



## 50-State Survey of School Discrimination Laws

Public Justice's Students' Civil Rights Project

(Last Updated January 2026)

This survey compiles state statutes and state constitutional provisions that provide a right to sue for discrimination (including harassment) based on race, national origin, color, ethnicity, sex, sexual orientation, and gender identity in school. Some of the laws cover other bases for discrimination as well. For each cause of action, we list the potential defendants, the types of discrimination covered, the available damages (if any), any administrative exhaustion or notice of claims requirements, any provisions for attorneys' fees awards, and any jurisdictional issues.

We hope that this resource will provide a helpful starting point for attorneys representing students to identify and evaluate potential claims. This survey is not legal advice, however, and some of the entries may be incomplete or include inaccuracies. Attorneys should conduct independent research to verify the information in this list. **If you spot any mistakes in this list or know of any statutes or constitutional provisions in your state that should be added, please email Project Director Adele Kimmel at [akimmel@publicjustice.net](mailto:akimmel@publicjustice.net).**

# Alabama

## Alabama School Choice and Student Opportunity Act, ALA. CODE § 16-6F-9

The statute does not include an express cause of action, and we did not locate any discrimination suits that have been brought under this statute to date. But some plaintiffs have successfully sued to compel state officials to perform their legal duties and/or ministerial acts under other statutes, and so a student or parent may be able to sue charter schools under this law to compel a school not to discriminate.<sup>1</sup>

### Potential Defendants

Public charter schools.<sup>2</sup>

### Bases of Discrimination

Race, color, national origin, and sex.<sup>3</sup>

### Available Damages

Injunctive relief only, if any. Although the state of Alabama (including local boards of education and public charter schools) enjoys broad sovereign immunity from state law claims, this immunity does not preclude actions against state *officials* to require them to perform their legal duties or to enjoin them from enforcing an unconstitutional state law.<sup>4</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

Two years.<sup>5</sup>

### Administrative Requirements

- Administrative exhaustion: not required.
- Notice of claim: N/A.

### Fee-Shifting

N/A.

### Jurisdictional Issues

N/A.

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<sup>1</sup> See, e.g., *Ex parte Bessemer Bd. of Educ.*, 68 So. 3d 782, 790 (Ala. 2011) (teacher prevailed in suing individual board members in their official capacities to compel them to perform their “legal dut[ies] or . . . ministerial act[s]”).

<sup>2</sup> ALA. CODE § 16-6F-9(c)(1) (West 2024).

<sup>3</sup> *Id.*

<sup>4</sup> See ALA. CONST. Art. 1, § 14; ALA. CODE § 16-6F-2(a) (West 2024); *Taylor v. Troy State Univ.*, 437 So.2d 472, 474 (Ala. 1983); *S.C. v. Huntsville City Schs.*, 441 F. Supp. 3d 1228, 1239 (N.D. Ala. 2020).

<sup>5</sup> ALA. CODE § 6-2-38 (West 2024).

# Alaska

## Prohibition Against Discrimination Based on Sex or Race in Public Education, ALASKA STAT. § 14.18.010-14.18.110

This statutory provision protects students and employees from sex-based discrimination in public education, and protects employees from race-based discrimination in public education.<sup>6</sup> The statute's protections against sex-based discrimination encompass "any education program or activity receiving federal or state financial assistance," including recreational and athletic activities, and also reach "sex bias" in textbooks and instructional materials.<sup>7</sup> The law also expressly prohibits sex-based discrimination in counseling and guidance services as well as in course offerings.<sup>8</sup> A review of the case law reveals a very slim volume of litigation arising out of these provisions.

### Potential Defendants

- The school board of each public primary and secondary school in the state of Alaska.<sup>9</sup>
- The Board of Regents governing the University of Alaska.<sup>10</sup>
- The state itself, by way of the State Board of Education.<sup>11</sup>

### Bases of Discrimination

Race, sex.<sup>12</sup>

### Available Damages

Civil damages and equitable relief.<sup>13</sup>

### Damages Cap(s)

Non-economic damages are capped at the greater of \$400,000 or the injured party's life expectancy in years multiplied by \$8,000.<sup>14</sup>

### Statute of Limitations

Two years.<sup>15</sup>

### Administrative Requirements

No express administrative exhaustion requirement.<sup>16</sup>

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<sup>6</sup> ALASKA STAT. § 14.18.010 (West 2024).

<sup>7</sup> *Id.*; §§ 14.18.040, 060 (West 2024).

<sup>8</sup> ALASKA STAT. §§ 14.18.030, 050 (West 2024).

<sup>9</sup> *Id.* § 14.18.020 (West 2024).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See ALASKA STAT. § 14.18.010 (West 2024).

<sup>13</sup> *Id.* § 14.18.100 (West 2024).

<sup>14</sup> See McDonald Plosser, *Sky's the Limit? A 50-State Survey Of Damages Caps and the Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule>; ALASKA STAT. § 09.17.010(b) (West 2024).

<sup>15</sup> ALASKA STAT. § 09.10.070 (West 2024).

<sup>16</sup> *Id.* § 14.18.100 (West 2024).

## Fee-Shifting

Presumably available.<sup>17</sup>

## Jurisdictional Issues

The statute explicitly establishes a private right of action with jurisdiction in superior court for civil damages and for such equitable relief as the court may determine.<sup>18</sup>

## **Unlawful Practices By the State or Its Political Subdivisions, ALASKA STAT. § 18.80.255**

This provision makes it unlawful to for the state or any of its political subdivisions “to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of race, religion, sex, color, or national origin”<sup>19</sup> or to aid, abet, or coerce such discrimination.<sup>20</sup> The chapter under which this particular law is created also creates a State Commission for Human Rights tasked with the overarching purpose of eliminating discrimination based on the protected categories, including by receiving complaints directly from individuals, conducting an investigation, and negotiating a resolution.<sup>21</sup> A person who “willfully engage[s] in an unlawful discriminatory practice prohibited by this chapter, or willfully resists, prevents, impedes, or interferes with the commission or any of its authorized representatives in the performance of duty under this chapter, or who willfully violates an order of the commission,” can be convicted for a misdemeanor punishable by a fine of up to \$500 and/or imprisonment in jail for up to 30 days.<sup>22</sup> We did not locate any cases brought under this statute in the school context.

## Potential Defendants

The state of Alaska and its agencies.<sup>23</sup>

## Bases of Discrimination

Race, sex.<sup>24</sup>

## Available Damages

Compensatory damages.<sup>25</sup>

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<sup>17</sup> ALASKA R. CIV. P. 82.

<sup>18</sup> ALASKA STAT. § 14.18.100 (West 2024).

<sup>19</sup> *Id.* § 18.80.255(1) (West 2024).

<sup>20</sup> *Id.* § 18.80.260 (West 2024).

<sup>21</sup> *Id.* § 18.80.100 (West 2024); see *Filing a Complaint with the Commission*, ALASKA STATE COMMISSION FOR HUMAN RIGHTS, <https://humanrights.alaska.gov/services/complaints/> (last visited Dec. 23, 2024).

<sup>22</sup> ALASKA STAT. § 18.80.270 (West 2024).

<sup>23</sup> *Id.* § 18.80.255 (West 2024).

<sup>24</sup> *Id.*

<sup>25</sup> See *Filing a Complaint with the Commission*, ALASKA STATE COMMISSION FOR HUMAN RIGHTS, <https://humanrights.alaska.gov/services/complaints/> (last visited Oct. 15, 2024).

# Arizona

## Preferential treatment or discrimination prohibited, ARIZ. CONST., Art. II, § 36

This constitutional provision prohibits the state from granting “preferential treatment to or discriminat[ing] against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.”<sup>26</sup>

### Potential Defendants

“For the purposes of this section, ‘state’ includes this state, a city, town or county, a public university, including the University of Arizona, Arizona state University and Northern Arizona University, a community college district, a school district, a special district or any other political subdivision in this state.”<sup>27</sup>

### Bases of Discrimination

Race, sex, color, ethnicity, and national origin.<sup>28</sup>

### Available Damages

Article II § 36(c) of the Arizona Constitution specifies that “[t]he remedies available for a violation of this section are the same . . . as are otherwise available for a violation of the existing antidiscrimination laws of this state.”<sup>29</sup> It is unclear, however, exactly which antidiscrimination law this constitutional provision intended to reference, and no Arizona court has yet reached the issue. Arizona’s employment antidiscrimination laws appear to be the most relevant.<sup>30</sup> Those laws allow for compensatory damages, including back pay, and equitable relief.<sup>31</sup>

### Damages Cap(s)

N/A.<sup>32</sup>

### Statute of Limitations

It is unclear what statute of limitations applies, since no court has yet addressed this and the constitutional provision itself is silent on the issue. The Arizona statute of limitations for personal injury actions is two years.<sup>33</sup>

### Administrative Requirements

- No known administrative exhaustion requirement.

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<sup>26</sup> ARIZ. CONST. Art. II § 36.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at (C).

<sup>30</sup> ARIZ. REV. STAT. ANN. § 41-1481(A) (effective Sept. 29, 2021).

<sup>31</sup> *Id.* § 41-1481(D)-(G) (effective Sept. 29, 2021).

<sup>32</sup> ARIZ. CONST. Art. II § 31 prohibits damage caps: “No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person.”

<sup>33</sup> ARIZ. REV. STAT. ANN. § 12-542.

Fee-Shifting

N/A.

Jurisdictional Issues

N/A.

## Arkansas

### **The Arkansas Civil Rights Act of 1993, ARK. CODE ANN. § 16-123-105**

Similar to 42 U.S.C. § 1983, this provision permits parties to bring claims for constitutional violations, including violations of the Arkansas Constitution's equal protection clause, ARK. CONST. ART II, § 3.<sup>34</sup> Specifically, this section of Arkansas Civil Rights Act of 1993 stipulates that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.”<sup>35</sup>

Potential Defendants

School officials.<sup>36</sup>

Bases of Discrimination

Race, national origin, and gender.<sup>37</sup>

Available Damages

- Compensatory and punitive damages.<sup>38</sup>

Damages Cap(s)

Certain damages caps apply to actions brought by employees under this provision.<sup>39</sup>

Statute of Limitations

Three years.<sup>40</sup>

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<sup>34</sup> See ARK. CODE ANN. § 16-123-105(c) (West 2024) (providing that “[w]hen interpreting this section, a court may look for guidance to state and federal decisions interpreting the Civil Rights Act of 1871”).

