

Board of Regents. The boards created by the New Mexico Constitution in Article 12, Section 13.

Community college board. The governing board that has the duty to determine the financial and educational policies of its community college as provided in the Community College Act (21-13 NMSA 1978).

Consideration. A thing of value including cash, property, services, or a form of compensation that is of a value at least equal to the value of the property interest to be conveyed.

Duty of care and prudent administration. The duty of a board member or regent to carry out their responsibilities with diligence, sound judgement, and skill that an ordinarily prudent person would reasonably exercise.

Duty of good faith. The duty of a board member or regent to act within the law as they advance the interests of their institution and to be ethical, honest, and be free from malice or ill intent.

Duty of undivided loyalty. The duty to faithfully pursue the mission of and act solely in the best interest of their institution, not serving for personal gain or the benefit of other organizations, groups, or individuals.

Performance or incentive compensation agreement. Is a contract that links additional compensation including a bonus or other incentive to the achievement of a specific performance target or milestone by an administrator. It can include academic, financial, athletic, or operational performance goals.

Qualifying agreement. Includes an employment agreement, performance or incentive compensation agreement, retention agreement, separation agreement, or settlement agreement, or any financial agreement that serves a similar purpose.

Regular full-time employee. Means a non-faculty employee who is hired for an indefinite period of time, subject to satisfactory performance and available funding.

Retention agreement. A contractual arrangement that provides the administrator with a specific financial benefit to continue employment with the institution.

Separation agreement. A contractual arrangement that provides terms and conditions for the administrator's voluntary or involuntary separation and includes severance compensation or benefits.

Settlement agreement. A contractual arrangement that is intended to resolve any dispute or potential legal claim that may arise from the administrator's employment or separation from the institution.

Severance compensation. A financial benefit or payment provided to the administrator upon separation.

Total compensation. The complete package of direct monetary payments and indirect non-monetary benefits an employee receives from the employer. It includes all compensation

whether provided directly by the institution or through an external entity affiliated with the institution, including foundations, athletic booster clubs or similar.

Qualifying agreement review.

SB266 requires prior to the execution of a qualifying agreement, the agreement be submitted to the state board of finance if the agreement is for more than 5 years of employment or the agreement includes a total compensation value that exceeds the lowest compensated regular full-time employee by more than 10 times.

In reviewing the qualifying agreement, the state board of finance is charged with preventing financial loss, waste, or abuse and shall:

- Ensure any significant expenditures do not impair the institution's financial standing or limit the institution's ability to invest in academic programs or student services;
- Ensure the qualifying agreement does not include unwarranted terms such as excessive severance compensation or other financial benefits;
- Identify fiscally imprudent terms.

Within 30 calendar days of receipt of a qualifying agreement, the state board of finance must complete its review and either approve the agreement, request modifications to the agreement, or reject the agreement.

If the state board of finance approves the agreement, the institution may execute the agreement. If the state board of finance requests modifications, the institution **must** modify the agreement as directed by the state board of finance. If the agreement is rejected, the institution may revise the agreement to resolve the reasons for rejection and resubmit.

If the qualifying agreement includes a release for liability or indemnification, the institution must also submit the qualifying agreement to the attorney general for review of those sections. The attorney general has 30 days to review the agreement. The attorney general may approve the terms, request modification of the terms, or reject the terms. Upon approval of the terms, the institution may execute the agreement. Review of an agreement does not preclude the attorney general from instituting an action for breach of fiduciary duty against the board of regents or governing boards.

A qualifying agreement that is executed without the review and approval of the state board of finance or the attorney general when required is null and void.

Reporting.

Beginning in the 2025-26 academic year, institutions that employ an administrator with a qualifying agreement that meets the criteria of SB266 shall submit to the attorney general and the secretary of higher education an annual report listing name, title, total compensation by category paid to the administrator, total compensation by category paid to the lowest paid full-time employee.

No later than December 31, 2025 and annually thereafter, the state board of finance shall submit to the attorney general and the secretary of higher education a report of the number of qualifying

agreements reviewed and a breakdown of the types of qualifying agreements reviewed. SB266 provides direction to the state board of finance on the report requirements.

Civil cause of action.

SB266 establishes a civil cause of action against regents and board members for breach of fiduciary duty. The action may be filed by the attorney general in either the district in which the institution resides or in the first judicial district.

If the attorney general brings a civil cause of action against a board member or regent, the counsel for the institution shall:

- Not serve as counsel to the member named in the action,
- Submit a plan to the attorney general to provide independent counsel to the individual
- Continue to act as counsel to an administrator named in the action consistent with fiduciary duty

SB266 establishes remedies the court may utilize if it is found the board member or regent breached their fiduciary duty.

The effective date of SB266 is July 1, 2025.

FISCAL IMPLICATIONS

The state board of finance would need to hire additional personnel, rely upon institutions, or contract with a third party. As New Mexico has 7 four-year institutions, 8 independent community colleges, 9 branch community colleges, 1 military institute, 1 school for the blind & visually impaired, 1 school for the deaf (27 institutions), the costs could be significant as SB266 requires the board of finance be able to certify the hiring of administrators will not negatively impact the institution's finances or ability to provide academic programs and student services. In order to certify, the state board of finance must be well versed in each institution.

Post-secondary education institutions may have increased costs due to failed executive searches due to time between final contract negotiations and acceptance of the contract by the board of finance.

SIGNIFICANT ISSUES

State board of finance.

6-1-1 NMSA 1978 establishes the state board of finance.

E. The state board of finance, in addition to other powers and duties provided by law, has general supervision of the fiscal affairs of the state and of the safekeeping and depositing of all money and securities belonging to or in the custody of the state, and it may make rules and regulations for carrying out the provisions of Sections 6-1-1, 6-10-2, 6-10-3, 6-10-20, 6-10-29, 6-10-37 through 6-10-44, 6-10-46, 6-10-47, 6-10-50, 6-10-52 through 6-10-54, 6-10-58 and 6-10-61 NMSA 1978. The board shall have access to all reports and correspondence relating to the condition of banks, and savings and loan associations whose deposits are insured by an agency of the United States, in this state which are in the financial institutions division or any department or agency of the state. If the board deems action necessary to enable it to perform its duties, it may require the director of the financial institutions division to make a special examination of any state bank or trust company or any state savings and loan

association whose deposits are insured by an agency of the United States.

The primary focus of the state board of finance has historically been within state finances and real estate – overseeing the issuance of bonds, overseeing the custodial and fiscal agent agreement for the state, approving bond sales for certain public entities, providing oversight over state treasurer investments, approving certain real estate transactions, approving allocation cap for private activity bonds, overseeing capital projects for the general services department, approving the state’s tax increments for TIDDS, approving certain post-secondary education capital projects, etc. These transactions vary from the tens of millions to hundreds of millions. Per the FY2023 state of New Mexico audit, the state treasurer had over \$17 billion of assets under management – the state board of finance does a fantastic job in overseeing the investment of these assets for the state.

In reviewing and approving the financial terms in an employment contract, SB266 requires the state board of finance ensure any significant expenditures do not impair the *institution’s financial standing or limit the institution’s ability to invest in academic programs or student services*; in order to fulfill these obligations, the state board of finance would most likely need to

1. Increase the number of state board of finance employees to include employees who are charged with understanding each public higher education institution’s financial standing, including knowledge of:
 - a. the revenue mix for each institution
 - b. the trends and ‘triggers’ for each of these revenue streams
 - c. the educational programmatic mix with the associated needs for each program
 - d. the student mix, including traditional/nontraditional, full-time, part-time, socio-economic status, ethnic make up, etc.
 - e. the institutional investments in student services
 - f.
2. *or* – rely upon the individual institutions to provide the assessment of the draft contract and if the contract will impair the institution’s financial standing or limit its ability to invest in programs or student services
3. *or* – contract with a third party to perform the assessment.

In addition to understanding each institution’s financial standing, in order to have the foundation for contract approval, the individuals charged with contract review must be well versed in compensation packages for executive leadership in public higher education institutions.

Governing bodies – president selection.

Whether appointed or elected, New Mexico’s higher education governing bodies are charged with hiring the president of the institution. Once the top candidate has been identified, the details of the employment contract – include monetary and non-monetary compensation are finalized.

Adding 30 days post contract finalization to being able to offer an employment contract could have a chilling effect on highly qualified individuals applying for a position at a New Mexico higher education institution. Additionally, as the candidate has not been provided a solid job offer, the candidate is free to continue to accept other job offers.

Governing bodies – accreditation.

Post-secondary institutions must have institutional accreditation awarded by a recognized regional accrediting body in order to receive federal funds. New Mexico’s public post-secondary

institutions are accredited by the Higher Learning Commission (HLC). To be eligible for accreditation, each institution must demonstrate it meets all 19 HLC eligibility requirements. HLC requirement 3 states:

The institution has a governing board that is free from undue external influence and that possess and exercises legal powers necessary to govern the institution, including with respect to budget and authority for engaging and dismissing the Chief Executive Officer of the institution. (HLC Eligibility Requirements October 31, 2024).

SB266 may be perceived as imposing an external influence on the institution and eliminating the board's authority to engage and dismiss the chief executive officer.

If it is determined the boards do have an undue external influence place upon them, the post-secondary institution's institutional accreditation is at risk. If an institution does not have regional accreditation – they can not receive any federal funding, including student financial aid.

Governing bodies – authority.

Per 21-3-7 NMSA 1978:

Said boards of regents shall have full and complete power and control over their respective normal schools [universities]. Each board shall employ a superintendent or principal for such school who shall have the supervision and control of the school under such rules and regulations as may be provided by such board. Such board shall determine and provide as to what branches of learning shall be taught in such school and the classification and order of the same, and shall also direct the number of teachers that shall be employed, and shall determine the compensation to be paid to the superintendent and teachers. Such board shall also prescribe upon what terms and conditions pupils shall be admitted to such school, but no pupils shall be admitted who are not residents of this state, except on payment of a tuition fee to be prescribed by the board of regents for each term.

Per 21-13-10 NMSA 1978:

Board duties.

A. It is the duty of the community college board to determine financial and educational policies of the community college. The community college board shall provide for the management of the community college and execution of these policies by selecting a competent president for the community college, and, upon the president's recommendation, the board shall employ other administrative personnel, instructional staff or other personnel as may be needed for the operation, maintenance and administration of the community college.

B. The community college board shall have the power to fix tuition and fee rates for resident and nonresident students of the community college district, to accept gifts, to accept federal aid, to purchase, hold, sell and rent property and equipment and to promote the general welfare of the institution for the best interest of educational service to the people of the community college district.

It appears SB266 removes authority from both appointed boards and elected boards as both are given the statutory authority to employ and set compensation for the institutional president.

OTHER SUBSTANTIVE ISSUES

The definition of “administrator” excludes any executive personnel who are employed by the university of New Mexico health sciences center. It is unclear if the intent is to exclude all personnel associated with the health sciences center or if the intent is to only exclude those personnel employed by the university of New Mexico hospital and the associated health system. As drafted, SB266 would exclude the Executive Vice President of UNM Health Sciences. It does not exclude the Chief Executive Officer of UNM Hospital.

ALTERNATIVES

Alternatives include: required annual reporting to the higher education department on executive hires and contract renewals to include total compensation; statutory provisions similar to the educational retirement board’s “anti-spiking” provision related to severance packages