



February 13, 2025

Senator William P. Soules, Chair
Senate Education Committee
New Mexico Legislature
bill.soules@nmlegis.gov

Re: Senate Bill 266 Relating to Higher Education

Dear Senator Soules:

I am writing on behalf of the members of the Governing Board of Central New Mexico Community College (the "Governing Board") to express our concern regarding certain provisions of Senate Bill 266 ("SB 266").

Given recent events, we do understand what may have prompted this proposed legislation and the good intentions with which it was prepared and introduced into the current legislative session. We certainly concur with any productive effort to ensure responsible governance of New Mexico's higher education institutions.

At Central New Mexico Community College ("CNM") we take our responsibility, as independently elected members of the Governing Board, seriously. Our actions, which are taken in meetings open to the public, are public, subject to the Open Meetings Act, the Inspection of Public Records Act, and to coverage and scrutiny of the media in all of its forms, including social media. This enables each of our separate constituencies to independently evaluate whether we are performing as we should in furtherance of the best interests of CNM. We are regularly judged by the constituencies we serve at each election cycle of the Governing Board.

We look to existing law for definition of our charge and for direction in implementing our charge. The New Mexico Community College Act provides that: "It is the duty of the community college board to determine financial and educational policies of the community college." (NMSA 1978, § 21-13-10(A)).

In this regard, as the Governing Board approaches its statutory duties, it does so in a fashion consistent with the CNM Governing Board Guide & Policy Manual, which sets forth policies applicable to the Governing Board including a code of conduct that addresses ethical standards,



conflict of interest standards, and fiduciary standards, including the duties of care, loyalty, and honesty. These polices, which collectively constitute the Governing Board code of conduct, are restated in the Annual Commitment Letter, which each member of the Governing Board must execute annually, a copy of which is attached as Exhibit A.

That the Governing Board takes its fiduciary responsibility seriously is borne out in its no-nonsense approach to ethical standards by mandating, in its code of conduct at Section 7.2, that “A member shall report a suspected violation of the Governing Board’s standards of conduct or any other apparent irregularity to the Chair, or if the matter involves the Chair, to the Vice Chair.”¹

However, no matter how well intentioned, the Governing Board needs administrators and employees to carry out the adopted financial and educational policies of the Governing Board. The Community College Act provides that:

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 . . .

(NMSA 1978, § 21-13-10(A)).

Given the significant administrative responsibility of managing CNM and implementing financial and educational policies of CNM as determined by the Governing Board, we consider the selection of the President of CNM to be our most important and consequential decision.

In this regard, so that the president selected by the Governing Board may effectively manage CNM and execute Governing Board policy, the Governing Board in its Governing Guide & Policy Manual has delegated the critical responsibility of day-to-day management of CNM, its operations, and general fiscal management to the president.

However, SB 266 will inhibit the recruitment, employment and retention of qualified applicants for the position of president if a prerequisite to execution of an employment agreement is State Board of Finance ("SBF") review and approval of the employment agreement if the term exceeds five years, or exceeds a 10 to 1 total compensation ratio. (SB 266, Section

¹ The Executive Committee is then charged with investigating the matter. A report of the results is presented to the entire Governing Board. If it is determined that a violation has occurred, in addition to any other action, the Governing Board may make an appropriate disclosure to governmental agencies, including law enforcement authorities.



3(A)). There are inherent problems with using a mathematical ratio as a measuring stick through which contracts are measured before employment can be offered. First, market conditions will determine appropriate compensation levels to attract and retain talent, not a stated ratio, no matter how well intentioned. Second, to require SBF review and approval, in the context of a potential multi-step process, following the initial negotiation of an employment agreement, will clearly be cumbersome and time consuming, discouraging applicants from even applying for a position subject to such further pre-employment review.

That the proposed SBF review will be time-consuming and exhaustive is clear from the legislative mandate that the SBF ensure that (1) any significant expenditures in the agreement do not impair the finances of the college, and (2) the agreement does not contain “unwarranted terms”, including excessive severance compensation or other financial benefits, and that the SBF identify any fiscally imprudent terms. (SB 266, Section 3(B)). This will constitute a second independent review of the employment agreement, after which the SBF can either approve, require modification or reject the agreement. (SB 266, Section 3(C)). How can an applicant of sufficient stature to be offered employment be expected to undergo such an invasive prolonged procedure?

The further review required by the office of the Attorney General (“AG”), potentially utilizing the same multi-step process, should the employment agreement contain release or indemnification language (Section 3(E)) will only further exacerbate an already untenable situation.

The yearly reporting requirements imposed on CNM set forth at SB 266, Section 5 are also problematic. If there are administrators at CNM who have employment agreements for more than five years, exceed the 10 to 1 ratio or have release or indemnification provisions in their contract, a report, listing each so indicated administrator, must be submitted to the AG and to the secretary of higher education (“SHE”).

Separately, the SBF must prepare a yearly submittal to the AG and the SHE reporting the number of agreements reviewed, identifying the institution submitting the agreement and explaining the criteria used to justify the SBF determination. That the SBF must justify its determination on each agreement review, necessarily requires a more exhaustive review of each agreement submitted to SBF, further delaying the process.

SB 266, Section 6(a) sets forth a litany of currently-existing duties of board members and administrators, and then provides that the AG may bring a cause of action against a board member or an administrator who commits a breach of fiduciary duty. (SB 266, Section 6(B)). This section would appear to be unwarranted and unnecessary, given that remedies for bad behavior are already



in place. *See* Governmental Conduct Act at NMSA 1978, § 10-16-6, *et seq.*, which specifies civil and criminal penalties for malfeasance, the New Mexico Criminal Code at NMSA 1978, § 30-1-1, *et seq.*, and note the availability of civil actions for damages and injunctive relief. There is no need to specifically target board members and administrators of community colleges when statutes of general applicability should be sufficient. That existing remedies are available is made clear in SB 266, Section 6(E) which provides that, “The civil action and remedies provided . . . are not exclusive and are in addition to any other actions or remedies in law or equity otherwise available”

Needless to say, the explicit threat of suit against a sitting Governing Board member or administrator may have a chilling effect in recruiting otherwise qualified candidates to run for Governing Board positions or remain as Governing Board members, given the adversarial tone of SB 266. Similar concerns would apply to administrators. SB 266 flags opportunities for legal mischief by setting forth possible causes of action for breach of fiduciary duty,” . . . including duty of care and prudent administration, a duty of good faith and a duty of undivided loyalty.” (Section 6(A) and (B)). Governing Board members and administrators make many decisions in overseeing and managing CNM which require the exercise of judgment. To seemingly encourage opportunities for lawsuits calling into question policy and management decisions may unintentionally result in defensive decision making, which would deprive CNM of innovative and forward-thinking policy makers and administrators.

We thank you and the members of the Senate Education Committee for considering our observations and concerns regarding SB 266, and we respectfully suggest that there is no need for SB 266 in its present form.

Sincerely,

A handwritten signature in black ink that reads "Thomas E. Swisstack". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas E. Swisstack
CNM Board Chair

Cc: Sen. George K. Munoz
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Sen. Carrie Hamblen
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Appendix 1: Annual Commitment Letter

Central New Mexico Community College Governing Board Member Code of Conduct

Member Role

Acting individually, or in concert with my fellow Governing Board Members as circumstances indicate, as a Member of the Governing Board of Central New Mexico Community College (CNM), I, _____
[Name] agree to:

- Support the Vision, Mission and Core Values of CNM
- Develop and support policies advancing the Vision, Mission and Core Values of CNM
- Evaluate execution of CNM programs and policies
- Hire, supervise, evaluate and counsel the CNM President
- Attend all meetings of the Governing Board
- Participate in assigned committee meetings
- Participate in short- and long-range planning activities
- Ensure effective fiscal controls and accountability
- Approve the annual budget
- Ensure CNM meets all legal and corporate requirements
- Establish such programs, provide such courses and other services as are of benefit to the education of CNM students
- Oversee control and management of all College property and funds, and the use of such funds and property to fulfill College objectives
- Promote the College program to the public and seek the opinion and advice of citizens of my district about matters concerning CNM's education programs
- Work cooperatively with the CNM President and interested citizens in a continuous effort to improve the total College program
- Provide appropriate notice of resignation to the Chair of the Governing Board if ever I am unable to fulfill the commitments as a Governing Board Member
- Comply with the Governing Board Guide & Policy Manual

Ethics

As a Governing Board Member I agree to:

