

LFC Requester:

Sunny Liu

### AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

#### SECTION I: GENERAL INFORMATION

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

Date Prepared: 02/06/25

Check all that apply:

Bill Number: SB 286

Original  Correction   
Amendment  Substitute

Sen. Craig W. Brandt  
Sen. James G. Townsend  
Sen. William E. Sharer  
Sen. Larry R. Scott  
Sen. Steve D. Lanier

Sponsor: \_\_\_\_\_

Agency Name and Code Number: 305 – New Mexico Department of Justice

Person Writing

Short Title: Education Freedom Account Act

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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
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

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

**SECTION III: NARRATIVE**

*This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator’s request. The analysis does not represent any official policy or legal position of the NM Department of Justice.*

**BILL SUMMARY**

Synopsis:

SB 286 contains twelve sections of new material to be added to the existing “Public School Code,” NMSA 1978, §§ 22-1-1 to -35-5 (1953, as amended through 2024).

Sections 1 and 2 names a new act the Education Freedom Account Act (EFAA) and define the various terms applicable to the EFAA, respectively.

Section 3 permits the Public Education Department (PED), based upon annual contracts with parents of participating students, to establish monetary accounts (educational freedom accounts) for enrolled students. Then, from those accounts, PED is authorized to pay for “private school” and for “other qualifying educational expenses” on behalf of enrolled students. The contracts between PED and parents would define how much money would be allocated per student and for what purpose. Provided a student remains in the private school, the department must continue to deposit money in their account monthly until the student graduates. The monies deposited into the educational freedom account will not be considered taxable income for state tax purposes of the parent or the student.

Section 4 governs the process for parents to apply annually for a freedom account on behalf of a qualifying student. Applications can be denied for many reasons including for the lack of funding of the program.

Section 5 requires that PED perform various duties, including: ensuring that parents have up to date information regarding what types of expenses are covered by the program, creating public-facing interfaces—especially for funding of the accounts, investigating the misuse of funds, and creating a process for disqualifying education service providers, parents, and students. It gives PED the discretion to perform other tasks, including contracting with private administrators, adopting rules, and requiring surety bonds.

Section 6 allows PED to create an application process for educational service providers. It also defines the relationship between providers and the State: they are not public actors and they cannot be made to change their creed, practices, admissions policy, or curriculum as a condition of receiving payment through the EFAA.

Section 7 requires public schools to provide records to the private school when a student

transfers to the private school.

Section 8 creates the education freedom review commission—consisting of nine voting members—which determines what qualifying educational expenses are, provides recommendations to PED, and plays a role in determining whether providers may participate in the program. The Secretary of Education appoints educators and parents to serve on the commission.

Section 9 requires that PED report to the Legislature and governor on the program.

Section 10 and 11 create the fund to pay for freedom accounts in the treasury and appropriates \$100,580,000 to fund the EFAA, which would not revert to the general fund, respectively.

Section 12 contains a severability provision.

## **FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

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

## **SIGNIFICANT ISSUES**

SB 286 potentially conflicts with both the New Mexico Constitution and United States Constitution.

### New Mexico Constitution

Article XII, Section 3 of the New Mexico Constitution provides that “no...funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school[.]” SB 286 seems to conflict with this provision because it provides public money to private schools for educational purposes. In *Moses v. Ruszkowski*, 2019-NMSC-003, 458 P.3d 406, the New Mexico Supreme Court (NMSC) changed its interpretation of Article XII, Section 3 and held that using public funds to lend textbooks to private school students did not violate the provision. The NMSC interpreted the section more permissively to avoid a possible conflict with the U.S. Supreme Court’s recent interpretation of the Free Exercise Clause of the First Amendment in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). 2019-NMSC-003, ¶¶ 17, 46. The NMSC did not articulate a clear rule, but held that loaning secular textbooks to private school students was permissible because it created a public benefit and “[a]ny benefit to private schools is purely incidental.” *Id.* ¶ 46.

The freedom accounts proposed by SB 286 have some differences from the textbook loan program in *Moses*. The textbook loan program provided books to students; “[a]lthough schools play a role in the implementation of the [the program], they do so as agents for the benefit of their students.” *Id.* ¶ 4. The department “retain[ed] ownership and control over the textbooks and the fund used to purchase them.” *Id.* ¶ 51. In contrast, SB 286 proposes that State would directly pay private schools – “[m]oney in an education freedom account shall not be refunded, rebated or shared with a parent or participating student in any manner.” § 3(C). Accordingly, it would be more difficult to argue that the benefit that public schools received was “purely incidental and

does not constitute ‘support[.]’” 2019-NMSC-003, ¶ 46.

