

LFC Requester:	Jorgensen
-----------------------	------------------

**AGENCY BILL ANALYSIS
2021 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original **Amendment**
Correction **Substitute**

Date 1/28/2021
Bill No: HB4

Sponsor: Reps. Georgene Louis & Brian Egolf
Short Title: NM CIVIL RIGHTS ACT

Agency Name and Code
Number: PED - 924
Person Writing
Phone: 505-570-7816 **Email** John.Sena@state.nm.us

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY21	FY22		
N/A	N/A	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23		
N/A	N/A	N/A	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Unknown	Unknown	Unknown	Unknown	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB29, No Discrimination for Hair; HB50, Private Right of Action for Certain Statutes; HB111, Housing Discrimination Changes; HB123, Limited Immunity for Overdose Program; SB60, Physical Therapy Licensure Compact; SB71, Patients’ Debt Collection Protection Act; and SB119, Psychology Jurisdictional Compact. Duplicates/Relates to Appropriation in the General Appropriation Act: N/A

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: House Bill 4 (HB4) proposes the “New Mexico Civil Rights Act” to establish a private right of action for deprivation of rights, privileges, or immunities against a public body or a person acting on behalf of a “public body,” which the bill defines as essentially any public entity, including school districts, institutions of higher education, and state agencies, such as the Public Education Department (PED). The bill provides persons claiming a violation or deprivation or rights to recover actual damages and injunctive relief in any state court. HB4 prevents any potential defendant from a lawsuit from claiming qualified immunity, and likewise bars the state from asserting a defense of sovereign immunity, in any lawsuits brought under the New Mexico Civil Rights Act. The bill also provides for mandatory attorney fees to be awarded for all successful plaintiffs under the act.

FISCAL IMPLICATIONS

HB4 does not contain an appropriation.

Fiscal implications for the PED and the public schools are undefined, but likely to be significant. HB4 arises from the work of the New Mexico Civil Rights Commission (Commission), which solicited input from the New Mexico Public Schools Insurance Authority (NMPSIA) on the proposed legislation. NMPSIA indicated that the total amount of annual payments for civil lawsuits brought against covered entities, for both litigated and non-litigated claims, totaled approximately \$10.2 million in judgments and settlements, and approximately \$3.4 million in attorney fees, for each of the previous five years. The elimination of qualified immunity proposed by HB4 would expand the likely pool of plaintiffs in similar and related actions; the inclusion of mandatory attorney fees for successful litigants would also likely increase the potential pool of plaintiffs and the amount of payouts. Thus, NMPSIA indicated increased potential costs in undetermined, but likely significant, in excess of approximately \$14 million, annually.

The provisions of HB4 may also result in similarly significant increases in the amount of money damages required to be paid by the state or PED.

SIGNIFICANT ISSUES

HB4 establishes a private right of action for actual damages and injunctive relief for persons claiming deprivation of any rights, privileges, or immunities under the New Mexico Constitution due to action or inaction on the part of a public body – including local school districts, state-chartered charter schools, and PED – as well as officers acting on their behalf, including superintendents and the Secretary of Education. The bill bars the employment of “qualified immunity” as a defense by any potential defendant under the act. “Qualified immunity” is a judicially created defense to federal civil rights claims, which prohibits courts from allowing claims to proceed against state government officials unless a plaintiff shows *both* that their rights had been violated, *and* that the violation was one already recognized by courts under clearly established law, a very difficult standard to meet. The exclusion of qualified immunity as a potential defense would likely greatly expand the number of cases initiated, permitted to proceed, and likely to be successful, thus increasing both the likely amount of money damages awarded to plaintiffs and the likelihood of injunctive relief. The inclusion of mandatory attorney fees to be awarded to successful plaintiffs would also likely increase the pool of potential plaintiffs, as substantial litigation costs can have a chilling effect upon lawsuits brought by otherwise likely litigants.

The bill would also prevent the use of the doctrine of sovereign immunity as a defense for the state and its components and agencies, such as PED. While this may also increase the potential field of civil rights litigants, state-level sovereign immunity is already generally inapplicable to alleged violations of the federal or state constitutions.

HB4 includes a statute of limitations of three years from the time of the conduct alleged to have deprived a potential plaintiff of rights, privileges, or immunities. The bill further stipulates that any action pending in court will not abate as a result of the death of any party to the action. The bill includes an indemnification clause that indicates any judgement against an individual acting on behalf of a public body shall be paid by that public body. Finally, public bodies are required under the bill to maintain a record of all final judgments and settlements paid pursuant to the act, which shall be subject to disclosure under the Inspection of Public Records Act.

In its response to inquiries from the Commission, NMPSIA indicated issues that schools address in defense or settlements of civil rights claims include or are likely to include:

- wrongful termination;
- unlawful use of force;
- sexual molestation;
- discrimination, including cases brought under the following federal statutes: Americans with Disabilities Act, Fair Labor Standards Act, the Family Medical Leave Act, Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972;
- whistleblower claims;
- school violence, including mass shootings, and bullying;
- restraint and seclusion; and
- potential acts by school security guards and school resource officers.

NMPSIA also notes that the recent decisions in the *Martinez* and *Yazzie* consolidated lawsuit raises the possibility of actions for failure to educate brought against individual school districts, although previously, such actions could not be brought against individual school districts.

However, regardless of whether actions for failure to educate can be brought against school districts, they can be brought against the state, PED, and the Secretary of Education. The court in the consolidated lawsuit found that the state had failed to provide an education to at-risk students sufficient to prepare them for college and career. “At-risk” students include low-income students, Native American and Hispanic students, English learners, and students with disabilities. Given the population of the state, these groups comprise a very large portion of the state’s students; this, combined with the provisions proposed under HB4, could significantly increase the number of such actions brought against the state and the department, with the accompanying potential for both significant financial damages and injunctive relief. Because the court in *Martinez* and *Yazzie* applied relief to the entire state, rather than just the individual plaintiffs, potential injunctive relief in other cases related to the constitutional right to education could profoundly impact the provision of education across the state, with undetermined fiscal, administrative, and performance effects.

PERFORMANCE IMPLICATIONS

HB4 would likely greatly impact the Office of General Counsel (OGC) of PED, as well as leadership, and other divisions within the department, depending upon the particularities of each individual potential lawsuit. Because OGC often hires contract attorneys for help with defense of litigation of significant lawsuits, the operating budgets of OGC and PED as a whole may be greatly impacted by the provisions of HB4, aside from any potential settlement or judgement costs.

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB4 includes the following related bills: HB29, No Discrimination for Hair; HB50, Private Right of Action for Certain Statutes; HB111, Housing Discrimination Changes; HB123, Limited Immunity for Overdose Program; SB60, Physical Therapy Licensure Compact; SB71, Patients’ Debt Collection Protection Act; and SB119, Psychology Injurisdictional Compact.

TECHNICAL ISSUES

N/A

OTHER SUBSTANTIVE ISSUES

N/A

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

N/A

AMENDMENTS

N/A