

# Colorado's New Legislation Addressing Claims of Sexual Misconduct Against Minors

## INTRODUCTION

If your entity operates or manages youth-related activities or programs, you no doubt are aware of the special risks that can come with running such programs, including the risk of claims of sexual abuse and molestation (SAM). While municipalities, in general, have tended to be on the periphery of the public discussion of SAM claims, claims against municipalities arising from incidents of alleged sexual abuse and molestation do occur. And, with the Colorado Legislature's passage of Senate Bills 21-088 and 21-073, which took effect January 1, 2022, an increase in SAM claims can be expected. Thus, the time is right to review your entity's risk management practices to ensure you are properly addressing this risk exposure.

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*The CIRSA Risk Control Department has a variety of resources to assist members' education and training on managing abuse risks, including regional in-person seminars. Click [here](#) for further information and to sign up for one of CIRSA's 2022 Abuse Risk Management Seminars.*

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## PUBLIC SECTOR SAM CLAIMS

The Association of Governmental Risk Pools (AGRIP) has observed that while SAM claims in the public sector do not happen often—and municipalities, public transit and special districts have lower incidence rates than schools—it's reasonable for all public entities to expect changes in reporting rates of SAM claims.<sup>1</sup> Factors contributing to increased reporting and claims include, but are not limited to, increased social awareness of the issue, increased advocacy and support for SAM victims, increasing numbers of attorneys and firms specializing in SAM claims, and legislation expanding rights of victims and extending statutes of limitations for bringing claims. In recent years, several states including Colorado have adopted legislation specifically expanding liability for SAM claims, including potential liability for public entities and their employees and volunteers.

## 2021 COLORADO LEGISLATION

The Colorado Legislature in its last session adopted [Senate Bill 21-088](#) ("SB 88" or "the Bill"), which creates a new cause of action for victims of sexual misconduct that occurred while the victim was a minor participating in a "youth-related activity or program." The Bill was signed by Governor Polis on July 6 and took effect January 1, 2022. The Bill allows the victim to bring a civil action for damages against the actor who committed the misconduct, which includes any employee, agent, or volunteer of an organization. It also allows a civil action for damages against the "managing organization"<sup>2</sup>—including a municipality—that knew or should have known that an actor or youth-related activity or program posed a risk of sexual misconduct against a minor and the misconduct occurred while the victim was participating in the organization's activity or program.

The Bill also provides expansive time periods for bringing civil actions, both prospectively and retroactively. A minor victim of sexual misconduct occurring after January 1, 2022, may bring an action under SB 88 at any time without limitation—i.e., prospectively, there is no statute of limitations.<sup>3</sup> In addition, SB 88 creates a three-year window in which the new cause of action applies retroactively to incidents which occurred between January 1, 1960, and January 1, 2022. An action for sexual misconduct within this period must be brought before January 1, 2025.

Importantly, while SB 88 creates a new tort liability exposure for public entities and their employees and volunteers, the new cause of action is outside the notice requirements of the Colorado Governmental Immunity Act (“CGIA”). That is, a claimant is not required to provide the entity with a “CGIA notice” in advance of suit, nor can a claim be barred for failure to provide this CGIA notice that is required for other tort claims. However, the Bill follows the CGIA with respect to damages liability, capping the amounts that may be awarded against a public entity or employee to the same amounts set forth in the CGIA.<sup>4</sup> A public entity does not have a duty to defend or indemnify a public employee if the employees conduct is willful or wanton.

### **LIABILITY COVERAGE FOR SAM CLAIMS**

SAM claims can be particularly difficult from an insurance coverage and claims handling perspective, given not only the nature of the conduct alleged but also the differing interests of the parties involved. For example, your city or town may be on the receiving end of a SAM claim based on alleged sexual abuse by an employee or volunteer, but your entity’s view is that it had no way of knowing of or preventing such a “lightning strike” of egregious conduct. But the claimant does not share your view, and files civil suit against both the employee who allegedly committed the abuse, as well your city or town as the employer.

