

HOUSE BILL 342

56TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2023

INTRODUCED BY

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This document may incorporate amendments proposed by a committee, but not yet adopted, as well as amendments that have been adopted during the current legislative session. The document is a tool to show amendments in context and cannot be used for the purpose of adding amendments to legislation.

AN ACT

RELATING TO EDUCATION; ALIGNING THE USES OF EDUCATION SAVINGS PLANS PROVIDED FOR IN THE EDUCATION TRUST ACT TO COMPLY WITH FEDERALLY ALLOWABLE USES OF THE SAVINGS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Hf11 → SECTION 1. Section 7-2-2 NMSA 1978 (being Laws 1986, Chapter 20, Section 26, as amended) is amended to read:
"7-2-2. DEFINITIONS.--For the purpose of the Income Tax

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Act and unless the context requires otherwise:

A. "adjusted gross income" means adjusted gross income as defined in Section 62 of the Internal Revenue Code, as that section may be amended or renumbered;

B. "base income":

(1) means, for estates and trusts, that part of the estate's or trust's income defined as taxable income and upon which the federal income tax is calculated in the Internal Revenue Code for income tax purposes plus, for taxable years beginning on or after January 1, 1991, the amount of the net operating loss deduction allowed by Section 172(a) of the Internal Revenue Code, as that section may be amended or renumbered, and taken by the taxpayer for that year;

(2) means, for taxpayers other than estates or trusts, that part of the taxpayer's income defined as adjusted gross income plus, for taxable years beginning on or after January 1, 1991, the amount of the net operating loss deduction allowed by Section 172(a) of the Internal Revenue Code, as that section may be amended or renumbered, and taken by the taxpayer for that year;

(3) includes, for all taxpayers, any other income of the taxpayer not included in adjusted gross income but upon which a federal tax is calculated pursuant to the Internal Revenue Code for income tax purposes, except amounts for which a calculation of tax is made pursuant to Section 55

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of the Internal Revenue Code, as that section may be amended or renumbered; "base income" also includes interest received on a state or local bond;

(4) includes, for all taxpayers, an amount deducted pursuant to Section 7-2-32 NMSA 1978 in a prior taxable year if:

(a) such amount is transferred to another qualified tuition program, as defined in Section 529 of the Internal Revenue Code, not authorized in the Education Trust Act; or

(b) a distribution or refund is made for any reason other than: 1) to pay for federally allowable qualified higher education expenses, [as defined pursuant to] set out in Section 529 of the Internal Revenue Code, including other expenses allowed pursuant to that section as qualified expenses; or 2) upon the beneficiary's death, disability or receipt of a scholarship; and

(5) excludes, for a taxpayer who conducts a lawful business pursuant to the laws of the state, an amount equal to any expenditure that is eligible to be claimed as a federal income tax deduction but is disallowed by Section 280E of the Internal Revenue Code, as that section may be amended or renumbered;

C. "compensation" means wages, salaries, commissions and any other form of remuneration paid to

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employees for personal services;

D. "department" means the taxation and revenue department, the secretary or any employee of the department exercising authority lawfully delegated to that employee by the secretary;

E. "fiduciary" means a guardian, trustee, executor, administrator, committee, conservator, receiver, individual or corporation acting in any fiduciary capacity;

F. "filing status" means "married filing joint returns", "married filing separate returns", "head of household", "surviving spouse" and "single", as those terms are generally defined for federal tax purposes;

G. "fiscal year" means any accounting period of twelve months ending on the last day of any month other than December;

H. "head of household" means "head of household" as generally defined for federal income tax purposes;

I. "individual" means a natural person, an estate, a trust or a fiduciary acting for a natural person, trust or estate;

J. "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended;

K. "lump-sum amount" means, for the purpose of determining liability for federal income tax, an amount that was not included in adjusted gross income but upon which the

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five-year-averaging or the ten-year-averaging method of tax computation provided in Section 402 of the Internal Revenue Code, as that section may be amended or renumbered, was applied;

L. "modified gross income" means all income of the taxpayer and, if any, the taxpayer's spouse and dependents, undiminished by losses and from whatever source, including:

