

Management Alert



The NY Child Victim Act: An Election Night Update Which Will Impact Your Institution

By Karen Y. Bitar

Our Management Alerts have been closely following efforts to enact the Child Victim Act, the passage of which has the potential to impact educational institutions for years to come.

New York remains one of the most restrictive states in the nation in connection with the time period within which a child victim of sexual assault must initiate suit. But Tuesday's election results, which gave the Democrats back control of the New York State Senate, after more than a decade of Republican rule, will likely change that. And with that change, the newly empowered Legislature can finally implement the long stymied Child Victim Act (the "Act" or "CVA").

Background

On June 20th 2018 the Legislative term ended without the CVA voted into law. In the 11 years since the measure was first introduced, support for the CVA has increased along with public awareness, thanks to continued media attention to the issue of sexual abuse. A February 20, 2018 Quinnipiac Poll shows 90% of New York voters support passage of the Act. Yet the CVA had failed to pass thanks to a razor thin Republican Majority in the New York State Senate. So while the Democrat controlled Assembly had proposed and passed the CVA with ease, each year Senate Republicans ensured the legislation was defeated.

The Senate had been the Republican Party's last foothold of power, and they used it to protect the special interest groups that lobbied hard to make sure the legislation never came up for a vote. Now, for just the third time in 50 years, the Democrats, which needed only to flip one seat, won 8 previously held Republican seats, taking command of both of the Legislative houses. Passage of the CVA is atop their list of proposed legislation.

What is the Child Victim Act?

The CVA would change and liberalize New York's strict statute of limitations in sex abuse cases. The current law requires initiation of any civil lawsuit within five years after an alleged victim's 18th birthday, or age 23. The new legislation, as currently drafted, would allow alleged victims to bring civil lawsuits until their 50th birthday and further provide an open one year window to revive old cases which may previously have been dismissed on statute of limitations grounds. The bill would also apply to private and public institutions named as defendants when sexual abuse is alleged.

So what does this mean for your educational institution?

This means that, if you have been fortunate enough to not have had to worry about defending claims of decades old sexual abuse due to the protections afforded by the statute of limitations, those protections will soon no longer exist. It means that more people than ever may now be emboldened to come forward, recognizing that they have broad-based legislative and public support, and that they will not be faced with an outright dismissal of their claims on statute of limitations grounds. Some victims may have hesitated to come forward because they knew that they would be putting themselves in the public eye for claims that would not even survive a motion to dismiss on timeliness grounds. As an educational institution, even if you are currently unaware of any pending issues as to former students, these individuals, so long as they are under 50 years old, would now be able to initiate a public lawsuit against the school. The defense of such cases is often extremely difficult because, as established case law in New York expressly states, “history proves claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared deprives a defendant of its day in court” (citations omitted). In cases of abuse in schools, evidence such as school records, medical records, witnesses to the abuse, individuals who might have received the victim’s outcry, and even the wrongdoers themselves, may be long gone. In many respects this can make an institution essentially defenseless when such claims are asserted.

Next Steps

Your institutional consideration of the ramifications of any legislation that will likely be enacted is a necessary and critical first step in addressing this potential problem. Being able to demonstrate that you have undertaken such consideration is also prudent business judgment. The reputation of the school, how your response is received by faculty, students and alumni, and the public face you want your institution to present, are all important considerations when you decide on how to proceed.

Understand the Act, and how its passage, in the current form, will change the laws concerning statute of limitations:

- Consider contacting your elected official and weigh in on how your institution will be impacted. When the new legislative term begins the actual provisions of the Act will be subject to change and political compromise.
- Consider if a lobbying effort, possibly in conjunction with other schools similarly situated, would help make the legislation more palatable.

Determine your potential risk:

- Are there lawsuits that were dismissed on statute of limitations grounds that will likely be resurrected?
- Investigate what is in your school’s history that has remained hidden, but may result in the next big lawsuit... and headline.
- Consider defenses, outreach, and creation of a victim fund.

Possible Avenues of Asset Protection:

What if your institution will face considerable litigation risk after a version of the CVA is enacted into law? How can the institution best protect itself? Some options to consider.

A charitable organization may establish a separate legal entity called a “supporting organization” for purposes of autonomy or limitation of liability. Supporting organizations have been used to provide support to a variety of public charities in the form of fundraising and related duties. A supporting organization may solicit potential funding for contributions to build and maintain a separate endowment for a public charity.

In order to receive and maintain its charitable status, a supporting organization must meet and maintain certain technical criteria with respect to its relationship to the public charity which it is established to support.

The “supporting organization” regulations are intricate and detailed, and establishment of supporting organization, its approval by the Internal Revenue Service and its continued operation require careful planning in coordination with its public charity.

Because of the required relationship with the public charity, it may not be possible for the public charity to protect its existing endowment from creditors by transfer to a supporting organization. The use of the supporting organization is more likely device used to build and maintain a future endowment under separate management for support of the public charity.

Another Option - Bankruptcy Protection:

- Filing for bankruptcy is a costly and time consuming step, but may be necessary for those institutions that know that they have untold lawsuits that will be filed if legislation passes.
- As part of the process, notice to potential claimants must be given, they need to assert claims before a bar date, and their claims will be settled in Bankruptcy.
- Those who do not file will have no claim.
- Concerns include reputational harm to institution, preference concerns, and fraudulent conveyance challenges, among others.

We would be happy to discuss this in more detail and share our collective wisdom with you.

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Seyfarth Shaw LLP Management Alert | November 9, 2018

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