

LFC Requester:	Connor Jorgensen
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AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO

AgencyAnalysis.nmlegis.gov and email to billanalysis@dfa.nm.gov

(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: 2/7/2025 *Check all that apply:*
Bill Number: SB 266 Original Correction
 Amendment Substitute

Sponsor: Senators Munoz & Hamblen **Agency Name and Code** University of New Mexico-952
Short Title: Higher Ed. Agreement Approval and Review **Number:** _____
Person Writing Lenaya Montoya
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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
Total	More than \$1,000,000				Recurring	

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HJR 12
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

SB 266 provides for the following:

- Review and approval by the State Board of Finance for certain qualifying agreements with “Administrators” for State Educational Institutions or Community Colleges;
- Review and approval by the Attorney General for release and indemnification terms of certain “Qualifying Agreements” with Administrators for state annual reports regarding reviewed Qualifying Agreements by the State Board of Finance to the Attorney General;
- Creation of a civil cause of action against a Board of Regents or Community College Board or a member of those Boards for a breach of fiduciary duty; and,
- Requirement of Boards to secure separate counsel in the event of a Board Member’s breach of fiduciary duty action.

FISCAL IMPLICATIONS

Note: Lost opportunity of potential highly valuable candidates for positions of significant skill and expertise while waiting for “Qualifying Agreements” to be vetted with BoF and AG as well as loss of candidates who do not wish employment agreement terms and conditions to be disclosed and vetted by outside state agencies. Lost opportunity to University to resolve matters of significance and potentially for lower amount while waiting for BoF and AG to vet Qualifying Agreements which contain release or indemnification clauses. University may also bear the cost of defense and liability of any Board and/or Regent accused of breach of fiduciary duty.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

The New Mexico Constitution established UNM. See N.M. Const., art. XII, § 11 (confirming UNM as a state educational institution); NMSA 1978, § 21-7-1 (West 2016) (naming UNM as “the state university”). Additionally, the New Mexico Constitution dictates that UNM be governed by a seven-member Board of Regents, where all seven members are appointed by the governor with consent of the state senate. N.M. Const., art. XII, § 13(D). Indeed, the Supreme Court of New Mexico affirmed in *Regents of University of New Mexico v. New Mexico Federation of Teachers*, 125 N.M. 401, 962 P.2d 1236 (N.M. 1998), that UNM “is a state institution whose management and control are placed by the New Mexico Constitution into the hands of a seven-member Board of Regents.” *Id.* at 1239. The Legislature has specified some of the Regents’ powers:

The board of regents shall have power and it shall be its duty to enact laws, rules and regulations for the government of the university of New Mexico. The board of regents may hire a president for the university of New Mexico as its chief

executive officer and shall determine the scope of the president's duties and authority.

NMSA 1978, § 21-7-7 (1995). "The reason for the Regents' autonomy is to assure that the educational process is free of interference from the *capricious whims of the political process*." *Regents of Univ. of N.M. v. New Mexico Federation of Teachers*, 125, N.M. at 415 (emphasis added). SB 266 presents a clear violation of the New Mexico constitutional delegation of authority to state educational institutions to manage and control their own affairs. The Legislature lacks authority to appropriate nonstate funds to institutions of higher learning or to control the use thereof through the power of appropriation. Const. art. 3, § 1; art. 12, § 13; 1953 Comp. §§ 73-22-4, 73-25-3, 73-26-3, 73-27-4, 73-30-15. *State ex rel. Sego v. Kirkpatrick*, 1974, 86 N.M. 359, 524 P.2d 975.

Legislature has the power, and perhaps the duty, in appropriating state monies, to consider the availability of federal funds for certain purposes, but it has no power to appropriate, and thereby endeavor to control, the manner and extent of the use or expenditure of federal funds made available to institutions of higher learning or to control funds in the forms of scholarships, gifts, donations, private endowments or other gratuities granted or given to the institutions by private parties and institutions. *State ex rel. Sego v. Kirkpatrick*, 1974, 86 N.M. 359, 524 P.2d 975.