- (1) compensation;
- (2) net profit from business;
- (3) gains from dealings in property;
- (4) interest;
- (5) net rents;
- (6) royalties;
- (7) dividends;
- (8) alimony and separate maintenance payments;
- (9) annuities;
- (10) income from life insurance and endowment contracts;
- (11) pensions;
- (12) discharge of indebtedness;
- (13) distributive share of partnership income;
- (14) income in respect of a decedent;
- (15) income from an interest in an estate or a trust;
- (16) social security benefits;

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(17) unemployment compensation benefits;

(18) workers' compensation benefits;

(19) public assistance and welfare benefits;

(20) cost-of-living allowances; and

(21) gifts;

M. "modified gross income" excludes:

(1) payments for hospital, dental, medical or drug expenses to or on behalf of the taxpayer;

(2) the value of room and board provided by federal, state or local governments or by private individuals or agencies based upon financial need and not as a form of compensation;

(3) payments pursuant to a federal, state or local government program directly or indirectly to a third party on behalf of the taxpayer when identified to a particular use or invoice by the payer; or

(4) payments for credits and rebates pursuant to the Income Tax Act and made for a credit pursuant to Section 7-3-9 NMSA 1978;

N. "net income" means, for estates and trusts, base income adjusted to exclude amounts that the state is prohibited from taxing because of the laws or constitution of this state or the United States and means, for taxpayers other than estates or trusts, base income adjusted to exclude:

(1) an amount equal to the standard deduction

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allowed the taxpayer for the taxpayer's taxable year by Section 63 of the Internal Revenue Code, as that section may be amended or renumbered;

(2) an amount equal to the itemized deductions defined in Section 63 of the Internal Revenue Code, as that section may be amended or renumbered, allowed the taxpayer for the taxpayer's taxable year less the amount excluded pursuant to Paragraph (1) of this subsection and less the amount of state and local income and sales taxes included in the taxpayer's itemized deductions;

(3) an amount equal to the product of the exemption amount allowed for the taxpayer's taxable year by Section 151 of the Internal Revenue Code, as that section may be amended or renumbered, multiplied by the number of personal exemptions allowed for federal income tax purposes;

(4) income from obligations of the United States of America less expenses incurred to earn that income;

(5) other amounts that the state is prohibited from taxing because of the laws or constitution of this state or the United States;

(6) for taxable years that began prior to January 1, 1991, an amount equal to the sum of:

(a) net operating loss carryback deductions to that year from taxable years beginning prior to January 1, 1991 claimed and allowed, as provided by the

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Internal Revenue Code; and

(b) net operating loss carryover deductions to that year claimed and allowed;

(7) for taxable years beginning on or after January 1, 1991 and prior to January 1, 2013, an amount equal to the sum of any net operating loss carryover deductions to that year claimed and allowed; provided that the amount of any net operating loss carryover from a taxable year beginning on or after January 1, 1991 and prior to January 1, 2013 may be excluded only as follows:

(a) in the case of a timely filed return, in the taxable year immediately following the taxable year for which the return is filed; or

(b) in the case of amended returns or original returns not timely filed, in the first taxable year beginning after the date on which the return or amended return establishing the net operating loss is filed; and

(c) in either case, if the net operating loss carryover exceeds the amount of net income exclusive of the net operating loss carryover for the taxable year to which the exclusion first applies, in the next four succeeding taxable years in turn until the net operating loss carryover is exhausted for any net operating loss carryover from a taxable year prior to January 1, 2013; in no event shall a net operating loss carryover from a taxable year beginning prior to

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January 1, 2013 be excluded in any taxable year after the fourth taxable year beginning after the taxable year to which the exclusion first applies;

(8) for taxable years beginning on or after January 1, 2013, an amount equal to the sum of any net operating loss carryover deductions to that year claimed and allowed; provided that the amount of any net operating loss carryover may be excluded only as follows:

(a) in the case of a timely filed return, in the taxable year immediately following the taxable year for which the return is filed; or

(b) in the case of amended returns or original returns not timely filed, in the first taxable year beginning after the date on which the return or amended return establishing the net operating loss is filed; and