CIRSA’s liability coverage document contains an exclusion that has important impacts on claims based on alleged sexual abuse.<sup>5</sup> In general, the exclusion operates as follows: Say a sexual abuse claim is made both against your city or town, for failure to deal effectively with the risk of sexual abuse, and against the offending employee or volunteer. Under this exclusion, the entity will probably be covered. However, the entity will have the option to direct CIRSA to defend or not defend the individual alleged to have committed sexual abuse. Thus, if the entity so directs, the individual will not have coverage through CIRSA for the sexual abuse claim against him or her. And in any event, even if the entity directs CIRSA to provide a defense, any liability imposed on the individual based upon a finding that sexual abuse occurred would not be covered through CIRSA.<sup>6</sup>

### **RISK MANAGEMENT PRACTICES**

The increased risk of SAM claim liability under SB 88 makes it even more important for entities that operate youth-related activities and programs to implement sound risk management practices. Some suggestions include:

- Appropriate background checks and screening for employees and volunteers who staff youth-related programs. In conjunction with this, your entity should have a background check policy that identifies positions for which checks are required. Among other provisions, your policy should provide for periodic updating of checks, identify disqualifying circumstances, and require self-reporting of criminal charges.
- Policies that limit or prohibit one-on-one interactions between employees and volunteers and participants in youth-related programs, particularly where such interactions could occur in an out-of-view setting. It is suggested that such a policy expressly prohibit one-on-one transportation of minors by employees or volunteers. Such policies should also address boundaries on other behaviors, such as social media communications, other contacts with participants, and gift-giving.

- Review and, as feasible and appropriate, changes to locations and facilities where youth-related programs occur to allow for openness, visibility, and joint supervision of activities.
- Adoption of clear and strong policies for reporting of any suspected incidents of sexual abuse or molestation. Such policies should broadly define reportable inappropriate behaviors, allow multiple channels for reporting, and expressly prohibit retaliation against anyone reporting an incident or participating in the processes for investigating and addressing complaints.
- Clear and effective policies and mechanisms for identifying and responding to inappropriate behaviors, peer-to-peer incidents, and allegations of incidents of abuse or other misconduct.
- Periodic, recurring training for supervisors, employees and volunteers about appropriate behaviors and conduct expectations. This should include specific information about the warning signs and predictors of sexual abuse and molestation.
- Information for youth program participants and their parents/guardians about behavioral expectations, your entity's commitment to avoiding inappropriate behaviors, and procedures for addressing concerns.

Municipalities in Colorado have a long tradition of providing safe and cost-effective youth-related activities and programs for their communities. As leaders in the provision of these services, municipalities are expected to have sound and up-to-day policies and procedures to effectively manage SAM risks. Though SAM claims are rare and there sometimes is an "It won't happen here," view of this risk, the truth is that the risk exposure for a SAM claim risk is real for CIRSA members, and your entity must ensure it has appropriate policies, practices, and training in place.

If you have any questions regarding this article, please call our Liability Hotline at 800.228.7136 to speak to CIRSA's General Counsel, Sam Light. For information on CIRSA Risk Control Department resources on this topic, contact Eileen Chavez, CIRSA Training & Event Specialist, at [eileenc@cirsa.org](mailto:eileenc@cirsa.org).

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<sup>1</sup> AGRIP, "Sexual Abuse and Molestation Claims in the Public Sector," published in Intelligence, Issue No. 08, September 2018, available at this [link](#).

<sup>2</sup> Readers will want to review closely SB 88's definitions of "youth-related activity or program" and "managing organization" to understand how the Bill applies to their entity's particular youth events, programs, and services.

<sup>3</sup> Previously, Colorado law provided for a six-year statute of limitations on claims based on sexual assault or sexual abuse against a child, and the normal statute of limitations for negligence claims against municipalities is two years. The six-year statute of limitations was eliminated by [Senate Bill 21-073](#). Thus, in conjunction with the provisions of SB 88, on a going forward basis civil claims related to sexual assault or abuse may be brought anytime regardless of how long ago the incident occurred.

<sup>4</sup> As of January 1, 2022, the CGIA damages limitations are \$424,000 for an injury to any one person in any single occurrence, and \$1,195,000 for an injury to two or more persons in any single occurrence (with the per-person cap of \$424,000).

<sup>5</sup> For coverage purposes, the CIRSA liability policy currently defines "sexual abuse" as "any actual, attempted or alleged criminal sexual conduct to a person by another person, or persons acting in concert, regardless if criminal charges or proceedings are brought, which cause physical and/or mental injuries." The term "sexual abuse" also includes "actual, attempted or alleged sexual molestation, sexual assault, sexual exploitation or sexual injury," but does not include "sexual harassment," which is separately defined and addressed.

<sup>6</sup> In practice, it is sometimes uncertain at the outset of a claim whether the alleged incident of sexual abuse occurred and in such situations the entity may have, at least initially, an obligation under the CGIA to defend its employee or volunteer. If CIRSA concludes a defense may be owed under such circumstances, it will assign a defense under a "reservation of rights," under which it reserves its rights to deny coverage if it is later determined an exclusion applies. Coverage exclusions implicated by these claims include not only the sexual abuse exclusion, but also the exclusions for willful and wanton conduct and criminal acts.