

LFC Requester:

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AGENCY BILL ANALYSIS  
2019 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

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

Check all that apply:

Original  Amendment   
Correction  Substitute

Date 3/11/19

Bill No: SB26HEC

Sponsor: Michael Padilla

Agency Code: 924

Short STANDARDIZE SCHOOL

Person Writing Daniel Manzano

Title: BATHROOM USE POLICIES

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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY19	FY20		
NFI	NFI	N/A	N/A

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		
NFI	NFI	NFI	N/A	N/A

(Parenthesis ( ) Indicate Expenditure Decreases)

## **ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY19</b>	<b>FY20</b>	<b>FY21</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	NFI	NFI	NFI	NFI	N/A	

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None as of 3/7/2019

Duplicates/Relates to Appropriation in the General Appropriation Act: None as of 3/7/2019

### **SECTION III: NARRATIVE**

#### **BILL SUMMARY**

##### **Synopsis of Senate Bill 26/ Education Committee Amendment 1 (SB26/HECa)**

SB26/HECa modifies the original bill to include language reflecting that the department-issued rules may include select provisions within the rule as opposed to the department-issued rules requiring provisions reflected in the original bill.

##### **Synopsis:**

Senate Bill 26 (SB26) enacts a new section of the Public School Code which standardizes student bathroom use policies, prohibiting withdrawal of bathroom privileges as a form of discipline, and provides for dignified and incremental intervention by school staff during students' bathroom use.

#### **FISCAL IMPLICATIONS**

##### **Fiscal Implications of SB26/HECa**

It is unclear what the fiscal implications would be in regards SB26/HECa as amended by the Senate Education Committee and further amended by the House Education Committee, to addressing student gender identity in relation to bathroom use. If public schools are expected to modify their restroom structure to allow for gender neutrality, this may be an unrealistic financial burden especially since SB26/HECa does not appropriate any funding to the public schools or PED for capital improvements. If public schools are expected to simply state that the same protections of the standardized bathroom policies extend to all students regardless of age, sexual orientation, gender identity, psychological and physical abilities and impairments, there may be little to no fiscal implications related to SB26/HECa.

##### **Fiscal Implications of SB26**

SB26 would not appear to have any fiscal implications for the New Mexico Public Education Department (PED). Although, it would require current staff to devote time to the promulgation of rules, research appropriate practices and recommendations, and communicate the rule requirements to school districts and charter schools.

## **SIGNIFICANT ISSUES**

### Significant Issues of SB26/HECa

The overall expectations of SB26/HECa are unclear. In the amendment, as amended by the Senate Education Committee and further amended by the House Education Committee, it is unclear as to what “take into account” factors that include “sexual orientation” and “gender identity” would entail in relation to the promulgation of rules requiring standardized student bathroom use policies. The new language may be interpreted in different ways. If the amendment would require the possible development of new bathroom structures to allow gender neutral bathroom use, this may cause certain legal and financial concerns. Also, the PED would need to consult with its Office of General Counsel throughout the rulemaking process to ensure that any New Mexico Administrative Code (NMAC) created is not in conflict with the U.S. Department of Education’s decision to rescind previous directives that allowed public schools to allow students to use bathrooms in accordance with their gender identity.

SB26/HECa may also be interpreted as simply extending the same protections of the general student population to these unique groups. If so, SB26/HECa would not require substantial changes from SB26, with the exception of including “sexual orientation” and “gender identity” in the language of the new rule.

### Significant Issues of SB26

SB26 mandates that all public schools have standardized bathroom use policies to ensure equal access for all students, including students of varying “age, special needs, psychological and physical abilities and impairments.” Student bathroom use is an inevitable action during the school day, and it is important that all students have appropriate access to perform this bodily function. The fact that students with special needs and impairment are included in this legislation is important and in accordance with the Americans with Disabilities Act (ADA) which prohibits discrimination on the basis of disability and ensures “that programs, services, activities, and facilities are accessible.” It’s important to note that SB26 also requires timely permission be given to use the restroom once a child requests to go. Depending on student age and physical abilities, lack of immediate access may result in an accident which could in turn cause emotional and social distress for the student affected.

Source: <https://www.hhs.gov/civil-rights/for-individuals/disability/index.html>

SB26 does allow for some “dignified and incremental intervention” by the school staff during a student’s bathroom break. When abuse of bathroom use is a concern, this portion of SB26 may allow for the school staff to monitor or intervene when bathroom breaks are being used inappropriately by the student. However, SB26 is clear that bathroom use cannot be withheld for any reason. Other forms of punishment (e.g. withholding food, limiting outdoor activities, etc.) will also not be allowed due to the student requesting to use the bathroom.

## **PERFORMANCE IMPLICATIONS**

### Performance Implications of SB26

SB26 may support the PED strategic lever to ensure students are ready for success by providing a safe, inviting, and caring learning environment.

## **ADMINISTRATIVE IMPLICATIONS**

### Administrative Implications of SB26/HECa

The changes as identified in SB26/HECa, as amended by the Senate Education Committee and further amended by the House Education Committee would necessitate the PED to consult with its Office of General Counsel throughout the rulemaking process to ensure that any New Mexico Administrative Code (NMAC) created is not in conflict with the U.S. Department of Education's decision to rescind previous directives that allowed public schools to allow students to use bathrooms in accordance with their gender identity.

### Administrative Implications of SB26

Current PED staff would be required to promulgate a new rule in accordance with SB26. This would entail researching appropriate practices and recommendations, initiating the agency rulemaking process, and communicating the rule requirements to school districts and charter schools.

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

None as of 3/7/2019

## **TECHNICAL ISSUES**

None

## **OTHER SUBSTANTIVE ISSUES**

None

## **ALTERNATIVES**

None

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

Current protections for students' access to restrooms would continue.

## **AMENDMENTS**

None