(c) in either case, if the net operating loss carryover exceeds the amount of net income exclusive of the net operating loss carryover for the taxable year to which the exclusion first applies, in the next nineteen succeeding taxable years in turn until the net operating loss carryover is exhausted for any net operating loss carryover from a taxable year beginning on or after January 1, 2013; in no event shall a net operating loss carryover from a taxable year beginning: 1) prior to January 1, 2013 be excluded in any taxable year after the fourth taxable year beginning after the taxable year to

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which the exclusion first applies; and 2) on or after January 1, 2013 be excluded in any taxable year after the nineteenth taxable year beginning after the taxable year to which the exclusion first applies; and

(9) for taxable years beginning on or after January 1, 2011, an amount equal to the amount included in adjusted gross income that represents a refund of state and local income and sales taxes that were deducted for federal tax purposes in taxable years beginning on or after January 1, 2010;

O. "net operating loss" means any net operating loss, as defined by Section 172(c) of the Internal Revenue Code, as that section may be amended or renumbered, for a taxable year as further increased by the income, if any, from obligations of the United States for that year less related expenses;

P. "net operating loss carryover" means the amount, or any portion of the amount, of a net operating loss for any taxable year that, pursuant to Paragraph (6), (7) or (8) of Subsection N of this section, may be excluded from base income;

Q. "nonresident" means every individual not a resident of this state;

R. "person" means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, limited liability company, joint venture,

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syndicate or other association; "person" also means, to the extent permitted by law, any federal, state or other governmental unit or subdivision or agency, department or instrumentality thereof;

S. "resident" means an individual who is domiciled in this state during any part of the taxable year or an individual who is physically present in this state for one hundred eighty-five days or more during the taxable year; but any individual, other than someone who was physically present in the state for one hundred eighty-five days or more during the taxable year, who, on or before the last day of the taxable year, changed the individual's place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without this state is not a resident for the purposes of the Income Tax Act for periods after that change of abode;

T. "secretary" means the secretary of taxation and revenue or the secretary's delegate;

U. "state" means any state of the United States, the District of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States or any political subdivision of a foreign country;

V. "state or local bond" means a bond issued by a state other than New Mexico or by a local government other than one of New Mexico's political subdivisions, the interest from

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which is excluded from income for federal income tax purposes under Section 103 of the Internal Revenue Code, as that section may be amended or renumbered;

W. "surviving spouse" means "surviving spouse" as generally defined for federal income tax purposes;

X. "taxable income" means net income less any lump-sum amount;

Y. "taxable year" means the calendar year or fiscal year upon the basis of which the net income is computed under the Income Tax Act and includes, in the case of the return made for a fractional part of a year under the provisions of the Income Tax Act, the period for which the return is made; and

Z. "taxpayer" means any individual subject to the tax imposed by the Income Tax Act."←Hf11

SECTION Hf11→1.←Hf11 Hf11→2.←Hf11 Section 7-2-32 NMSA 1978 (being Laws 1997, Chapter 259, Section 8) is amended to read:

"7-2-32. DEDUCTION--PAYMENTS INTO EDUCATION TRUST FUND.--
A taxpayer may claim a deduction from net income in an amount equal to the payments made by the taxpayer into the education trust fund pursuant to [~~a college~~] an education investment agreement or prepaid tuition contract under the Education Trust Act in the taxable year for which the deduction is being claimed. The amount of payments made on behalf of any one beneficiary that may be deducted shall not exceed in the

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aggregate the cost of attendance at the applicable institution of higher education, as determined by the education trust board. [~~A husband and wife~~] Married individuals who file separate returns for the taxable year in which they could have filed a joint return may each claim only one-half of the deduction that would have been allowed on the joint return. Individuals having income both within and without this state shall apportion this deduction in accordance with regulations of the secretary."