Article IV, Section 31 of the New Mexico Constitution forbids the appropriation of money “for... educational... purposes to any person, corporation, association, institution or community, not under the absolute control of the state[.]” SB 286 appropriates money to PED, which is a state entity under public control. This could weigh against a potential violation of Article IV, Section 31. *See State ex rel. Interstate Stream Comm’n v. Reynolds*, 1963-NMSC-023, ¶ 17, 71 N.M. 389 (rejecting such a challenge when appropriations were made to the State Engineer). But, under SB 286, PED would not have “absolute control over [the] expenditure[s],” *id.* – it would be bound by contract to deliver the money to a qualifying private school, which would then use it according to its own policies and creed. As such, private schools who received money directly from the State may do more than “incidentally benefit,” *id.*, from the appropriations. The NMSC in *Moses* found that lending textbooks to private school students did not violate this provision. 2019-NMSC-003, ¶ 48. Again, NMSC did not articulate a clear rule, and there are differences between that program and SB 286. *See also* NMAG Op. No. 99-01 (Jan. 29, 1999) (“The Attorney General’s Office in the past has applied the anti-donation clause to tuition grants and scholarships for private school education, and has concluded generally that they would probably violate the anti-donation clause”).

Article IX, Section 14 of the New Mexico Constitution, referred to as the Anti-Donation Clause, provides that the State shall not “directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation[.]” SB 286 does not require the State to pledge its credit to public schools, so the only question would be whether providing them with money through freedom accounts would constitute a “donation.” In *Moses*, the NMSC reaffirmed that a donation for the purposes of this provision is “a gift, an allocation or appropriation of something of value, without consideration.” 2019-NMSC-003, ¶ 50 (quotations omitted). Private schools would provide consideration; they would educate students and agree to abide by the Act. But similar things could be said of the ranchers in *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, 63 N.M. 110. Again, SB 286 is different from the program upheld in *Moses* because it would directly give money to private schools; the department would not retain ownership of the funds. Accordingly, the appropriations would more resemble a subsidy to private schools.

Article XII, Section 12 of the New Mexico Constitution provides that a “uniform system of free public school schools sufficient for the education of, and open to, all of the children of school age in the state shall be established and maintained.” If sufficient funds were diverted as a result of SB 286 that sufficiently affected and compromised the state’s ability to maintain its public schools, this constitutional provision could be triggered.

SB 286 could also raise Establishment Clauses issues under both our state and federal constitutions. SB 286 would authorize the State to directly fund private schools, which by the definitions under SB 286 could include religious schools. The U.S. Supreme Court upheld a private school voucher program in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In that program, the State provided money to parents based on economic need; the parents could then choose to spend the money on tutoring or on private school tuition, in which case the State would write a check to the parents, who would then sign it over to the private school. *Id.* at 646. On the other hand, SB 286 would allow the department to give money directly to private religious schools, creating a closer nexus between public money and religious instruction.

While further review may reveal additional impacts of SB 286, there are significant

constitutional questions presented.

## **PERFORMANCE IMPLICATIONS**

N/A

## **ADMINISTRATIVE IMPLICATIONS**

N/A

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Companion bill in House: HB 480. There are a few small differences between these two bills. SB 286 defines “qualifying educational expenses” and HB 480 does not.

Also, SB 286, under Section 6, states that educational service providers “shall not” provide education services as contracted and shall not refund, rebate, or share money from the education freedom accounts with parents or student. HB 480 states that educational service providers “will not” provide education services as contracted and shall not refund, rebate, or share money from the education freedom accounts with parents or student.

## **TECHNICAL ISSUES**

N/A

## **OTHER SUBSTANTIVE ISSUES**

There are undefined terms throughout the bill, which could operate to render sections unclear. For example, Section 2(D) states that education service providers are “qualified to provide educational goods and services” but does not provide guidance for the department to determine which entities or persons are qualified and which are not. Similarly, Section 3(B)(2) allows funds to be used for “tutoring services provided by a qualified person.” The term “qualified person” is not defined. Section 5 requires the department to develop two systems that are “commercially viable, cost-effective and user-friendly” without defining these terms for purposes of SB 286.

Finally, SB 286 specifically makes funds received under the EFSA as tax exempt for State tax purposes. There could be federal tax implications of this bill that might fall upon parents, students, or both.

## **ALTERNATIVES**

N/A

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

## **AMENDMENTS**