"Qualifying agreements" are defined to include the following:

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, however named, that serves the same purposes

An "Administrator" whose "Qualifying Agreement" is subject to the vetting process is defined as follows:

a president, chancellor, vice president, vice chancellor, provost or vice provost, regardless of any executive, senior or assistant designation, a director of athletics and any other person that is performing a similar executive function or role at a state educational institution or community college, regardless of that person's title. "Administrator" does not include any executive personnel who are employed by the university of New Mexico health sciences center;

So, an Administrator's Qualifying Agreement will be subject to vetting under the following circumstances if the agreement is: (a). for more than 5 yrs. or (b). includes a total compensation value (and the definition of "total compensation" more than typically is considered employment compensation) more than 10x the lowest compensated regular FTE at the state educational institution and will be:

- a. Reviewed by the Board of Finance for approval, revision, rejection; and,
- b. If includes any form of release or indemnification term, will also be reviewed by the AG for approval, revision, rejection

The BOF and AG will each have 30 days to act from submission of the agreement by the state educational institution. Any agreement that has not been approved by the BOF and/or AG is null and void. There are many assumptions in the bill that are flawed in certain areas. For example, the Bill seems to ignore that every employment agreement, either explicitly or implicitly, incorporates the terms of the New Mexico Tort Claims Act which provides for indemnification of all public employees by the State. Thus, every employment agreement that otherwise meets the Qualifying Agreement criteria will have to be reviewed by the AG. The same applies to incentive or retention agreements.

The Bill proposes to codify common law fiduciary duties of “undivided” loyalty, care and prudent administration, diligence, and good faith as to every state educational institution regent and community college board member when those obligations are already codified in the statutory sections regarding public officers and employees, and state educational institutions. The Bill creates the right of the AG to pursue civil action against regents and community college board members (in the jurisdiction of the state education institution *or* in First Judicial Dist.) despite the fact regents of state educational institutions may not be held personally liable in any actions arising based upon a claim for damages arising out of an act or failure to act of that board of regents. NMSA 1978, §21-1-18.

The Bill requires general counsel to recuse themselves from representing a regent or board member the AG has initiated action against and obtain independent counsel for regent/board member. General counsels would be required to provide the AG with a plan to ensure independent counsel to the regent/board member even though this may be a violation of the Rules of Professional Conduct as the AG purportedly is adverse to the regent/board member.

SB 266 creates reporting requirements for state education institutions to disclose all *existing* qualifying agreements (that otherwise meet criteria for reporting to BOF and/or AG) to the NM HED Secretary and AG by 6/30/26.

PERFORMANCE IMPLICATIONS

The requirements provided for in SB 266 would significantly hinder UNM’s ability to recruit top candidates to critical administrative roles by causing substantial delays in our recruitment and hiring process:

- UNM already faces challenges in competing with peer institutions for top talent as our salaries and total compensation packages are well below market rates.
- UNM’s ability to move quickly and negotiate with candidates to find mutually agreeable employment terms allows us to compete in a very competitive national market. The proposed requirements will dramatically slow down the process to get an accepted offer from a candidate and execute a contract, and will lead to losing top candidates who are either being targeted by multiple institutions or who refuse to move forward with such a drawn out and public process.
- Particularly in industries where it is standard for recruitment processes to move quickly and there is a higher sense of urgency (such as Athletics), the addition of potentially multiple 30-day review, revision, and approval cycles will make it nearly impossible to keep top candidates in our applicant pools.
- Similarly, when it’s deemed in the best interest to terminate an employment agreement with an employee, the ability to negotiate the specific terms of a separation or settlement

agreement is critical. The inability to effectively, and quickly, negotiate such agreements will increase the risk of lawsuits and open the university up to an increased level of litigation that these agreements by their nature are designed to avoid.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

Many of UNM's administrators meeting the criteria outlined in Section 3.a.(2) are faculty administrators. As such, a more appropriate total compensation comparison would be to the university's lowest-paid regular full-time faculty member, rather than the lowest-paid regular, full-time staff member as defined in Section 2(m).

Including the cost of employee benefits as part of the total compensation calculation is problematic. The contribution of many such benefits (such as ERB retirement contributions) are mandated by state statute, so their inclusion in the compensation calculations skews the comparison of total compensation and implies the institution has any decision-making authority or influence over our expenditures on such benefits. Further, in cases of voluntary benefits (such as health insurance), comparing the total compensation between an employee who voluntarily elects insurance coverage to one that voluntarily declines such coverage is problematic and raises several challenges to our ability to administer. For example, an administrator with total compensation less than the 10x threshold who later on elects voluntary insurance coverage and as such is subject to this rule – would we retroactively be required to seek SBOF approval?

Are routine contract renewals subject to the SBOF and/or AG review and approval requirements, particularly if there are no material changes to terms? There is risk that the State is opening the door to either of these entities making implied employment decisions on behalf of the Board of Regents or University, in the event that the contract renewal for a currently employed administrator is either modified or rejected during this review process.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS