

## **Response from New Mexico Public Schools Insurance Authority**

- 1. How many civil rights lawsuits against public employees / public entities covered by your entity have been filed each year for the past five years? If possible, please provide a breakdown of how many of these were against police officers /departments? Corrections officers /correctional facilities? School employees /schools? Other government employees / entities?**

In order to provide similar, consistent data to the Commission, we adopted the same date range as the other responding entities, dates of loss from July 1, 2012 through June 30, 2016.

For that date range, there were 84 civil rights suits filed. There were an additional 40 claims that were resolved pre-litigation.

- 2. What percentage of the lawsuits covered by your entity over the last five years have been civil rights cases?**

The 84 litigated claims represent 42% of the 198 litigated claims during the time frame specified.

- 3. What was the total amount of money paid out in settlements and judgments each year for civil rights cases over the last five years? If possible, please delineate how much was paid in settlement and how much in judgment.**

The loss payments totaled \$9,706,035 for the litigated claims; \$568,403 for the non-litigated claims.

- 4. How much did you pay in plaintiffs' attorneys' fees and costs for civil rights cases each year for the last five years?**

Plaintiffs' attorney fees are extrapolated as \$3,202,992 for the litigated claims and \$187,440 for the non-litigated claims.

- 5. How much did you pay in defense attorneys' fees and costs for each year over the last five years?**

Defense costs and fees totaled \$7,643,552 for the litigated claims and \$205,563 for the non-litigated claims.

- 6. What coverage is provided for your civil rights cases and by whom? (e.g. private insurance, self, insure, excess policies)**

NMPSIA provides civil rights coverage through a combination of both self-insurance and reinsurance excess carriers.

**7. Are insurance policies or certificates issued? If so, please provide sample copies. If not, please provide any other documents that set forth what is covered.**

Coverage is afforded using a Memorandum of Coverage (MOC) or a customized insurance document and carriers reinsure the MOC. MOC is attached.

**8. How are premiums determined and by whom?**

NMPSIA utilizes a Cost Allocation Formula for determining insurance premiums for each pool Member. The process begins with collecting a cross-section of data or better defined as “exposures.” These exposures fall within four (4) categories of business insurance that are then used to calculate annual premiums next to a rating basis established by actuaries that are updated periodically:

1. Workers’ Compensation - **Exposure Basis Rating:** Payroll Per \$100
2. General Liability (including civil rights violations, professional and management liability) - **Exposure Basis Rating:** Student Count - Average Daily Attendance (ADA)
3. Auto Liability (Buses and Vehicles) - **Exposure Basis Rating:** Number of Per Bus(es) and/or Per Vehicle(es) reported.
4. Property - **Exposure Basis Rating:** Appraised Building Per Building Replacement Cost Value

The cost-sharing formula proportionally allocates costs based on exposures, size compared to membership, credibility factors, experience modification formulas, and five (5) years of loss experience (excluding the current year) but stops each occurrence loss per Member at \$100,000.

**9. Identify any actuarial consultants you have employed over the last five years and please provide any studies they provided to you related to civil right claims.**

NMPSIA contracts with Pinnacle Actuarial Resources, Inc. The most recent actuarial Liability study is attached.

**10. To the extent there is a cost-sharing for civil right lawsuits, how is the allocation determined between the governmental entity and you or your insurer?**

As respects civil rights coverage and claims, NMPSIA provides General Liability coverage which includes civil rights, but does not separate the coverage nor provide a separate premium solely for civil rights coverage. The description of the cost allocation was provided in #8.

**11. Describe any preventative measures you have taken to with your insureds to prevent future civil rights litigation.**

**CIVIL RIGHTS**

There are several areas of Civil Rights that schools currently address or maybe confronted with in the future from Wrongful Terminations to Unlawful Use of Force. The risk management and loss prevention measures taken by NMSPIA will be addressed from current issues to potential issues.

### **Sexual Molestation**

NMPSIA's highest dollar exposure is Sexual Molestation committed by an employee :

- NMPSIA developed a Boundaries Policy which was ultimately adopted by the NM School Board Policy Service. NMPSIA is providing training to School Boards on the Policy and the impact on staff and budgets.
- NMPSIA provides training to school staff – teachers, maintenance, bus drivers and cafeteria workers on the Boundaries Policy.
- NMPSIA has also developed a nationally recognized Identifying a Predator Training that has been presented to – teachers, maintenance, bus drivers and cafeteria workers.
- NMPSIA has worked to make the mandatory Child Abuse training more accessible to school staff.

