

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)).

## FISCAL IMPACT REPORT

ORIGINAL DATE 03/03/21

SPONSOR HAFC LAST UPDATED \_\_\_\_\_ HB 222/HAFCS

SHORT TITLE Special Education Ombud Act SB \_\_\_\_\_

ANALYST Becerra

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

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	See Fiscal Implications					

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates SB346. Related to SB289, SB319, and HB213.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General (NMAG)  
 Developmental Disabilities Planning Council (DDPC)  
 Early Childhood Education and Care Department (ECECD)  
 Public Education Department (PED)

#### No Response Received

Child, Youth and Families Department (CYFD)  
 Regional Education Cooperatives (RECs)

### SUMMARY

#### Synopsis of Bill

The House Appropriations and Finance Committee substitute for House Bill 222 establishes the Office of the State Education Ombud and amends the Developmental Disabilities Act, placing the office within the Developmental Disabilities Planning Council. The bill provides the duties of the office.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

## FISCAL IMPLICATIONS

The HAFCS substitute for HB222 contains no appropriation.

The bill creates the Office of the State Special Education Ombud within the Developmental Disabilities Planning Council, which will assist students and families with navigating the special education system. DDPC notes that the agency anticipates the office will quickly receive numerous requests for assistance from students and families across the state; if this is the case, the office can potentially request funding for these purposes in subsequent years.

## SIGNIFICANT ISSUES

***Ombudsman Role.*** An ombudsman, or “ombud” as used in the bill, is a designated neutral facilitator with authority and responsibility to provide confidential and impartial assistance in resolving grievances and disputes. This role is also often identified as an advocate or mediator that investigates complaints, reports findings, and mediates fair settlements among individuals, groups of individuals, institutions, or organizations. If enacted, New Mexico will join 22 other states that have established a Children’s Ombudsman/Office of the Child Advocate to assist in providing oversight of children’s services.

HB222/HAFCS requires that a state special education ombudsman be appointed by the DDPC to head the office and supervise the ombudsmen and other staff of the office. The office will identify, investigate and look to resolve concerns related to special education communicated by, or on behalf of, students and parents. The office will have confidential access to the student’s educational records, as necessary, to carry out its responsibilities after obtaining consent from the student or the student’s parent.

The Legislative Education Study Committee notes that housing the office of the special education ombudsman within DDPC may call into question the neutrality and impartiality with which ombudsmen are typically expected to function.

***Duplication of Efforts.*** HB222/HAFCS assigns duties and responsibilities to the state special education ombudsman that are already responsibilities of the Public Education Department, a constitutional body under Article 12, Section 6, of the New Mexico Constitution, with authority to control public schools as provided by law. The office of Attorney General notes *Wickersham v. New Mexico State Bd. of Ed.* (1970-NMCA-012, ¶ 3, 464 P.2d 918, 920) as reference. Specifically, Section 22-13- NMSA 19785 requires school districts to provide special education and related services appropriate to meet the needs of special education students. That is likewise true with respect to charter schools, which under Section 22-8B-4 NMSA 1978 must comply with all applicable state and federal laws and regulations related to providing special education services.

## PERFORMANCE IMPLICATIONS

HB222/HAFCS requires the Office of the State Special Education Ombud prepare an annual report no later than December 1 of each year that includes

- Actions taken by the office in that year;
- Special education concerns identified, resolution of the concerns, and the effectiveness of the resolution processes;

- Recommendations for improving the quality of special education services provided to students and protecting the educational rights of students; and
- Policy, regulatory, and legislative recommendations to solve identified concerns related to special education, to
  - Improve processes of resolutions of concerns,
  - Improve the quality of services provided to students,
  - Protect the educational rights of students, and
  - Remove barriers to education and educational services.

The bill does not specify to whom the report should be made available.

### **ADMINISTRATIVE IMPLICATIONS**

The Office of the State Special Education Ombud will be under the oversight of the Developmental Disabilities Planning Council but requires the collaboration of the Public Education Department (PED) to provide the office with student records, as needed.

HB222 requires every public school providing special education services post a notice regarding the services provided by the Office of the State Special Education Ombud.

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

Duplicates Senate Bill 346, Special Ed Ombud Act.

Relates to Senate Bill 289, Special Ed Division of Ed Dept., which creates a new Special Education Division and assistant secretary for special education within PED.

Relates to Senate Bill 319, School-Use of Restraint, which creates requirements for using restraints in a school setting, while also prohibiting schools' use of seclusion.

Relates to House Bill 213, School Districts Special Ed Services Fund, which requires school districts (but not charter schools) to maintain a special education services fund to be used to provide assistance and reimburse families of special education students with IEPs through the school district who have paid out of pocket for special education services and whose school districts have not provided services to the special education student.

### **TECHNICAL ISSUES**

HB222/HAFCS requires an annual report be prepared by the office but does not specify to whom that report should be made available.

Office of Attorney General notes that HB222/HAFCS contemplates that DDPC shall ensure adequate legal counsel is available and able to provide legal services to the office of the ombudsman. The office of Attorney General provides legal counsel services to DDPC. It is unclear if HB 222's intent is for NMAG to provide counsel to DDPC, or if DDPC is to procure outside counsel services for the state ombudsman.

NMAG also notes that HB222/HAFCS grants the office access "to the student's educational records from the [PED], a school district or a public school as necessary to carry out the office's

responsibilities,” and potentially violates the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, also known as the Buckley Amendment, protecting the privacy of a student’s “education records” as defined in the act.

HB222/HAFCS specifies the special education ombudsman should identify, investigate, and resolve “concerns” about special education services; however, “concerns” is not defined in Section 2 of HB222/HAFCS.

#### **OTHER SUBSTANTIVE ISSUES**

HB222/HAFCS defines "parent" as a legal guardian or custodian who has custody and control of a student or an individual who has legal authority to make educational decisions on behalf of the student.

HB222/HAFCS expands the powers and duties of the DDPC to include promulgating rules in accordance with the State Rules Act to carry out the provisions of the Special Education Ombud Act.

MB/al