- Recognize and honor the fact that my fellow citizens have entrusted me with the educational development of the men and women attending this college.
- Recognize and honor the fact that the public expects my first and greatest concern to be in the best interest of every student without distinction
- Recognize that my private actions may reflect upon the reputation of the College, and act accordingly.
- Devote time, thought and study to my role as Governing Board Member so that I may render effective and credible service.
- Work with my fellow Governing Board Members in a spirit of harmony and cooperation despite differences of opinion that may arise during debates of issues.
- Base my personal decision upon all available facts in each situation, vote my honest conviction in every case unswayed by partisan bias of any kind, and abide by and uphold the final majority decision of the Board
- Acknowledge that as an individual I have no legal authority outside the meetings of the Governing Board and conduct my relationships with the college employees, the local citizenry and all communication media based on this fact.
- Acknowledge that the primary function of the Governing Board is to establish the policies by which the College is to be administered, and that the administration of the educational program and conduct of routine College business is left to the College President and employees.
- Reject pressure to use my position as a Governing Board Member to benefit either myself or any other individual or agency apart from the total interest of the College.
- Strive toward ideal conditions for the most effective service of the Governing Board to my community and state, in a spirit of teamwork and devotion to public education as the greatest instrument for the preservation and perpetuation of our representative democracy.
- Consent to any requested criminal background check necessary for the College to carry out its business.

Conflict of Interest

As a Governing Board Member, I will not knowingly:

- Disclose or use confidential information about the College to advance my financial or other private interest or that of others.
- Approve or make any payment or use of College funds with the intention that any part of said funds be used for any purpose other than that described in the documents authorizing payment.
- Participate in the negotiation or the making of any contract between the College and any business entity in which I have a financial interest, either directly or indirectly.
- Represent a private interest in any action or proceeding before the Governing Board.
- Request or receive any money, thing of value or promise thereof, that is conditioned upon or given in exchange for performance or promised performance of an official act.
- Render any commercial service to the College on a commission basis.
- Disclose or use confidential information about the College to advance my financial or other private interests or that of others.
- Use College assets or equipment for any unlawful or improper purpose or to promote any personal business interest.
- Serve on any College evaluation committee for proposals or bids without disclosing any potential conflict of interest prior to the start of committee business.
- Make decisions contrary to the ethical principles described in New Mexico's Governmental Conduct Act.
- Deprive anyone of rights in physical or intellectual property for my personal benefit in connection with any action undertaken or withheld.

And I will:

- Disclose any real, apparent or potential conflict of interest, making it a matter of record, through an annual procedure or when the interest becomes a matter of Governing Board action, if not otherwise anticipated. I will ensure the minutes of any meeting where this might occur duly show that I have abstained from voting due to the potential or occurrence of a conflict of interest.

- Not vote or use my personal influence on any matter, which might constitute a conflict of interest, provided that I may state my opinion or position on any matter described above, or answer pertinent questions to which I may lend my expertise, so long as I abstain from a Governing Board vote on the matter.

Fiduciary Duties

As a Governing Board Member, I agree to fulfill my fiduciary duties, generally, and as indicated in each of the following areas:

Duty of Care:

- Faithfully carry out my duties as the elected representative of my district.
- Act in accordance with CNM policies and procedures and comply with all applicable local, state and federal laws, in letter and in spirit.

Duty of Loyalty:

- Place the interests of CNM ahead of my own interests.
- Support all decisions made by majority vote of the Governing Board. I shall not discredit a member who votes for or against a Governing Board decision.
- Keep CNM confidential information private.
- Maintain familiarity with laws, regulations, and Governing Board rules applicable to my position. Questions about the legality or propriety of any action or failure to act are to be brought to the attention of the Chair and the CNM General Counsel, in advance whenever possible.

Duty of Honesty:

- Accurately report all relevant information to fellow Members, the President and employees of CNM and/or the public as appropriate.
- Refrain from misleading or misrepresenting facts, by omission, commission, or concealment in communications with fellow Members, the President, CNM employees, and/or the public.
- Refrain from using College assets or equipment for any unlawful or improper purpose.
- Refrain from requesting or receiving any money, item of value or promise thereof, that is conditioned upon or given in exchange for performance or promised performance of an official act.

My signature evidences my annual commitment to undertake and fulfill the obligations, duties and responsibilities of a Governing Board Member stated above.

Governing Board Member Signature:

Date: _____