In addition, NMPSIA has worked with the NMAA to implement a mandatory set of training video's for public school coaches on mandatory reporting, child abuse and Hazing.

NMPSIA was a driving force in the creation of HM 57, which required establishment of a task force composed of NMPSIA, NMPED, NMAG, CYFD, AFT, NEA, and PTA to review school misconduct. The task force reviewed existing statutes for compliance gaps and contradictions, as well as staffing at PED. Recommendations were submitted to the legislature in February 2020. It is our understanding, the NMLESC will be reviewing the recommendations for inclusion in the 2021 session. It is our hope that stronger legislation and investigative efforts will make a dent in the growing issue of child abuse.

NMPSIA is also working to implement a state-wide reporting system, that will incorporate and on-line anonymous reporting system for students and faculty. It is our intention to also present this in the 2021 legislative session.

### **Employment**

Employment related issues include Discrimination to Whistleblower claims.

NMPSIA provides extensive resources to schools to avoid Employment liability claims including discrimination claims under Title VII of the Civil Rights Act. These services include supervisory training, and staff training. NMPSIA provides 99% of the training on sexual

harassment required every year to school staff. The training has had an impact on the frequency of claims. We also provide consultation to schools on an as requested basis for termination issue, in order to avoid a wrongful termination.

Whistleblower claims are more problematic, NMPSIA's cases usually involve the local Board and/or the Superintendent or college President. In other, cases involving lower level employees NMPSIA can provide specific consultation to avoid a claim.

NMPSIA also provides significant consulting for specific issues encountered by schools. These cover areas such as the Americans with Disabilities Act as Amended (ADAA), Fair Labor Standards Act (FLSA), and the Families Medical Leave Act (FMLA). NMPSIA is also providing consultation and training on the Families First Coronavirus Recovery ACT (FFCRA) and its proper implementation.

A sub-category of employment are issues regarding discrimination under the Civil Rights Act of 1964 Title VII and the Education Amendments of 1972 Title IX.

- Title VII issues require an administrative process through the Equal Employment Opportunity Commission or the NM Human Right Division. NMPSIA provides training to school District on discrimination laws and the individual behaviors that can be considered discriminatory. Our major focus has been on providing Sexual Harassment training. NMPSIA also provides consultation to Districts before an issue becomes a charge and assistance with responding to a charge, to reduce the possibility of a Federal Claim of discrimination.
- Title IX recently went through a significant overhaul by the US Department of Education. The changes included a significant change in the process a school must use to ensure due process and avoid a charge of deliberant indifference. NMPSIA has spent this last summer producing training sessions on the new requirements. These are directed at school administration, the Title IX Coordinator, the investigators, the hearing officer and the appeal process. The training programs have aired in sequence, the next program will be aired the first of October to provide training for the hearing officer/decision maker. This training includes the review of relevant testimony, cross examination and the process for findings of fact. Due to the complexity of the hearing, this training will be provided in three parts.

## **School Violence**

School Violence ranges from Mass shooting to Bullying.

- NMPSIA has been actively providing training to schools on Intrusion, Shelter in Place, Lock Downs and Fortification.
- In 1998, NMPSIA began providing training to schools on the US Secret Service Threat Assessment process. In hopes that schools can implement a process to identify children

intent on executing mass violence. Most districts have a threat assessment process in place, NMPSIA has been asked by several districts to review and retrain individuals involved in the process.

- NMPSIA has been providing on-site security assessments for schools for use in their School Safety Plans required by PED.
- NMPSIA provides training for schools on the development of an effective Bullying policy. A policy that is reviewed for effectiveness every year. Although all schools are required to have a bullying policy, few are effectively measuring their efforts. Bullying is incorporated in Hazing, Sexual Harassment training and employment discrimination training.

### **Restraint and Seclusion**

- Restraint and seclusion issues arise generally from Special Education Programs. They are incorporated in US DOE regulations as well in NM PED. Restraint is generally prohibited in lieu of Crisis Prevention using de-escalation techniques. Although the schools routinely train in and use verbal de-escalation skills and disengagement safety techniques, there are a growing number of cases in which school employees are determining a disruptive student is a danger to themselves or others and calling in law enforcement. In cases involving a School Resource Officers, the LEA has provided an officer to assist the school with an extremely disruptive student, who presumably understands the historical behavior of a child and has an understanding of the behavioral interventions that will effectively reduce the disruption. In cases that do not involve an SRO, often an officer not trained in de-escalation techniques involving a special education student responds and the issue results in a claim.
- NMPSIA is providing de-escalation training for school bus drivers and cafeteria workers. The de-escalation training has been expanded to include Special Education staff.
- NMPSIA also has a Technical Assistance Program for Special Education (TAPS) in partnership the NM Cooperative Educational Services (CES) that aids Special Education staff on effective Individual Education Plans (IEP) and effective Behavior Intervention Plans (BIP). The TAPS program also uses a behavioral specialist to work with Special Education staff to look at behaviors and the BIP to avoid disruptive behavior.
- NMPSIA provided input into the revision of the restraint and seclusion changes made in 2020. However, it does not include any language regarding the training required to use non-lethal restraints. NMPSIA will continue to bring this issue to the forefront and may begin providing guidance on proper use of non-lethal restraints.

### **Armed School Security Officers**

In 2007, NMPSIA began a review of armed security on school grounds. The findings indicated a lack of consistency in regulations regarding who could or could not carry a weapon on to school grounds. Several schools had contracted with private security firms to provide an armed presence at schools; however, the contracts generally did not set out proper rules of engagement. Several schools had entered into agreements with local Law Enforcement Agencies to provide School Resource Officers (SROs) however, these agreements also did not provide language regarding rules of engagement. SRO's were in many cases used to implement school discipline; a practice discouraged by the national SRO Association. A handful of schools had an armed employee who was assigned to carry a weapon as a deterrent to school violence, again without clear rules of engagement. One school District has an LEA authorized through the County Sheriff. Another District had a security staff that they were intending to arm in the 2020-21 school year.

In 2019, NMPSIA worked with the NM Legislature to develop the definition of an Armed School Security Guard. NMPSIA, PED, NMDPS worked in 2019 and 2020 to develop standards for training, a standard weapon and a regular review of Standard Operating Procedures (SOP). Although the final rules were effective July 2020, COVID19 has redirected the attention of most schools away from arming staff.

NMPSIA will be reviewing the SOP's for proper training regarding special education issues, cultural sensitivity, weapons training – both lethal and non-lethal.

NMPSIA will be paying close attention to staff (required to be former law enforcement officers) with authority to carry a weapon on school grounds for proper conduct, i.e. rules of engagement, proper use of force, and compliance with the rules set by PED.

Each District is to develop an initial use of force training of eight hours, to be co-taught by school district or charter school personnel including the following topics: resistance; confrontational dynamics; deadly force (when it is justifiable); communications; self-control, fear and anger management in the use of force; consequences of unreasonable force; vicarious liability; legality of use of force in school setting by school security personnel; documenting use of force; search and seizure; other topics as recommended by the local law enforcement agency, school district or charter school;

NMPSIA is also pursuing a state-wide anonymous reporting system to identify students who are planning or have ideations of mass violence.

Although, the rule change goes a long way to define who can carry a weapon on school grounds. No level of training or rules will totally insulate a school from an active shooter incident and a judgement made by a staff member to shoot a child threatening other students lives. NMPSIA understands this risk both for the schools and the employee, our preference is for schools to enter into agreements with LEA's to provide SRO's that ensures the proper training and for NMPSIA members to have clear MOU's defining each party's liability.

## **Failure to Educate**

Although it has long been held that an individual school district cannot be held responsible for failure to educate. The Yazzie/ Martinez lawsuit has raised the possibility. Lawsuits across the country have been directed at State constitutional requirements and the legislative funding necessary to meet those requirements. A failure to properly educate a student at a District level may be more difficult to prove; schools are held to a standard of performance determined at a higher level; NMPED or USDOE. It may also be difficult to outline a standard for providing an adequate and sufficient education. Like COVID19 there are many factors that affect a student's education.