SECTION Hf11→2.←Hf11 Hf11→3.←Hf11 Section 21-21K-2 NMSA 1978 (being Laws 2014, Chapter 76, Section 2) is amended to read:

"21-21K-2. DEFINITIONS.--As used in the Education Trust Act:

A. "account" means an individual trust account pursuant to [~~a college~~] an education investment agreement entered into pursuant to the [~~college~~] education savings program;

B. "account owner" means the person who has entered into [~~a college~~] an education investment agreement with the board and is designated as having the right to withdraw money from the account before the account is disbursed to or for the benefit of the beneficiary;

C. "beneficiary" means the person who is designated at the time the account is opened, or the person who replaces a designated beneficiary, as the person whose qualified higher

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education expenses are expected to be paid from the account;

D. "board" means the education trust board;

E. "~~college~~ education investment agreement" means an agreement entered into by the board and an account owner to participate in the [~~college~~] education savings program and establish an account to be used for the qualified higher education expenses of a beneficiary [~~at an eligible institution of higher education~~];

F. "department" means the higher education department;

G. "eligible educational institution" means any college, university, vocational school or other post-secondary institution recognized by the United States department of education;

[G.] H. "financial institution" means a bank, broker-dealer, insurance company, mutual fund, savings and loan association or other financial entity;

[H. "~~institution of higher education~~" means a post-secondary educational institution eligible to participate in student financial aid programs administered by the United States department of education;]

I. "Internal Revenue Code" means the federal Internal Revenue Code of 1986, as amended; [~~and~~]

J. "manager" means a financial institution under contract with the board to serve as manager of [~~a college~~] an

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education savings plan in the [~~college~~] education savings program and receive contributions on behalf of the program; and

K. "qualified higher education expenses" means federally allowable qualified expenses set out in the Internal Revenue Code Section 529 and includes other expenses allowed under that section as qualified education expenses."

SECTION Hf11→3.←Hf11 Hf11→4.←Hf11 Section 21-21K-3 NMSA 1978 (being Laws 2014, Chapter 76, Section 3) is amended to read:

"21-21K-3. [~~COLLEGE~~] EDUCATION SAVINGS PROGRAM CREATED-- EDUCATION TRUST FUND CREATED--PURPOSE--INVESTMENT OF ACCOUNTS BY THIRD PARTIES--BOARD REVIEW--PROGRAM ADMINISTRATION FUND CREATED--PURPOSE.--

A. The "[~~college~~] education savings program" is created to allow interested persons to enter into [~~college~~] education investment agreements with the board as a means to save money to pay a beneficiary's eligible expenses for [~~a college~~] an education. The [~~college~~] education savings program may consist of one or more [~~college~~] education savings plans. The board shall administer the [~~college~~] education savings program through accounts established in the education trust fund pursuant to [~~college~~] education investment agreements. Money in an account may be used by the beneficiary [~~at any eligible institution of higher education in New Mexico or any other state~~] for qualified higher education expenses.

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B. The board shall develop and administer the [college] education savings program in a manner that allows account owners and beneficiaries to obtain and maintain federal income tax benefits or treatment provided by the Internal Revenue Code for qualified [state] tuition programs and exemptions under the federal securities laws.

C. The "education trust fund" is created as a nonreverting fund in the state treasury. The fund shall be administered by the board to carry out the [college] education savings program. The fund consists of separate trust accounts held in the name of account owners. Income from investment of the fund shall be credited to the separate accounts.

D. The board may contract with one or more managers to invest the contributions deposited to the education trust fund. The board and the managers shall account for each contribution by an account owner.

E. Amounts may be withdrawn or transferred from trust accounts in the education trust fund only as provided in the related [college] education investment agreements. All money contributed to accounts established in the fund are held in trust by the board and the respective managers for the sole benefit of the respective account owners and beneficiaries.

F. The "program administration fund" is created as a nonreverting fund in the state treasury. The fund consists of all administrative and other fees received by the board

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pursuant to [~~college~~] education investment agreements and contracts with managers and any other money credited to the fund. The state treasurer shall invest the fund, and the investment income shall be credited to the fund. Money in the fund may be used to pay costs of establishing, marketing and otherwise administering the [~~college~~] education savings program in accordance with the Education Trust Act. Disbursements from the fund shall be by warrants of the secretary of finance and administration on vouchers signed by the director of the board or the director's authorized representative."