<sup>35</sup> *Id.* § 16-123-105(a) (West 2024).

<sup>36</sup> *Id.*; see also *Anderson v. Nat'l Park Cnty. Coll.*, No. 14-6141, 2015 WL 2340635, at \*4 (W.D. Ark. May 14, 2015).

<sup>37</sup> See, e.g., ARK. CODE ANN. § 16-123-107 (West effective Aug. 1, 2017); see also ARK. CODE ANN. § 16-123-105(c) (West 2024) (providing that “[w]hen interpreting this section, a court may look for guidance to state and federal decisions interpreting the Civil Rights Act of 1871”).

<sup>38</sup> ARK. CODE ANN. § 16-123-107(b) (West effective Aug. 1, 2017).

<sup>39</sup> See *Id.* §§ 16-123-107(c)(1)(A) (West effective Aug. 1, 2017); 16-55-208 (West 2024); *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822, 831 (Ark. 2011) (holding that the statutory cap on punitive damages is unconstitutional to the extent it applies outside of employment relationships).

<sup>40</sup> *Hutcherson v. Rutledge*, 533 S.W.3d 77, 80 (Ark. 2017).

## Administrative Requirements

- The statute is silent on administrative requirements, but at least one Arkansas district court has held that the same administrative requirements that apply under Title VII apply to employment discrimination claims brought under this law.<sup>41</sup>
- Notice of claims: presumably none.

## Fee-Shifting

Attorneys' fees and costs are statutorily authorized.<sup>42</sup>

## Jurisdictional Issues

N/A.

## **The Arkansas Civil Rights Act of 1993, ARK. CODE ANN. § 16-123-106**

This section of Arkansas Civil Rights Act of 1993 permits “[a] person [to] bring a civil action for injunctive relief or damages, or both, if he or she is subject to an act motivated by racial, religious, or ethnic animosity and the act was an act of (1) [i]ntimidation or harassment; (2) [v]iolence directed against his or her person; or (3) [v]andalism directed against his or her real or personal property.”<sup>43</sup>

## Potential Defendants

School officials.<sup>44</sup>

## Bases of Discrimination

Race and ethnicity.<sup>45</sup>

## Available Damages

*Compensatory damages* (including emotional distress damages).<sup>46</sup>

*Punitive damages.*<sup>47</sup>

## Damages Cap(s)

None.<sup>48</sup>

## Statute of Limitations

Likely three years.<sup>49</sup>

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<sup>41</sup> Compare ARK. CODE ANN. § 16-123-107 (West effective Aug. 1, 2017) with *Lee v. Pine Bluff Sch. Dist.*, No. 4:23-CV-00486-BSM, 2023 WL 6129793, at \*3 (E.D. Ark. Sept. 19, 2023).

<sup>42</sup> ARK. CODE. ANN. § 16-123-105(b) (West 2024).

<sup>43</sup> *Id.* § 16-123-106(a) (West effective Aug. 1, 2017).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> ARK. CODE ANN. § 16-123-106(b) (West effective Aug. 1, 2017).

<sup>47</sup> *Id.*

<sup>48</sup> ARK. CODE ANN. § 16-55-208 (West 2024); *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822, 831 (Ark. 2011).

<sup>49</sup> The statute does not contain an express statute of limitations. See ARK. CODE. ANN. § 16-123-106 (Aug. 1, 2017). However, Arkansas courts typically apply a three-year statute of limitations to actions arising from a statute that does not contain an explicit statute of limitations, as here. *Hutcherson*, 533 S.W.3d at 80.

## **The Arkansas Civil Rights Act of 1993, ARK. CODE ANN. § 16-123-107**

The Arkansas Civil Rights Act of 1993 establishes “The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability is recognized as and declared to be a civil right.”<sup>50</sup> Said right includes, but is not limited to, “The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement.”<sup>51</sup>

### Potential Defendants

- School officials.<sup>52</sup>
- Public school districts.<sup>53</sup>

### Bases of Discrimination

Race, national origin, and gender.<sup>54</sup>

### Available Damages

- Compensatory and punitive damages.<sup>55</sup>

### Damages Cap(s)

Certain damages caps apply to actions brought by employees under this provision.<sup>56</sup>

### Statute of Limitations

Unclear. If the claim relates to employment discrimination, the statute of limitations is one year, or within 90 days of receipt of a “Right to Sue” letter or notice of “Determination” from the Equal Employment Opportunities Commission (EEOC).<sup>57</sup> But if the claim relates to some other kind of discrimination, it is unclear what the relevant statute of limitations would be.

### Administrative Requirements

The statute is silent on administrative requirements, however, at least one Arkansas district court has held that the same administrative requirements that apply under Title VII apply to employment discrimination claims brought under this law.<sup>58</sup>

### Fee-Shifting

Cost of litigation and “reasonable attorney’s fees” are statutorily authorized.<sup>59</sup>

### Jurisdictional Issues

N/A.

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<sup>50</sup> *Id.* § 16-123-107(a) (West effective Aug. 1, 2017).

<sup>51</sup> *Id.* at (a)(2) (West effective Aug. 1, 2017).

<sup>52</sup> ARK. CODE ANN. § 16-123-106(a) (West effective Aug. 1, 2017).

<sup>53</sup> *See* Baker v. Bentonville Sch. Dist., 75 F.4th 810, 817-18 (8th Cir. 2023).

<sup>54</sup> ARK. CODE ANN. § 16-123-107(a) (West effective Aug. 1, 2017).

<sup>55</sup> *Id.* § 16-123-107(b) (West effective Aug. 1, 2017).

<sup>56</sup> *See* ARK. CODE. ANN. § 16-123-107(c)(1).

<sup>57</sup> ARK. CODE ANN. §§ 16-56-105 (West 2024); 16-123-107(c)(4) (West effective Aug. 1, 2017).

<sup>58</sup> *See* ARK. CODE ANN. § 16-123-107 (West effective Aug. 1, 2017); *Lee*, 2023 WL 6129793, at \*3.

<sup>59</sup> ARK. CODE ANN. § 16-123-107(b) (West effective Aug. 1, 2017).

## Notes

- ARK. CONST. ART. 14, § 1 provides that Arkansas “shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.”<sup>60</sup> It is possible that a victim of discrimination could bring a cause of action under this provision, though we did not locate any successful claims to have been brought along these lines.<sup>61</sup>

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<sup>60</sup> ARK. CONST. ART. 14 §1.

<sup>61</sup> See *Walker v. Ark. State Bd. of Educ.*, 365 S.W.3d 899, 910 (Ark. 2010) (holding that ARK. CONST. ART. 14 § 1 creates an “absolute [constitutional] duty . . . to provide an adequate education to each school child, as well as an equal education to each school child); *Baker v. Bentonville Sch. Dist.*, 75 F.4th 810, 817-18 (8th Cir. 2023) (suggesting that a student might state a claim if a school’s failure to remedy harassment caused a student to be denied an “adequate or equal education”).

# California

## State Constitutional Equal Protection Claims, CAL. CONST. § 7(a)

### Potential Defendants

- The provision requires state action for conduct to be actionable.<sup>62</sup> Receipt of public funds alone is insufficient to convert an entity's actions into state action.<sup>63</sup>
- Other constitutional provisions suggest that the following actors are state actors and therefore may be defendants under this provision: the State of California; any city, county, city and county in California; California public university system, including the University of California; any California community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.<sup>64</sup> School boards are also potential defendants.<sup>65</sup>

### Bases of Discrimination

Race, national origin, sex,<sup>66</sup> sexual orientation,<sup>67</sup> gender identity.<sup>68</sup>

### Available Damages

Likely unavailable, unless brought alongside a common-law or statutory claim.

- In 2019, a judge for the Northern District of California explained that “[i]n general, California’s equal protection clause . . . does not provide a private right of action for monetary damages for alleged violations of the clause. A plaintiff, however, may state a claim for damages under [the clause] if the claim is tied to an established common law or statutory cause of action.”<sup>69</sup> However, this is the only case wherein a judge has awarded damages under this provision of the California constitution.<sup>70</sup>

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<sup>62</sup> CAL. CONST. § 7(a).

<sup>63</sup> See *Anton v. San Antonio Cnty. Hosp.*, 183 Cal. Rptr. 423, 430 (Cal. Ct. App. 1982) (finding actions of nonprofit community hospital not to be state action despite hospital’s receipt of public funds).

<sup>64</sup> CAL. CONST. § 31(f).

<sup>65</sup> See *Cranford v. Bd. of Educ.*, 551 P.2d 28, 36 (Cal. 1976) (“[L]ocal school boards are so ‘significantly involved’ in the control, maintenance and ongoing supervision of their school systems as to render any existing school segregation ‘state action’ under our state constitutional equal protection clause.”).

<sup>66</sup> See *People v. Leng*, 83 Cal. Rptr. 2d 433, 439 (Cal. Ct. App. 1999), as modified on denial of reb’g (Apr. 28, 1999) (“The equal protection guarantees of the Fourteenth Amendment and the California Constitution are substantially equivalent and analyzed in a similar fashion.”).

<sup>67</sup> See *Taking Offense v. State*, 281 Cal Rptr. 3d 298, 321-22 (Cal. Ct. App. 2021) (applying strict scrutiny to anti-gay and anti-transgender law based on California constitution’s consideration of gender classifications as “suspect”).

<sup>68</sup> See *id.*

<sup>69</sup> *Whooley v. Tamalpais Union High Sch. Dist.*, 399 F. Supp. 3d 986, 997 (N.D. Cal. 2019) (finding that plaintiff was allowed to seek damages because she successfully pl[ed] a cause of action under Section 504 of the Rehabilitation Act); *see also Julian v. Mission Cnty. Hosp.*, 11 Cal. App. 5th 360, 391 (N.D. Cal. 2017), as modified on denial of reb’g (May 23, 2017) (“There is no cause of action for damages for alleged violations of California Constitution . . . article I, section 7, subdivision (a) . . . when such an action is not tied to an established common law or statutory action . . . .”).

<sup>70</sup> See, e.g., *Williams v. Alameda Cnty.*, No. 21-CV-00523-CRB, 2023 WL 4552108, at \*12-13 (N.D. Cal. July 14, 2023) (criticizing *Whooley* and *Julian*, and holding “that the California equal protection clause does not allow for damages as a remedy” because the relevant inquiry is whether the “statutory provision or an established common law tort authoriz[ed] such a damage remedy for the California constitutional violation,” and pointing to previous Supreme Court of California jurisprudence “find[ing] nothing in the ballot materials to suggest that the voters affirmatively intended to create, within article I, section 7(a), a damages remedy”) (alterations omitted).

- It is possible that a plaintiff could seek damages for a violation of this provision through the Tom Bane Civil Rights Act, which is California's equivalent of Section 1983.<sup>71</sup>

## Damages Cap(s)

N/A.<sup>72</sup>

## Statute of Limitations

One year.<sup>73</sup>

## Administrative Requirements

- A claim against a public entity—which includes the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State<sup>74</sup>—must be presented directly to the clerk, secretary, or auditor thereof or mailed to the clerk, secretary, auditor, or governing body at its principal office.<sup>75</sup>
- This claim must be acted upon or rejected by the board—which is the governing body (if defendant is local public entity), Department of General services (if state), or Trustees of the California State University (if said university)<sup>76</sup>—before a claim for damages may be brought.<sup>77</sup>

## Fee-Shifting

Available.<sup>78</sup>

# State Constitutional Education Discrimination Claims, CAL. CONST. § 31

This is the provision colloquially known as Proposition 209.

## Potential Defendants

State of California; any city, county, city and county in California; California public university system, including the University of California; any California community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.<sup>79</sup>

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<sup>71</sup> CAL. CIV. CODE § 52.1(c) (West effective Jan. 1, 2022); *see also id.* at 52.1(d) (specifying requirements for filing); *Weimer v. Cnty. of Kern*, No. 1:06-CV-00735OWWDLB, 2006 WL 3834237, at \*8 (E.D. Cal. Dec. 28, 2006) (denying plaintiff's prayers for damages in connection with his California constitutional claims, but noting that "a damages remedy may be available under California Civil Code § 52.1").

<sup>72</sup> As *Whooley* is the only case wherein a judge has awarded damages under this provision of the California constitution, there is little information about the types of damages or the caps thereon that might apply.

<sup>73</sup> *See Coral Constr. Inc. v. City & Cnty. of San Francisco*, 10 Cal. Rptr. 3d 65, 81 (Cal. Ct. App. 2004).

<sup>74</sup> CAL. GOV. CODE § 811.2 (West effective Jan. 1, 2011).

<sup>75</sup> *Id.* § 915(a) (West effective Jan. 1, 2021).

<sup>76</sup> *Id.* § 900.2 (West effective June 27, 2016).

<sup>77</sup> *Id.* § 945.4 (West 2024).

<sup>78</sup> CAL. CIV. PROC. CODE § 1021.5 (West 2024); *see City of Fresno v. Press Comm'n, Inc.*, 36 Cal. Rptr. 2d 456, 463 (Cal. Ct. App. 1994) ("Litigation which enforces constitutional rights necessarily affects the public interest and confers a significant benefit upon the general public." (citing *Press v. Lucky Stores, Inc.*, 667 P.2d 704, 707 (Cal. 1983))).

<sup>79</sup> CAL. CONST. § 31(f).

## Bases of Discrimination

Race, color, national origin, ethnicity, sex.<sup>80</sup>

## Available Damages

- Compensatory and punitive damages.<sup>81</sup>

## Damages Cap(s)

None.<sup>82</sup>

## Statute of Limitations

One year.<sup>83</sup>

## Administrative Requirements

- None specific to this provision.<sup>84</sup>
- Any claim against a public entity—which includes the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State<sup>85</sup>—must be presented directly to the clerk, secretary, or auditor thereof or mailed to the clerk, secretary, auditor, or governing body at its principal office.<sup>86</sup>
  - This claim must be acted upon or rejected by the board—which is the governing body (if defendant is local public entity), Department of General services (if state), or Trustees of the California State University (if said university)<sup>87</sup>—before a claim for money or damages may be brought.<sup>88</sup>

## Fee-Shifting

Available.<sup>89</sup>

# California Education Code

California's education code has a general prohibition of discrimination, CAL. EDUC. CODE § 220, and one specific to sex, the Sex Equity in Education Act, CAL. EDUC. CODE § 221.5. This section refers to both, since they have the same requirements and specifications.

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<sup>80</sup> CAL. CONST. § 31(a).

<sup>81</sup> This constitutional provision incorporates the remedies that are available for violations of California's other antidiscrimination law. CAL. CONST. § 31(g). This likely refers to California's Fair Employment and Housing Act (FEHA), which provides for compensatory damages, inclusive of emotional distress, and punitive damages. *See Available Remedies*, CAL. DEP'T CIVIL RTS. <https://calcivilrights.ca.gov/fair-chance-act/employment-remedies> (last visited Dec. 30, 2024) (describing the various damages available for violations of FEHA in the employment context).

<sup>82</sup> *See Commodore Home Sys., Inc. v. Superior Ct.*, 649 P.2d 912, 914 (Cal. 1992) (explaining that there is no limit on the relief a court may award under FEHA); *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130 (Cal. 2011) (explaining that California has no cap on either punitive or compensatory damages).

<sup>83</sup> *See Coral Constr., Inc.*, 10 Cal. Rptr. 3d at 81.

<sup>84</sup> CAL. CONST. § 31(h) ("This section shall be self-executing.").

<sup>85</sup> CAL. GOV. CODE § 811.2 (West effective Jan. 1, 2011).

<sup>86</sup> *Id.* § 915(a) (West effective Jan. 1, 2021).

<sup>87</sup> *Id.* § 900.2 (West effective June 27, 2016).

<sup>88</sup> *Id.* § 945.4 (West 2024).

<sup>89</sup> *See* CAL. CIV. PROC. CODE § 1021.5 (West 2024).

## Potential Defendants

Any educational institution that receives, or benefits from, state financial assistance or that enrolls pupils who receive state financial aid.<sup>90</sup>

- “Educational institution” means a public or private preschool, elementary, or secondary school or institution; the governing board of a school district; or any combination of school districts or counties recognized as the administrative agency for public elementary or secondary schools.<sup>91</sup>
  - Religious schools are exempted,<sup>92</sup> but these statutory requirements do apply to alternative schools and charter schools.<sup>93</sup>
- “State financial assistance” means any funds or other form of financial aid appropriated or authorized pursuant to state law (or federal law administered by any state agency) for the purpose of providing assistance to any educational institution for its own benefit or for the benefit of its pupils.<sup>94</sup> Other forms of financial assistance include grants of state property (or interest therein), provision of the services of state personnel, or funds provided by contract, tax rebate, appropriation, allocation, or formula.<sup>95</sup>
- “State student financial aid” means any funds or other form of financial aid appropriated or authorized pursuant to state law (or federal law administered by any state agency) for the purpose of providing assistance directly to any student admitted to an educational institution, including, but not be limited to, scholarships, loans, grants, or wages.<sup>96</sup>

## Bases of Discrimination

Race, national origin, ethnicity, sex,<sup>97</sup> gender, gender identity, gender expression, sexual orientation.<sup>98</sup>

## Available Damages

- *Compensatory damages*: available.<sup>99</sup>
  - A California appellate court has held that California courts should look to Title IX to establish the elements cause of action for money damages, rather than to California state law.<sup>100</sup> California courts have not addressed whether this prescription would extend to awarding only the types of damages available under Title IX.<sup>101</sup> No case has addressed whether emotional distress damages are available under this provision.
- *Punitive damages*: not available against public entities.<sup>102</sup>

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<sup>90</sup> CAL. EDUC. CODE § 220 (West effective Jan. 1, 2018).

<sup>91</sup> *Id.* § 210.3 (West effective Jan. 1, 2008).

<sup>92</sup> *Id.* § 221 (West effective Jan. 1, 2008).

<sup>93</sup> *Id.* § 235 (West effective Jan. 1, 2008).

<sup>94</sup> *Id.* § 213(a) (West 2024)).

<sup>95</sup> *Id.* § 213(b) (West 2024).

<sup>96</sup> *Id.* § 214 (West 2024).

<sup>97</sup> *Id.* §§ 220 (West effective Jan. 1, 2018); § 221.5 (Sex Equity in Education Act) (West Jan. 1, 2015).

<sup>98</sup> CAL. EDUC. CODE § 220 (West effective Jan. 1, 2018).

<sup>99</sup> *Donovan v. Poway Unified Sch. Dist.*, 84 Cal. Rptr. 3d 285, 303 (Cal. Ct. App. 2008) (holding that “money damages [are] available in a private enforcement action under [Cal. Educ. Code] section 262.3”).

<sup>100</sup> *Id.* at 307.

<sup>101</sup> *Id.*

<sup>102</sup> CAL. GOV. CODE § 818 (West 2024) (“[A] public entity is not liable for . . . damages imposed primarily for the sake of example and by way of punishing the defendant.”); *see also* *Gay-Straight All. Network v. Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088, 1111 (E.D. Cal. 2001) (“Because [Cal. Educ. Code § 262.3] does not limit the type of remedies allowed to

## Damages Cap(s)

None for compensatory damages.<sup>103</sup>

## Statute of Limitations

Two or three years.<sup>104</sup>

## Administrative Requirements

- None specific to this provision,<sup>105</sup> although administrative remedies are available.<sup>106</sup> If a plaintiff elects to pursue administrative remedies, however, they must exhaust the process before proceeding with a civil action.<sup>107</sup>
- Any claim against a public entity—which includes the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State<sup>108</sup>—must be presented directly to the clerk, secretary, or auditor thereof or mailed to the clerk, secretary, auditor, or governing body at its principal office.<sup>109</sup>
  - This claim must be acted upon or rejected by the board—which is the governing body (if defendant is local public entity), Department of General services (if state), or Trustees of the California State University (if said university)<sup>110</sup>—before a claim for money or damages may be brought.<sup>111</sup>

## Fee-Shifting

Likely unavailable.<sup>112</sup>

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a complainant, pursuant to California Government Code section 818, public entities such as [defendant-school district] are immune from exposure to punitive damages from State law claims.”).

<sup>103</sup> See McDonald Plosser, *United States: Sky's The Limit? A 50-State Survey Of Damages Caps And The Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule>.

<sup>104</sup> No court has pronounced on this, and there is nothing in the statutory text that serves as a guide. In *Burke v. Basil*, the Ninth Circuit found that the district court had properly dismissed plaintiff's claims, including his claims under CAL. EDUC. CODE § 220, as untimely based on California's two-year statute of limitations for personal injury claims (CAL. CIV. PROC. CODE § 335.1) and three-year limitations period for fraud claims (*id.* § 352(a)). No. 20-56124, 2021 WL 2936744 (9th Cir. July 13, 2021).

<sup>105</sup> CAL. EDUC. CODE § 262.3(c) (West 2024) (“Nothing in this chapter shall be construed to require an exhaustion of the administrative complaint process before civil law remedies may be pursued.”).

<sup>106</sup> *Id.* § 262.3(a)-(b), (d) (West 2024).

<sup>107</sup> *Id.* § 262.3(d) (West 2024) (specifying that “a person who alleges that he or she is a victim of discrimination may not seek civil remedies pursuant to this section until at least 60 days have elapsed from the filing of an appeal to the State Department of Education” if seeking damages); *see also* R.N. by & through Neff v. Travis Unified Sch. Dist., No. 2:20-CV-00562-KJM-JDP, 2020 WL 7227561, at \*11 (E.D. Cal. Dec. 8, 2020) (granting defendant-school district's motion to dismiss because “plaintiffs did not exhaust their administrative remedies upon receiving this denial” since “they failed to file an appeal to the State Department of Education as required” after they “filed a complaint with SCOE, the local education agency”).

<sup>108</sup> CAL. GOV. CODE § 811.2 (West effective Jan. 1, 2011).

<sup>109</sup> *Id.* § 915(a) (West effective Jan. 1, 2021).

<sup>110</sup> *Id.* § 900.2 (West effective June 27, 2016).

<sup>111</sup> *Id.* § 945.4 (West 2024).

<sup>112</sup> See *Richardson-Bass v. State Ctr. Cmty. Coll. Dist.*, No. 1-19-CV-01566-AWI-SAB, 2020 WL 5658225, at \*16 (E.D. Cal. Sept. 23, 2020) (holding that plaintiff's Title IX and California Education Code claims were “only to vindicate her own personal rights and economic interests” such that “an award of attorney's fees under section 1021.5 of the California Civil Procedure Code is improper”); *Royal v. Governing Bd. of Salinas City Elementary Sch. Dist.*, 159 Cal. App. 4th 1143, 1149, 72

## Unruh Civil Rights Act, CAL. CIV. CODE §§ 51-52

### Potential Defendants

Public universities<sup>113</sup> and likely private universities.<sup>114</sup>

### Bases of Discrimination

Race, color, national origin, sex (including gender identity and gender expression),<sup>115</sup> sexual orientation.<sup>116</sup>

### Available Damages

- *Compensatory damages, including emotional distress:* Available, with a minimum of \$4,000 for each violation.<sup>117</sup>
- *Punitive damages:* potentially available.<sup>118</sup>

### Damages Cap(s)

Three times actual damages (including emotional distress and actual losses).<sup>119</sup>

### Statute of Limitations

Two or three years.<sup>120</sup>

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Cal. Rptr. 3d 146, 151 (2008) (finding that plaintiff-employees' successful age discrimination claims brought under California Education Code "did not amount to enforcement of an important *public* right" even though it remedied a defect in compliance) (emphasis in original); *Donovan v. Poway Unified Sch. Dist.*, 84 Cal. Rptr. 3d 285, 294 (Cal. Ct. App. 2008) (holding trial court did not err in awarding plaintiffs attorney fees under 42 U.S.C. § 1988(b) and denying them fees under CAL. CIV. PROC. CODE § 1021.5).

<sup>113</sup> See, e.g., *Sherman v. Regents of Univ. of Cal.*, No. 20-CV-06441-VKD, 2022 WL 1137090, at \*15 (N.D. Cal. Apr. 18, 2022). Public school districts, public school officials, and private religious schools are *not* liable under the Unruh Act. *Brennon B. v. Superior Ct.*, 513 P.3d 971, 984-85 (Cal. 2022), *reb'g denied* (Aug. 31, 2022) (public school districts and school officials); *Doe v. Cal. Lutheran High Sch. Ass'n*, 88 Cal. Rptr. 3d 475, 484 (Cal. App. 2009) (private religious schools).

<sup>114</sup> See, e.g., *Nkwuo v. Golden Gate Univ.*, No. 5:14-CV-05192-HRL, 2016 WL 706020, at \*10 (N.D. Cal. Feb. 23, 2016), *aff'd sub nom. Nkwuo v. Angel*, 693 F. App'x 696 (9th Cir. 2017) (assessing plaintiff's sex discrimination claim against private university under Unruh Act on the merits); *but see Terry Mattingly, Covering Cal Baptist, MTV, the Law, and Gender Identity*, PATHEOS (Mar. 5, 2013), <https://www.patheos.com/blogs/getreligion/2013/03/covering-cal-baptist-mtv-the-law-and-gender-identity> (reporting assessment by Transgender Law Center attorney that Unruh Act does not typically apply to private colleges and universities).

<sup>115</sup> CAL. CIV. CODE § 51(e)(5) (West effective Jan. 1, 2016 to Dec. 31, 2024).

<sup>116</sup> *Id.* § 51(b) (West effective Jan. 1, 2016 to Dec. 31, 2024).

<sup>117</sup> *Id.* § 52(a), (g) (West effective June 30, 2022); *see also Boemio v. Love's Rest.*, 954 F. Supp. 204, 208 (S.D. Cal. 1997) (citing *Walnut Creek Manor v. Fair Emp. & Housing Comm'n*, 814 P.2d 704 (Cal. 1991)) (describing available damages); *see also Kwon v. Ramirez*, 576 F. Supp. 3d 696, 699 (C.D. Cal. 2021) (explaining that litigants need not prove actual damages to recover the minimum of \$4,000 in statutory damages).

<sup>118</sup> See *Botosan v. Fitzhugh*, 13 F. Supp. 2d 1047, 1053 (S.D. Cal. 1998) (authorizing disability discrimination plaintiff to seek punitive damages under CAL. CIV. CODE § 52(a), but relying on since-rejected precedent reasoning that the structure of the Unruh Act implies support for punitive damages, and reasoning specifically about damages available for disability discrimination (e.g., discussing damages caps in CAL. CIV. CODE § 54.3(a))).

<sup>119</sup> CAL. CIV. CODE § 52(g) (West effective June 30, 2022).

<sup>120</sup> As to the claims under the Unruh Act, courts are divided on the statute of limitations for such claims. Some hold California's two-year personal injury statute of limitations applies to Unruh claims, like it does to section 1983 claims. *See, e.g., Gatto v. Cnty. of Sonoma*, 98 Cal. App. 4th 744, 760 (2002); *Hartline v. Nat'l Univ.*, No. 2:14-cv-0635 KJM AC (PS), 2015 WL 4716491 (E.D. Cal. Aug. 7, 2015). Others have applied a three-year statute of limitations to claims under the Unruh Act. *See, e.g., Kramer v. Regents of Univ. of Cal.*, 81 F. Supp. 2d 972, 978 (N.D. Cal. 1999); *see also Olympic Club v. Those Interested Underwriters at Lloyd's London*, 991 F.2d 497, 501, n.11 (9th Cir. 1993) (indicating in dicta that the three-year statute of

## Administrative Requirements

- No administrative exhaustion required.<sup>121</sup>
- In cases alleging a violation of the statute, each party must serve a copy of the party's brief or petition and brief on the State Solicitor General at the Office of the Attorney General, and the brief must be filed with a proof of service showing this service.<sup>122</sup>

## Fee-Shifting

Available.<sup>123</sup>

## Jurisdictional Issues

Claims against the state of California under the Unruh Act cannot be brought in federal court.<sup>124</sup>

## Colorado

### State Constitutional Equal Protection Claims, COLO. CONST. art. II, § 25<sup>125</sup>

#### Potential Defendants

Public entities including school districts, school districts board of education, and any “agency, instrumentality or political subdivision” of a school district such as charter schools, institute charter schools, public schools or subdivisions, and public employees of the school district or charter school.<sup>126</sup>

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limitations of California Code of Civil Procedure § 338(a) should apply to claims under the Unruh Act); *O'Shea v. Cnty. of San Diego*, No. 19-CV-1243-BAS-BLM, 2019 WL 4674320, at \*4 (S.D. Cal. Sept. 24, 2019); *see also K.S. ex rel. P.S. v. Fremont Unified Sch. Dist.*, No. C 06-07218 SI, 2007 WL 915399, at \*3-4 (N.D. Cal. Mar. 23, 2007) (collecting cases).

<sup>121</sup> CAL. CIV. CODE § 52(d)-(e) (West effective June 30, 2022).

<sup>122</sup> *Id.* § 51.1 (West effective Jan. 1, 2003).

<sup>123</sup> *Id.* § 52(a) (West effective June 30, 2022).

<sup>124</sup> *Stanley v. Trs. of Cal. State Univ.*, 433 F.3d 1129, 1134 (9th Cir. 2006) (holding that state of California did not consent to suit in federal court in passing Unruh Civil Rights Act).

<sup>125</sup> “No person shall be deprived of life, liberty or property, without due process of law.” COLO. CONST. art. II, § 25; *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1014 (Colo. 1982) (explaining that although the state constitution does not contain an “identical provision of equal protection as the United States Constitution, it is well-established that a like guarantee exists within the [state] constitution’s due process clause”). At the same time, the Colorado Supreme Court has held that, in connection with Colorado’s equal protection clause, there should not be excessive judicial intrusion in education policy. *Lobato v. State*, 218 P.3d 358, 373 (Colo. 2009) (discussing the “minimally-intrusive standard” of review courts should adhere to when reviewing cases related to educational goals and systems).

<sup>126</sup> These possible defendants are listed on both the Colorado Government Immunity Act (CGIA) and the Claire Davis School Safety Act (which imposes a limited waiver of sovereign immunity for schools). COLO. REV. STAT. ANN. §§ 24-10-103 (West effective Sept. 14, 2020), 24-10-106.3 (West effective Jan. 1, 2022 to Dec. 31, 2024); *Claire Davis School Safety Act* (C.R.S. 24-10-106.3), COLO. SCH. SAFETY RES. CTR., DEPT’T OF PUB. SAFETY (2019), <https://cdpsdocs.state.co.us/safeschools/CSSRC%20Documents/Claire%20Davis%20School%20Safety%20Act%207.2017%20Update%20ed2019.pdf>; *King v. U.S.*, 53 F. Supp. 2d 1056 (D. Colo. 1999), rev’d in part, 301 F.3d 1270 (10th Cir. 2002) (holding that a charter school organized under Colorado’s Charter School Act is a public entity within the definition of the CGIA).

## Bases of Discrimination

Suspect classifications, including race, ethnicity, national origin, or sex/gender classifications.<sup>127</sup>

## Available Damages

- *Compensatory damages*: likely available.<sup>128</sup>
- *Punitive damages*: not available for claims against public entities but available for claims against public school employees when their actions were willful and wanton.<sup>129</sup>

## Damages Cap(s)

- *Compensatory damages*: generally uncapped.<sup>130</sup>
  - However, the Claire Davis School Safety Act and CGIA instate a cap: “the maximum amount that may be recovered . . . in any single occurrence, whether from one or more public entities and public employees” is (a) \$350,000 for one injury to one person in a

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<sup>127</sup> *Lujan*, 649 P.2d at 1014–15, 1020 (affirming that equal protection under Colorado state constitution involves eliminating suspect classifications or gender classifications based on impermissible criteria, created either in its language or application, such as where school students claim a school law or system unconstitutionally impinged on their recognized, distinct class based on race, religion, ethnicity, national origin, or gender); *Villanueva v. Carere*, 873 F. Supp. 434, 448 (D. Colo. 1994), aff’d, 85 F.3d 481 (10th Cir. 1996) (holding that the Colorado Charter Schools Act did not violate state equal protection clause because the students in questions did not constitute a protected class discriminated on the basis of their race, national origin, or status as aliens). A search of relevant caselaw revealed that neither the state constitution nor any case law under § 25 articulates whether sex/gender classifications include sexual orientation and gender identity and/or expression. The only mention to gender was in *Lujan*, stating that when the statutory classification is based on gender, the “State must show that the classification serves important government-objectives and that it is substantially related to achievement of those objectives.” *Lujan*, 649 P.2d at 1015. However, because *Lujan* was not based on gender, the court did not discuss this standard of review or what it defined as gender. However, in a non-education context, *Ross v. Denver Department of Health and Hospitals* includes sexual orientation as part of the basis of sex discrimination. *Ross v. Denver Dept. of Health and Hosps.*, 883 P.2d 516, 521–22 (Colo. App. 1994) (stating that rules adopted by a state agency must not “classify or differentiate on the basis of sexual orientation,” which thus is necessarily encompassed under the larger basis of sex or gender classifications). Gender identity or expression does not otherwise appear to be explicitly addressed.

<sup>128</sup> Historically, equal protection cases brought in the education context seemingly have *only* sought injunctive relief and/or declaratory judgment. Whether this history suggests that *only* injunctive or declaratory relief is available is unclear. *See, e.g.*, *Lujan*, 649 P.2d 1005 (seeking declaratory judgment); *Villanueva*, 873 F. Supp. 434 (seeking declaratory judgment and injunctive relief); *Dolores Huerta Preparatory High v. Colo. State Bd. of Educ.*, 215 P.3d 1229 (Colo. App. 2009) (seeking declaratory relief, certiorari, and mandamus relief); *Zuments by Zuments v. Colo. High Sch. Activities Ass’n*, 737 P.2d 1113 (Colo. App. 1987) (seeking injunctive relief); *Lobato*, 218 P.3d 358 (seeking declaratory judgment and injunctive relief). Notably, Colorado statutes outline the maximum recoverable amount possible for a single occurrence of injury from a public entity or employee as \$350,000, supporting the likelihood that damages are in fact available, just not commonly sought. COLO. REV. STAT. ANN. § 24-10-114 (West effective May 29, 2018).

<sup>129</sup> COLO. REV. STAT. ANN. § 24-10-118(1)(c) (West 2024) (setting out willful and wanton standard for claim against public employees). If the CGIA applies, then punitive damages against educational institutions or school districts are not available, but the employees may however be sued for such. *Subryan v. Regents of the Univ. of Colo.*, 789 P.2d 472 (Colo. App. 1989) (holding that because the Board of Regents is a “public entity,” it is exempt from liability for punitive damages in actions brought under the Governmental Immunity Act); *Gray v. Univ. of Colo. Hosp. Auth.*, 284 P.3d 191 (Colo. App. 2012) (similar).

<sup>130</sup> That is, so long as monetary damages are available as a form of relief, *see McDonald Plosser, Sky’s The Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule>; COLO. REV. STAT. ANN. § 13-21-102.5(3)(a) (West effective Aug. 2, 2019) (stating that economic damages are not capped, but non-economic damages or injury must not exceed \$250,000, which amount the court however can increase to a maximum of \$500,000 upon clear and convincing evidence).

single occurrence or (b) \$990,000 for two or more persons in any single occurrence but no person can recover more than \$350,000.<sup>131</sup>

- *Punitive damages*, where available, cannot exceed three times the amount of compensatory damages awarded.<sup>132</sup>

## Statute of Limitations

Two years.<sup>133</sup>

## Administrative Requirements

- Administrative exhaustion: required only in limited circumstances not relevant here.<sup>134</sup>
- Notice requirements: unclear, but unlikely to apply.<sup>135</sup>

## Fee-Shifting

Presumptively not available.<sup>136</sup>

## Jurisdictional Issues

Action to be brought in the trial courts, in the applicable judicial district.<sup>137</sup>

# **State Constitutional Right to Education Claims, COLO. CONST. art. IX, § 2<sup>138</sup>**

## Potential Defendants

Public entities including school districts, school districts board of education, any “agency, instrumentality or political subdivision” of a school district such as charter schools, institute charter

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<sup>131</sup> COLO. REV. STAT. ANN. §§ 24-10-106.3 (West effective Jan. 1, 2022 to Dec. 31, 2024), 24-10-114 (West effective May 29, 2018).

<sup>132</sup> *Id.* § 13-21-102 (West 2024).

<sup>133</sup> *Id.* § 13-80-102 (West effective July 1, 2014).

<sup>134</sup> The Colorado Department of Education requires administrative exhaustion, but seemingly only for “disagreement[s] about the identification, evaluation, placement, or provision of a free appropriate public education (FAPE) for a child with a disability.” *Due Process Complaints*, COLO. DEP’T OF EDUC. , <https://www.cde.state.co.us/spedlaw/dueprocess> (last visited (?) Oct. 13, 2023). Colorado, only in this circumstance and seemingly for no other type of discrimination, requires a parent of a student with a disability to request a hearing before an Administrative Law Judge by filing a due process complaint. Thus, administrative exhaustion for race or sex/gender discrimination does not seem required.

<sup>135</sup> COLO. REV. STAT. ANN. § 24-10-102 (West 2024) (no notice of claim requirements was found under general state constitutional violation search. However, under the CGIA, there are notice requirements. The CGIA provides governmental immunity for public entities, with a few narrow exceptions, from tort suits); *see also id.* § 24-10-109 (West effective Jan. 1, 2022) (setting forth notice requirements under the CGIA for tort suits against state governmental entities).

<sup>136</sup> Allstate Ins. Co. v. Huizar, 52 P.3d 816, 820–21 (Colo. 2002) (holding that the “general rule [is] that attorney fees are not recoverable by the prevailing party in the absence of an express statute, court rule, or private contract to the contrary”). There does not seem to be any applicable statutes that provide for attorney’s fees. *See generally* COLO. REV. STAT. ANN. §§ 13-17-201 (West effective June 8, 2022) and 5-5-206 (West 2024).

<sup>137</sup> COLO. CONST. art. VI, § 9; *Colorado’s State Court System*, COLO. JUD. BRANCH, <https://www.courts.state.co.us/Courts/Index.cfm> (last visited Jan. 22, 2024).

<sup>138</sup> *Id.* art. IX, § 2 (titled “Establishment and maintenance of public schools” and commonly referred to as the “Education Clause”) (“The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state, at least three months in each year; any school district failing to have such school shall not be entitled to

schools, public schools or subdivisions, and public employees of the school district or charter school.<sup>139</sup>

## Bases of Discrimination

- Can use “thorough and uniform” clause to bring claims regarding “unequal treatment” regarding equal educational opportunity of students.<sup>140</sup>
- So far, cases utilizing the State Constitution have focused on discrimination through school finance and admission requirements.<sup>141</sup>
- However, the door remains open for other discrimination-based claims.

## Available Damages

- *Compensatory damages*: likely available.<sup>142</sup>
- *Punitive damages*: not available for claims against public entities but available for claims against public school employees when their actions were willful and wanton.<sup>143</sup>

## Damages Cap(s)

- Compensatory damages generally uncapped.<sup>144</sup>
  - However, the Claire Davis School Safety Act and CGIA instate a cap: Claire Davis School Safety Act and CGIA state: “the maximum amount that may be recovered . . . in any single occurrence, whether from one or more public entities and public employees” is (a) \$350,000 for one injury to one person in a single occurrence or (b) \$990,000 for two or more persons in any single occurrence but no person can recover more than \$350,000.<sup>145</sup>
- Punitive damages, where available, cannot exceed three times the amount of compensatory damages awarded.<sup>146</sup>

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receive any portion of the school fund for that year.”). Many of the following sections parallel to those listed above for the equal protection provision in section 1.

<sup>139</sup> See *supra* note 126.

<sup>140</sup> *Lobato v. State*, 304 P.3d 1132, 1139 (Colo. 2013) (holding that the phrase “thorough and uniform” of the Education Clause “describes a free public school system that is of a quality marked by completeness, is comprehensive, and is consistent across the state”); *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1018–19 (Colo. 1982) (explaining however that “thorough and uniform” does not mandate “absolute equality in educational services or expenditures” but rather that each child receive the “opportunity to receive a free education”).

<sup>141</sup> *Lujan*, 649 P.2d at 1021, 1023 (inquiring into whether public school financing system, which “applies a uniform subsidy formula on a statewide basis, while concurrently promoting community control by means of local taxation,” amounted to discrimination, invidious or otherwise to low-income residents); *Villanueva v. Carere*, 873 F. Supp. 434, 449 (D. Colo. 1994), aff’d, 85 F.3d 481 (10th Cir. 1996) (holding that the admission requirements for the charter school at issue “lack[ed] some aspects of fairness” and arguably discriminated on the basis of socioeconomic class, which is not a protected class); *Dolores Huerta Preparatory High v. Colo. State Bd. of Educ.*, 215 P.3d 1229, 1234 (Colo. App. 2009) (holding it is not discriminatory nor required under the Education Clause for schools to provide unequal expenditures in each school district or identical educational expenditures per student in every school district).

<sup>142</sup> See *supra* note 128.

<sup>143</sup> See *supra* note 129.

<sup>144</sup> See *supra* note 130.

<sup>145</sup> See *supra* note 131.

<sup>146</sup> COLO. REV. STAT. ANN. § 13-21-102 (West 2024).

## State of Limitations

Two years.<sup>147</sup>

## Administrative Requirements<sup>148</sup>

- Administrative exhaustion: not required.<sup>149</sup>
- Notice requirement: unclear, but unlikely to apply.<sup>150</sup>

## Fee-Shifting

Presumptively not available.<sup>151</sup>

## Jurisdictional Issues

Action to be brought in the trial courts, in the applicable judicial district.<sup>152</sup>

## **Colorado Anti-Discrimination Act (CADA), Public Accommodations** **COLO. REV. STAT. ANN. § 24-34-601<sup>153</sup>**

### Potential Defendants

Any public place considered a public accommodation including any (public) educational institution, inclusive of school districts, but likely not private schools.<sup>154</sup>

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<sup>147</sup> *Id.* § 13-80-102 (West effective July 1, 2014).

<sup>148</sup> Same Administrative Requirements as the equal protection claims from Section 1.

<sup>149</sup> *See supra* note 134.

<sup>150</sup> *See supra* note 135

<sup>151</sup> *See supra* note 136

<sup>152</sup> *See supra* note 137

<sup>153</sup> COLO. REV. STAT. ANN. § 24-34-601 (West effective Aug. 7, 2024) (Colorado state law aimed to entitle Colorado citizens the “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation” offered to the public and regardless of any protected class). Although CADA covers employment principally, cases/complaints may still be brought under the public accommodation arm of the statute. This is a particularly viable pathway for students to sue against a discriminatory school regulation or requirement.

<sup>154</sup> *Id.*; Sch. Dist. No. 11-J v. Howell, 33 Colo. App. 57, 517 P.2d 422 (1973) (suing school district for discriminatory student hair length regulation). Importantly, CADA only pertains to places of public accommodation, meaning those open to the public or those offering services to the public. COLO. REV. STAT. ANN. § 24-34-601 (West effective Aug. 7, 2024); Creek Red Nation, LLC v. Jeffco Midget Football Ass’n., Inc., 175 F. Supp. 3d 1290, 1296–97 (D. Colo. 2016) (explaining that place of accommodation is “public” if “participation in it was open to the public,” thus transforming a place’s actions into state action”). Accordingly, private schools likely do not qualify as a public place of accommodation. Despite Colorado Courts applying a “liberal construction” of what it means for an organization or place to be “public,” such as in *Creek Red Nation*, where the basketball organization in question played games on public playing fields and was affiliated with public parks in the nearby area, private schools likely do not have similar attachments that would transform the schools themselves into places of public accommodation. *Id.* at 1298, 1296–97.

## Bases of Discrimination

Race, color, sex, sexual orientation, gender identity,<sup>155</sup> gender expression, marital status, national origin, or ancestry.<sup>156</sup>

## Available Damages

- *Compensatory damages*: available and include emotional distress.<sup>157</sup>
- *Punitive damages*: Available against private parties but no government entities.<sup>158</sup>

## Damages Cap(s)

- Amount of compensatory damages cannot exceed those caps as set by 42 U.S.C. § 1981(a)(b)(3).
  - \$300,000 listed as the highest amount possible.<sup>159</sup>

## Statute of Limitations

- Complaints must be filed within 60 days after the alleged discriminatory act occurred.
  - If the claim is not filed within this timeframe, it shall be barred.<sup>160</sup>
  - The Colorado Civil Rights Division then has 450 days to complete their administrative process, starting as of the date on which the formal complaint is filed.<sup>161</sup>
  - While a party is allowed to appeal the director's determination within 10 days from the date of the mailing of the Director's Determination, an appeal is "not necessary" to exhaust the administrative process; rather, the Letter of Determination includes the Notice of Right to Sue, allowing a plaintiff to file a case in district court.<sup>162</sup>

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<sup>155</sup> 3 COLO. CODE REGS. § 708-1:10.2 (Effective Mar. 30, 2023) (Colorado Department of Regulatory Agencies' Civil Rights Commission issued state rules under the Colorado Administrative Code, broadly defining gender identity as "an individual's innate sense of the individual's own gender, which may or may not correspond with the individual's sex assigned at birth"). These rules expressly require educational institutions to allow individuals to use any gender-segregated facility they feel is "consistent with their gender identity. *Id.* § 708-1:81.9 (amended 2014 and current as of November 25, 2023). Importantly, these rules expressly state that "[n]othing in this Act prohibits segregation of facilities on the basis of gender;" that "[a]ll covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity."

<sup>156</sup> COLO. REV. STAT. ANN. § 24-34-601 (West effective Aug. 7, 2024).

<sup>157</sup> *Id.* § 24-34-405 (West effective Aug. 10, 2022) ("A plaintiff may recover compensatory damages against a defendant for other pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.").

<sup>158</sup> *Id.* (allowing a plaintiff to recover punitive damages, but prohibiting the award if the defendant, pursuant to the CGIA, is a "state or any political subdivision, commission, department, institution, or school district of the state").

<sup>159</sup> *Id.*; 42 U.S.C. § 1981(a)(b)(3).

<sup>160</sup> *The Complaint Process*, COLO. DEP'T OF REGUL. AGENCIES, COLO. CIV. RTS. DIV. (2024), <https://ccrd.colorado.gov/the-complaint-process>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* A party must receive this Notice of Right to Sue before they can file any claim in court; moreover, the CCRD will not issue the notice until the termination of the complaint, conciliation efforts, or the charging party requests such notice. CODE OF COLO. REGULS., SEC. OF STATE, STATE OF COLO., DEPARTMENT OF REGULATORY AGENCIES CIVIL RIGHTS COMMISSION: STATE OF COLORADO CIVIL RIGHTS COMMISSION RULES AND REGULATIONS 3 CCR 708-1, at 9, <https://www.sos.state.co.us/CCR/3%20CCR%20708-1.pdf?ruleVersionId=6008&fileName=3%20CCR%20708-1> (last visited July 16, 2024). Please note that at any time during a complaint's investigation, the charging party may request to waive further investigation and can instead request administrative closure. *Id.* at 16.

- From this receipt of the Notice of Right to Sue, a plaintiff typically has 90 days to file their lawsuit in district court.<sup>163</sup>

## Administrative Requirements

- Administrative exhaustion is required, as claimant must file a claim first with the Colorado Civil Rights Division (CCRD)<sup>164</sup> within 60 days of the discriminatory act.<sup>165</sup>

## Fee-Shifting

Presumptively available.<sup>166</sup>

# Connecticut

## Human Rights and Opportunities Claims, GEN. STATUTES OF CONN. (C.G.S.A.) §§ 46a–51–125

### Potential Defendants

- C.G.S.A. § 46a-58 is violated when “any person” subjects or causes to be subjected, “any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States”<sup>167</sup> on account of the bases of discrimination listed below.
- “Person” is defined as “one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, receivers and the state and all political subdivisions and agencies thereof.”<sup>168</sup>

### Basis of Discrimination

National origin, alienage, color, race, sex, gender identity or expression, sexual orientation.<sup>169</sup>

### Available Damages

- *Compensatory damages:* Available.<sup>170</sup>

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<sup>163</sup> *Id. The Role of the EEOC or CCRD*, McCURDY & EICHSTADT, P.C. (2024), <https://www.mccurdy-eichstadt.com/role-eeoc-ccrd/>. The time of 90 days was one date I found, but it could be variable based on the type of discrimination alleged. STATE OF COLORADO CIVIL RIGHTS COMMISSION RULES AND REGULATIONS, *supra* note 162, at 9 (stating that the contents of the Notice of the Right to Sue will detail the appropriate time period in which to sue as provided by Law).

<sup>164</sup> *The Complaint Process*, COLO. DEP’T OF REGUL. AGENCIES, COLO. CIV. RTS. DIV. (2024), <https://ccrd.colorado.gov/the-complaint-process>.

<sup>165</sup> COLO. REV. STAT. ANN. § 24-34-604 (West 2024); *The Complaint Process*, COLO. DEP’T OF REGUL. AGENCIES, COLO. CIV. RTS. DIV. (2024), <https://ccrd.colorado.gov/the-complaint-process> (explaining that CCRD does not have the authority to extend this deadline, regardless of good cause or any underlying exigent circumstances).

<sup>166</sup> *Id.* § 24-34-405 (West effective Aug. 10, 2022) (“[T]he court may award reasonable attorney fees and costs to the prevailing plaintiff. If the court finds that an action or defense . . . was frivolous, groundless, or vexatious as provided in article 17 of title 13, C.R.S., the court may award costs and attorney fees to the defendant in the action.”).

<sup>167</sup> CONN. GEN. STAT. ANN. § 46a-58(a) (West effective July 1, 2023).

<sup>168</sup> *Id.* § 46a-51(14) (West effective Oct. 1, 2024).

<sup>169</sup> *Id.* § 46a-58(a) (West effective July 1, 2023).

<sup>170</sup> *Comm’n on Hum. Rts. and Opportunities v. Bd. of Educ. of Town of Cheshire*, 270 Conn. 665, 694 (2004) (holding that the CHRO was authorized to award compensatory damages for a violation of § 46a-58).

- *Emotional distress damages*: Available.<sup>171</sup>
- *Punitive damages*: Likely not available.<sup>172</sup>

## Damages Cap(s)

N/A.

## Statute of Limitations

- Plaintiffs must file a claim with the Commission on Human Rights and Opportunities (CHRO) within 300 days of the discriminatory act.<sup>173</sup>
- Upon receiving a release of jurisdiction from the CHRO, plaintiffs must file any civil action within two years of the date of filing the complaint with the commission.<sup>174</sup>

## Administrative Requirements

- Administrative exhaustion is required.<sup>175</sup>
- Notice of claim: N/A.

## Fee-Shifting

Available.<sup>176</sup>

## Jurisdictional Issues

The CHRO has concurrent subject jurisdiction with the State Board of Education over students' discrimination claims in the public schools.<sup>177</sup>

## Notes

- Generally under Connecticut law, governments and their agents are immune from liability for tortious acts conducted in the performance of their official duties.<sup>178</sup> However, if the act in question is not governmental but "ministerial," or "performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action,"<sup>179</sup> then it is not protected by governmental immunity.<sup>180</sup>
- Connecticut's State Constitution has an equal protection clause, but there is no private right of action under that provision.<sup>181</sup>

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<sup>171</sup> *Id.* at 705.

