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## FISCAL IMPACT REPORT

<b>SPONSOR</b> <u>Duhigg/Hemphill/Dixon</u>	<b>LAST UPDATED</b> <u>2/10/23</u>	<b>ORIGINAL DATE</b> <u>2/1/23</u>
<b>SHORT TITLE</b> <u>Child Abuse Statute of Limitations</u>	<b>BILL NUMBER</b> <u>Senate Bill 126</u>	<b>ANALYST</b> <u>Daly</u>

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

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
PSIA	\$0.0	\$5,270.6	\$5,534.0	\$10,804.6	Recurring	Risk Fund
GSD		Indeterminate	Indeterminate	Indeterminate	Recurring	Public Liability Fund

Parentheses ( ) indicate expenditure decreases.  
\*Amounts reflect most recent version of this legislation.

### Sources of Information

LFC Files

#### Responses Received From

Children, Youth and Families Department (CYFD)  
General Services Department (GSD)  
New Mexico Attorney General (NMAG)  
Public School Insurance Authority (PSIA)

## SUMMARY

### Synopsis of Senate Bill 126

Senate Bill 126 eliminates the statute of limitations applicable to actions for damages based on childhood sexual abuse. It retroactively applies to all actions not pending currently, regardless of the date of that abuse, even when a statute of limitations on such an action expired prior to the effective date of the bill.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

## FISCAL IMPLICATIONS

PSIA receives revenue from public schools to cover the costs of insurance premiums. The schools pay those costs using General Fund monies. PSIA projects a 30 percent increase in premiums under SB126, which would require school districts to pay an additional \$5,270,558 per year, which is reflected for FY24 in the operating budget table above. It has increased that

number for FY25 to include an inflationary component. GSD comments the retroactive application of this bill makes any financial analysis extremely difficult, and impact to the public liability fund is indeterminate. Similarly, CYFD warns that increased litigation authorized by this bill may have a fiscal impact on CYFD's risk exposure, settlements, and judgments. This concern may be true for other state agencies, institutions, public schools, and local public entities as well.

## SIGNIFICANT ISSUES

CYFD comments that the changes contained in SB126 are consistent with current knowledge concerning the disclosure of traumatic childhood events such as child sexual abuse. CYFD advises that someone subjected to sexual abuse as a child may not be ready to remember or process the trauma until later in adulthood. Alternatively, a young child may disclose enough to a medical or mental health provider to trigger a reporting event, but not be ready or old enough to verbalize the events with the detail and clarity needed to support a cause of action. According to CYFD, the long-term impact on a child may also be better assessed later in life.

NMAG advises that actions that have been dismissed previously due to statute of limitations will be revived under SB126. GSD advises it is likely that the constitutionality of the law would be challenged under the Ex Post Facto Clause:

The Ex Post Facto clause prohibits retroactive application of penal statutes and civil penalties that are punitive in nature. *See State ex rel. Foy v. Austin Cap. Mgmt., Ltd.*, 2015-NMSC-025, ¶ 26, 355 P.3d 1 (“The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation. . . . The prohibition does not apply to penalties that are considered remedial in nature.” (internal quotation marks and citations omitted)). The bill would revive civil causes of action, which are generally remedial in nature. *See Folz v. State*, 1990-NMSC-075, ¶ 50, 110 N.M. 457, 797 P.2d 246 (“The whole theory of our tort law is to compensate the victim for his or her losses, not (unless punitive damages are awarded) to punish the tortfeasor.”) Accordingly, it is likely the retroactive application of this bill will survive a facial challenge based on the Ex Post Facto Clause. However, it is possible that there may be ex post facto issues to the extent a court awards punitive damages. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 281 (1994) (“Retroactive imposition of punitive damages would raise a serious constitutional question [under the Ex Post Facto clause].”)

The retroactive application of the bill may also raise due process concerns under the Fourteenth Amendment of the U.S. Constitution and Article II, Section 18 of the N.M. Constitution (the state due process clause). While the U.S. Supreme Court has rejected similar challenges, it is unknown whether New Mexico courts will follow suit given that the New Mexico due process clause can be interpreted to provide more protections than its federal counterpart. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-12 (1945) (“[W]here lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar.”)

GSD also comments on the language in Subsection D making retroactivity applicable, “Regardless of whether any statute of limitations on such actions expired prior to the effective

date of this 2023 Act.” It asserts that it is unclear whether the bill would override the statutes of limitation contained in the Tort Claims Act or the New Mexico Civil Rights Act, although it points out that the New Mexico Civil Rights Act specifies that “[c]laims arising solely from acts or omissions that occurred prior to July 1, 2021 may not be brought pursuant to the New Mexico Civil Rights Act.”, Section 41-4A-12 NMSA 1978 (2021), concluding that the revival of claims for acts brought before July 1, 2021, will likely not be allowed pursuant to that act.

PSIA also expresses concern about the applicability of SB126 to actions under the Tort Claims Act:

Lawsuits against public schools and their employees seeking damages are generally governed by the New Mexico Tort Claims Act. NMSA (1978) §§41-4-1 et seq. (“TCA”). Most claims brought under the TCA must be brought within “two years after the date of the occurrence resulting in the loss, injury or death.” Id. §41-4-15(A). The two-year period may be extended for claims by children under the age of nine, if application of the rule would constitute a due process violation. *Jaramillo v. Heaton*, 2004-NMCA-123, ¶ 11, 136 N.M. 498, 502, 100 P.3d 204, 208. Sexual abuse claims against public schools and its employees are also asserted under the Federal Civil Rights Act and the New Mexico Civil Rights Act.

In addition to the provisions of Section 37-1-30, NMSA 1978, which this bill amends, PSIA calls attention to another related provision recognized in existing law:

An important tolling provision regarding minority and incapacity under NMSA § 37-1-10. According to that statute:

[t]he times limited for the bringing of actions by the preceding provisions of this chapter shall, in favor of minors and incapacitated persons, be extended so that they shall have one year from and after the termination of such incapacity within which to commence said actions.

Under this tolling provision, PSIA advises, courts have been allowed to consider whether victims can proceed with claims outside of the statute of limitations on a case-by-case basis.

PSIA believes SB126 “will have a significant impact on the public school risk premiums which are paid out of school districts’ operating budgets and PSIA’s risk fund.” PSIA advises that PSIA and its members cannot force insurers to honor claims on policies retroactively. The bottom line, PSIA warns, is that there is a “very practical problem in securing the insurance necessary to pay for removing any reasonable statute of limitations on claims against public entities.”

## OTHER SUBSTANTIVE ISSUES

According to the National Center for Victims of Crime, nearly every state has a basic suspension of the statute of limitation (“tolling”) for civil actions while a person is a minor. Many states have also adopted additional extensions specifically for cases involving sexual abuse of children. Extensions for filing civil actions for child sexual abuse are most often based upon the discovery rule—by the time the victim discovers the sexual abuse or the relationship of the conduct to the

injuries, the ordinary time limitation may have expired. This "delayed discovery" may be due to emotional and psychological trauma and is often accompanied by repression of the memory of abuse. Child victims frequently do not discover the relationship of their psychological injuries to the abuse until well into adulthood —usually during the course of psychological counseling or therapy. They may not even discover the fact of such abuse until they undergo such therapy.

<https://www.ncsl.org/human-services/state-civil-statutes-of-limitations-in-child-sexual-abuse-cases>

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