 30 days of receipt.

        - Training will need to be held for the Board so that they can best consider qualifying agreements.

    - The Attorney General must review and either approve, request modifications, or reject the release of liability or indemnification terms within 30 days of receipt.

- Reporting Requirements:

    - State educational institutions and community colleges must submit annual reports to the Attorney General and the Secretary of Higher Education detailing administrators' compensation and the lowest-compensated full-time employee's compensation.

    - The State Board of Finance must submit annual reports to the Attorney General and the Secretary of Higher Education on the number and types of qualifying agreements reviewed, including details of the agreements and the determinations made.

- Legal and Compliance Responsibilities:

    - Institutions must ensure that qualifying agreements comply with the review and approval requirements to avoid having them declared null and void.

    - In the event of a breach of fiduciary duty action brought by the Attorney General, institutions must secure independent counsel for board members involved in the action.

- Rulemaking:

    - The State Board of Finance and the Attorney General must promulgate and adopt rules to implement the provisions of the bill in accordance with the State Rules Act.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

- § 41-4-4, NMSA 1978 (Immunity from Tort Liability):

- The New Mexico Tort Claims Act (NMTCA) provides that a governmental entity shall pay any settlement or final judgment entered, including defense costs and attorney fees, against a public employee for any tort committed, including breaches of fiduciary duty. The NMTCA only allows for the recovery of funds from a public employee if it is shown that the employee acted fraudulently or with actual intentional malice.

- As written, SB266 may require universities and community colleges to pay for the costs of defending regents, members, and/or administrators against any suits instituted for breach of fiduciary duties and pay any settlements or final judgments resulting therefrom.

TECHNICAL ISSUES

- SB266 requires the review, approval, modification, or rejection of qualifying agreements within 30 days of submittal to the Board of Finance and Attorney General.
    - This review process will likely slow the hiring process and possibly result in top candidates accepting positions elsewhere.

OTHER SUBSTANTIVE ISSUES

N/A.

ALTERNATIVES

N/A.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If SB266 is not passed, qualifying agreements will continue to be negotiated, drafted, and approved by the associated board of regents or governing board and will not be subject to review by the State Board of Finance. The existing structure of oversight of such agreements would remain the same.

AMENDMENTS

N/A.