<sup>172</sup> Punitive damages are not explicitly authorized by CONN. GEN. STAT. ANN. § 46a-58. *See Chestnut Realty, Inc. v. Comm'n on Hum. Rts. and Opportunities*, 201 Conn. 350, 514 A.2d 749, 757 (1986) (punitive damages not available in a housing discrimination case because they were not explicitly authorized in the applicable statute nor at common law).

<sup>173</sup> CONN. GEN. STAT. ANN. § 46a-82(f)(2) (West effective July 1, 2023).

<sup>174</sup> *Id.* § 46a-102 (West 2024).

<sup>175</sup> *Id.* § 46a-101(a) (West effective Oct. 1, 2015) ("No [private] action may be brought . . . unless the complainant has received a release from the commission in accordance with the provisions of this section.").

<sup>176</sup> *Id.* § 46a-86(c) (West effective June 27, 2023).

<sup>177</sup> *Town of Cheshire*, 270 Conn. at 706, 725-26 (2004).

<sup>178</sup> CONN. GEN. STAT. ANN. § 52-557n (West effective June 26, 2023); *Lotto v. Hamden Bd. of Educ.*, No. CV054010436, 2006 WL 618361 (Conn. Super. Ct. Feb. 21, 2006)

<sup>179</sup> *Heigl v. Bd. of Educ. of Town of New Canaan*, 218 Conn. 1, 587 A.2d 423 (1991).

<sup>180</sup> *Id.*

<sup>181</sup> *Pierce v. Semple*, No. 3:18-cv-1858 (KAD), 2018 WL 6173719, at \*6 (D. Conn. Nov. 26, 2018).

- Discrimination in public schools on the basis of race, color, national origin, sex, and sexual orientation is prohibited per C.G.S.A. § 10-15c,<sup>182</sup> but there is no private right of action under that statute.<sup>183</sup> This statute is enforced by the State Board of Education pursuant to § 10-4b,<sup>184</sup> with the CRHO having concurrent jurisdiction.<sup>185</sup>

C.G.S.A. § 10-222d requires boards of education to develop and implement anti-bullying “safe school climate plans” to address bullying in schools based on race, color, ancestry, national origin, gender, sexual orientation, gender identity or expression,<sup>186</sup> but there exists no private right of action.<sup>187</sup>

## District of Columbia

### D.C. Human Rights Act, D.C. CODE ANN. § 2-1401.01 – 1431.08

#### Potential Defendants

Any public or private institution including an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system or university; and a business, nursing, professional, secretarial, technical, or vocational school; and includes an agent of an educational institution.<sup>188</sup>

#### Bases of Discrimination

Race, color, religion, national origin, sex, age, marital status, homeless status, personal appearance, sexual orientation, gender identity and expression, family responsibilities (such as supporting a person in a dependent relationship), political affiliation, disability, familial status, source of income.<sup>189</sup>

#### Available Damages

Compensatory, emotional, punitive, and injunctive.<sup>190</sup>

#### Damages Cap(s)

Civil penalties are capped at \$10,000 if first offense; \$25,000 if the respondent has committed one other unlawful discriminatory practice during the five-year period before the case filing; \$50,000 if two or more unlawful discriminatory practices during the seven-year period before the case filing.<sup>191</sup>

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<sup>182</sup> CONN. GEN. STAT. ANN. § 10-15c(a) (West effective July 1, 2024).

<sup>183</sup> *Lotto*, 2006 WL 618361, at \*5.

<sup>184</sup> *Id.*

<sup>185</sup> *Town of Cheshire*, 270 Conn. at 706, 725-26.

<sup>186</sup> CONN. GEN. STAT. ANN. § 10-222d(a)(1) (West July 1, 2024).

<sup>187</sup> *Karlen ex rel. J.K. v. Westport Bd. of Educ.*, 638 F. Supp. 2d 293 (D. Conn. 2009).

<sup>188</sup> D.C. CODE ANN. § 2-1401.02(8) (West effective Mar. 10, 2023).

<sup>189</sup> *Protected Traits by Enforcement Area*, OFF. OF HUM. RTS., D.C. (Jan. 2023),

[https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHR\\_ProtectedTraits\\_OnePager\\_Jan2023-English.pdf](https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHR_ProtectedTraits_OnePager_Jan2023-English.pdf).

<sup>190</sup> D.C. CODE ANN. § 2-1403.16(b) (West effective May 2, 2015) (“The court may grant any relief it deems appropriate,” including injunctive and compensatory relief, provide in §§ 2-1403.07 and 2-1403.13(a)).

<sup>191</sup> *Id.* § 2-1403.13(a)(1)(E-1) (West effective Apr. 1, 2017).

## Statute of Limitations

One year.<sup>192</sup>

## Administrative Requirements

**Administrative exhaustion:** not required, but a complaint can be filed with the District of Columbia Office of Human Rights.<sup>193</sup>

## Fee-Shifting

Yes, including reasonable attorney fees.<sup>194</sup>

# Delaware

## State Constitutional Equal Protection Claims, DEL. CONST. ART. I, § 21<sup>195</sup>

### Potential Defendants

- At least one court has held this provision requires state action for conduct to be actionable.<sup>196</sup>
- A footnote from an unrelated Chancery Court case suggests that public schools in Delaware are “state actors” at least when acting as an institution.<sup>197</sup>

### Bases of Discrimination

Race, color, national origin, sex.<sup>198</sup>

### Available Damages

Unclear.

### Damages Cap(s)

N/A.

### Statute of Limitations

Unclear if constitutional questions are bounded by statute of limitations beyond typical concerns of ripeness. However, personal injuries are subjected to a statute of limitations of two years.<sup>199</sup>

## Administrative Requirements

Administrative exhaustion not required.

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<sup>192</sup> *Id.* § 2-1403.16(a) (West effective May 2, 2015).

<sup>193</sup> *Id.*

<sup>194</sup> D.C. CODE ANN. § 2-1403.13(a)(1)(E) (West effective Apr. 1, 2017); § 2-1403.16 (West effective May 2, 2015).

<sup>195</sup> DEL. CONST. art. 1, § 21.

<sup>196</sup> *Giles v. Town of Elsmere*, 2022 WL 17826005, at \*6 (Del. Super. Ct. Dec. 20, 2022).

<sup>197</sup> *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 731 n. 87 (Del. Ch. 2017).

<sup>198</sup> DEL. CONST. art. 1, § 21.

<sup>199</sup> DEL. CODE ANN. tit. 10, § 8119 (West 2024).

## Fee-Shifting

Delaware Courts follow the American Rule that “each party is generally expected to pay its own attorneys’ fees regardless of the outcome of the litigation.”<sup>200</sup> Even under the American Rule, however, this court retains the ability to shift fees for bad faith conduct “to deter abusive litigation and protect the integrity of the judicial process.”<sup>201</sup>

## Jurisdictional Issues

Possible question of sovereign immunity for potential damages. In Delaware sovereign immunity is waived based upon insurance coverage held by the state, something often not knowable by a plaintiff at time of suit.<sup>202</sup>

## **State Constitutional Education Discrimination Claims, DEL. CONST. art. 10, § 1**

This provision, titled “§ 1. Establishment and maintenance of free public schools; attendance,” provides: “The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means.”<sup>203</sup> Courts have held that the provision has a “substantive element that requires Delaware schools to meet a Constitutionally mandated level of education adequacy.”<sup>204</sup>

### Potential Defendants

Public schools.

### Bases of Discrimination

Unclear. Arguably allows equal protection claims.

### Available Damages

N/A.<sup>205</sup>

### Damages Cap(s)

N/A.

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<sup>200</sup> *Petty v. Gilead Scis., Inc.*, 2020 WL 6870461, at \*29 (Del. Ch. Nov. 24, 2020), judgment entered, (Del. Ch. 2020).

<sup>201</sup> *Id.*

<sup>202</sup> *Clouser v. Doherty*, 175 A.3d 86 (Del. 2017) “(25) Under 18 Del. C. § 6511, ‘[t]he defense of sovereignty is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance’ The State has an insurance coverage program in place to cover some losses. When the State’s Insurance coverage program does not cover the loss, however, the State typically files an affidavit of no insurance coverage—as it did here—to show it has not waived sovereign immunity under § 6511. Before it can consider the affidavit of no insurance, which is outside of the complaint, the Superior Court must give notice of its intent to convert the motion to dismiss into a summary judgment motion. If the plaintiff asserts a sufficient basis in a Rule 56(f) affidavit to contest the affidavit of no insurance, she can pursue narrow and limited discovery into the statements in the affidavit of no insurance.”).

<sup>203</sup> DEL. CONST. art. 10, § 1.

<sup>204</sup> *Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109, 118 (Del. Ch. 2018).

<sup>205</sup> *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 (Mich. 2004) (“[P]unitive damages are available in Michigan only when expressly authorized by the Legislature. Here, the Civil Rights Act does not authorize punitive damages . . . .”) (footnote omitted).

## Statute of Limitations

Unclear if constitutional questions are bounded by statute of limitations beyond typical concerns of ripeness. However, personal injuries are subjected to a statute of limitations of two years.<sup>206</sup>

## Administrative Requirements

Administrative exhaustion not required.

## Fee-Shifting

Delaware courts follow the American Rule that “each party is generally expected to pay its own attorneys’ fees regardless of the outcome of the litigation.”<sup>207</sup> Even under the American Rule, however, this court retains the ability to shift fees for bad faith conduct “to deter abusive litigation and protect the integrity of the judicial process.”<sup>208</sup> However, for cases where this is used to remedy unequal funding for school districts, fees are possibly available under Delaware’s common benefit doctrine.<sup>209</sup>

## Jurisdictional Issues

N/A

# Florida

## State Constitutional Equal Protection Claims, FLA. CONST. art. I, § 2

Research has not revealed any cases where a plaintiff has brought an education discrimination case under art. I, § 2. However, the research has not indicated that this pathway is foreclosed.

### Potential Defendants

This provision requires that a “state actor”<sup>210</sup> has violated a federal or Florida constitutional right. The Florida Supreme Court has generally construed “state action” to be the “infringement of . . . rights (that are) fairly attributable to the state.”<sup>211</sup>

### Bases of Discrimination

Race, national origin and gender.<sup>212</sup>

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<sup>206</sup> See DEL. CODE ANN. tit. 10, § 8119 (West 2024).