SECTION Hf11→4.←Hf11 Hf11→5.←Hf11 Section 21-21K-4.1 NMSA 1978 (being Laws 2014, Chapter 76, Section 5) is amended to read:

"21-21K-4.1. BOARD--POWERS AND DUTIES.--

A. The board may:

(1) adopt, amend or repeal and promulgate rules necessary to carry out the provisions of the Education Trust Act;

(2) sue and be sued;

(3) enter into contracts;

(4) employ or contract for professional, technical and clerical staff and independent counsel;

(5) contract with one or more financial institutions to manage the education trust fund and the separate trust accounts;

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(6) enter into [~~college~~] education investment agreements with interested persons to participate in the [~~college~~] education savings program;

(7) charge, impose and collect administrative fees as provided in [~~a college~~] an education investment agreement or other contract relating to the [~~college~~] education savings program in amounts not exceeding the reasonable costs of establishing, marketing and otherwise administering the program; and

(8) do those things necessary or convenient in accordance with the Education Trust Act to carry out the provisions of that act.

B. The board shall adopt and promulgate education trust fund investment guidelines and otherwise administer the [~~college~~] education savings program in compliance with the Uniform Prudent Investor Act."

SECTION Hf11→5.←Hf11 Hf11→6.←Hf11 Section 21-21K-5 NMSA 1978 (being Laws 2014, Chapter 76, Section 6) is amended to read:

"21-21K-5. [~~COLLEGE~~] EDUCATION INVESTMENT AGREEMENTS-- ACCOUNTS.--

A. An account owner may enter into [~~a college~~] an education investment agreement with the board under which an account in the education trust fund is established and contributions may be made to the account from time to time,

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consistent with the terms of the agreement, to defray the cost of [~~eligible~~] qualified higher education expenses [~~at institutions of higher education~~]. Each account shall be accounted for separately from all other accounts in the education trust fund. An account owner may enter into [~~a college~~] an education investment agreement on behalf of any beneficiary.

B. Gifts and bequests by persons other than the account owner may be made to an account in the education trust fund for the benefit of the beneficiary in accordance with the terms of the [~~college~~] education investment agreement.

C. The board shall set forth procedures relating to the withdrawal of money from an account established in the education trust fund pursuant to [~~a college~~] an education investment agreement.

D. [~~A college~~] An education investment agreement may be terminated by the account owner at any time. The board shall specify by rule appropriate provisions for the term and termination of [~~college~~] education investment agreements.

E. Contributions made to an account in the education trust fund, together with accrued investment earnings and capital appreciation in such account, shall be excluded from any calculation of the respective beneficiary's student financial aid eligibility in New Mexico.

F. The board shall notify each account owner

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annually about the status of the account owner's account in the education trust fund."

SECTION Hf11→6.←Hf11 Hf11→7.←Hf11 Section 21-21K-6 NMSA 1978 (being Laws 2014, Chapter 76, Section 7) is amended to read:

"21-21K-6. CLAIMS OF CREDITORS--EXEMPTION--LIABILITY IMMUNITY--STATE NOT LIABLE.--

A. Money credited to or expended from any account in the education trust fund by or on behalf of an account owner or beneficiary is exempt from all claims of creditors of the account owner, the beneficiary or the board.

B. If the board carries out its review responsibility of the manager's investment decisions consistent with the Uniform Prudent Investor Act, the board or an employee shall not be liable to anyone for any losses sustained as a result of investment decisions. A member of the board, while acting within the scope of the member's authority or while acting as a trustee of the education trust fund or any separate trust fund or account of the board, shall not be subject to any personal liability for any action taken or omitted within that scope of authority.

C. In no event shall any liability of or contractual obligation incurred by the [college] education savings program obligate or encumber any of the state's funds or treasury, including but not limited to the state's general

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fund, land grant permanent funds, the severance tax permanent fund or any other permanent fund or any money that is a part of a state-funded financial aid program. Nothing in the Education Trust Act creates any obligation, legal, moral or otherwise, to fulfill the terms of any [~~college~~] education investment agreement or any other obligation or liability out of any source other than the education trust fund or the program administration fund."