<sup>207</sup> *Petty v. Gilead Scis., Inc.*, 2020 WL 6870461, at \*29 (Del. Ch. Nov. 24, 2020), judgment entered, (Del. Ch. 2020)).

<sup>208</sup> *Id.*

<sup>209</sup> *In re Del. Pub. Schs. Litig.*, 2023 WL 2711328, at \*1 (Del. Ch. Mar. 29, 2023).

<sup>210</sup> Historically, state actors have included: state public schools, the state athletic association (the Florida High School Activities Association (FHSAA)), charter schools, and public school employees. *See Lee v. Florida High Sch. Activities Ass’n, Inc.*, 291 So. 636 (Fla. Dist. Ct. App. 1974); FLA. STAT. ANN. § 1002.33 (West effective July 1, 2024); *N.R. by Ragan v. Sch. Bd. of Okaloosa Cnty., Fla.*, 418 F. Supp. 3d 957, 996-97 (N.D. Fla. 2019) (explaining that negligent retention and supervision of a teacher by a school board is not an act covered with sovereign immunity under Florida law); *Duval Cnty. Sch. Bd. v. Dutko*, 483 So. 2d 492 (Fla. Dist. Ct. App. 1986) (refusing to expand sovereign immunity to the alleged negligent acts of a school bus driver because “transportation of children was an operational function”).

<sup>211</sup> *Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204, 211 (Fla. Dist. Ct. App. 1983).

<sup>212</sup> FLA. CONST. art. I, § 2 (“All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.”).

- The Supreme Court of Florida held that art. I, § 2 “recognizes gender as a specific class (but) it does not separately recognize sexual orientation as a protected class” under the state’s Equal Protection Clause.<sup>213</sup>

## Available Damages

- *Compensatory damages (including emotional distress damages):* unclear.<sup>214</sup>
- *Punitive damages:* unclear. Under Florida law, punitive damages are generally available in tort except in claims brought against the state.<sup>215</sup>

## Damages Cap(s)

- *Compensatory damages:* generally uncapped, except that claims brought against the “state and its agencies and subdivisions” cannot exceed \$200,000 per person or a total of \$300,000.<sup>216</sup>
- *Punitive damages:* may not exceed the greater of three times the amount of compensatory damages or the sum of \$500,000.<sup>217</sup>

## Statute of Limitations

Four years.<sup>218</sup>

## Administrative Requirements

Administrative exhaustion required.<sup>219</sup>

## Fee-Shifting

Presumptively permissible.

- In claims against the state, attorney’s fees cannot exceed 25 percent of any judgment or settlement.<sup>220</sup>

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<sup>213</sup> *D.M.T. v. T.M.H.*, 129 So. 3d 320, 341-42 (Fla. 2013).

<sup>214</sup> Florida’s damages statutes reference compensatory and emotional distress damages but research has not revealed specific statutes or case law that expressly make such damages available. *See* FLA. STAT. ANN. §§ 760.11(5) (West effective July 1, 2020), 768.28(5) (West effective July 1, 2024). The equal protection cases we located in other contexts sought only injunctive relief and/or declaratory judgment. *See e.g.*, *D.M.T.*, 129 So. 3d 320 (seeking declaratory judgment in parental rights case concerning same-sex couples); *Ricketts v. Vill. of Mia. Shores*, 232 So. 3d 1095 (Fla. Dist. Ct. App. 2017) (seeking declaratory judgment in property rights dispute).

<sup>215</sup> FLA. STAT. ANN. §§ 768.72 (West 2024), 768.28(5)(a) (West effective July 1, 2024).

<sup>216</sup> *Id.* § 768.28(5) (West effective July 1, 2024) (“Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$300,000.”).

<sup>217</sup> *Id.* § 768.73(1)(a) (West 2024).

<sup>218</sup> *Id.* § 95.11(3)(e) (West effective July 1, 2024).

<sup>219</sup> *See Fla. High Sch. Athletic Ass’n v. Melbourne Cent. Cath. High Sch.*, 867 So. 2d 1281, 1288 (Fla. Dist. Ct. App. 2004) (“As a general rule, when a private organization has procedures for internal review of its decisions, those procedures must be exhausted before seeking redress from a court . . . only under exceptional circumstances will a court intervene without the aggrieved party having exhausted the organization’s remedies.”); *See also* FLA. STAT. ANN. § 768.28(6)(a) (West effective July 1, 2024) (“An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality, county or the Florida Space Authority, presents such claim in writing to the Department of Financial Services, within three years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing.”).

<sup>220</sup> FLA. STAT. ANN. § 768.28(8) (West effective July 1, 2024).

## Jurisdictional Issues

- Actions are to be brought in the Circuit Courts.<sup>221</sup>
- Actions brought against the state are subject to the notice provisions of FLA. STAT. ANN. § 768.28(6)(a).<sup>222</sup>

## Florida Civil Rights Act, Fla. Stat. Ann. §§ 760.01-760.11

Research has not revealed many cases where students have brought education discrimination claims under the Florida Civil Rights Act (the “FCRA”)<sup>223</sup>. Instead, the plaintiffs are usually teachers or employees of the education-related state entity suing for employment discrimination.<sup>224</sup>

### Potential Defendants

- The FCRA creates a cause of action for victims of unlawful discrimination “in the areas of education, employment or public accommodations.”<sup>225</sup>
  - “Public accommodations” does not extend to “lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically.”<sup>226</sup>
- The Florida Supreme Court has held that Florida essentially waived its sovereign immunity under the FCRA.
  - Florida’s statute governing sovereign immunity in tort actions<sup>227</sup> does not apply to actions brought under the FCRA, except in the express reference to the limitation on damages provision.<sup>228</sup>

### Bases of Discrimination

Race, color, gender, pregnancy, national origin or marital status.<sup>229</sup>

### Available Damages<sup>230</sup>

- *Compensatory damages (including emotional distress damages): available.*<sup>231</sup>

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<sup>221</sup> FLA. CONST. art. 5, § 5.

<sup>222</sup> See FLA. STAT. ANN. § 768.28(6)(a).

<sup>223</sup> However, there is at least one instance where the FCRA has been used in conjunction with the Florida Equal Protection Clause, Article IX, Section 1 of the Florida Constitution (The Public Education Provision), and the Florida Educational Equity Act (FEEA) to certify a class of “Students of Black descent, who . . . alleged claims of racial discrimination.” *Pinellas Cnty. Sch. Bd. v. Crowley*, 911 So. 2d 881, 882 (Fla. Dist. Ct. App. 2005).

<sup>224</sup> See *Univ. of Cent. Fla. Bd. of Trs. v. Turkiewicz*, 21 So. 3d 141 (Fla. Dist. Ct. App. 2009); *St. Louis v. Fla. Int’l Univ.*, 60 So. 3d 455 (Fla. Dist. Ct. App. 2011); *Marchetti v. Sch. Bd. of Broward Cnty.*, 117 So. 3d 811 (Fla. Dist. Ct. App. 2013); *Pickford v. Taylor Cnty. Sch. Dist.*, 298 So. 3d 707 (Fla. Dist. Ct. App. 2020).

<sup>225</sup> FLA. STAT. ANN. § 760.07 (West effective Sept. 4, 2020).

<sup>226</sup> *Id.*

<sup>227</sup> FLA. STAT. ANN. § 768.28 (West effective July 1, 2024).

<sup>228</sup> *Id.* § 768.28(5) (West effective July 1, 2024); See *Maggio v. Fla. Dep’t of Lab. & Emp. Sec.*, 899 So. 2d 1074, 1078 (Fla. 2005) (“The Florida Civil Rights Act compel(s) the conclusion that the Act is a stand-alone statutory scheme specifically designed to address civil rights violations regardless of whether the State is a named defendant.”).

<sup>229</sup> *Id.* § 760.07 (West effective Sept. 4, 2020).

<sup>230</sup> *Id.* (“Any violation of any Florida statute that makes unlawful discrimination because of race, color, . . . gender, pregnancy, national origin, . . . or marital status in the (area) of education . . . gives rise to a cause of action for all relief and damages described in § 760.11(5), unless greater damages are expressly provided for.”); see also FLA. STAT. ANN. § 760.11(5) (West effective July 1, 2020) (“The court may also award compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries, and punitive damages.”).

<sup>231</sup> *Id.* § 760.11(5) (West effective July 1, 2020).

- *Punitive Damages*: generally available, except that punitive damages cannot be rewarded in claims brought against the state.<sup>232</sup>

## Damages Cap(s)

- *Compensatory damages*: generally uncapped, except that claims brought against the “state and its agencies and subdivisions” cannot exceed \$200,000 per person or a total of \$300,000.<sup>233</sup>
- *Punitive damages*: where applicable, cannot exceed \$100,000.<sup>234</sup>

## Statute of Limitations

365 days from the time of the alleged violation.<sup>235</sup>

## Administrative Requirements

- Administrative exhaustion required.<sup>236</sup>
  - A complaint must be filed with the Florida Commission on Human Relations (the “commission”)<sup>237</sup> within 365 days of the alleged FCRA violation.<sup>238</sup>
  - Upon certification by the commission that there is reasonable cause to believe discriminatory practices have occurred, the aggrieved party may either bring a civil action or request an administrative hearing.<sup>239</sup>
  - After receipt of the certification by the commission, the aggrieved party has one year to bring the civil action.<sup>240</sup>

## Fee-Shifting

The prevailing party is, at the court’s discretion, “entitled to an award of reasonable attorney’s fees” as part of the costs.<sup>241</sup>

## Jurisdictional Issues

- The Commission:

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<sup>232</sup> *Id.* (“Notwithstanding the above, the state and its agencies and subdivisions shall not be liable for punitive damages.”).

<sup>233</sup> *Id.* (“The total amount of recovery against the state and its agencies and subdivisions shall not exceed the limitation as set forth in § 768.28(5).”); *see also id.* § 768.28(5)(a) (West effective July 1, 2024) (“Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$300,000.”).

<sup>234</sup> *Id.* § 760.11(5) (West effective July 1, 2020) (“The judgment for the total amount of punitive damages awarded under this section to an aggrieved person shall not exceed \$100,000.”).

<sup>235</sup> *Id.* § 760.11(1) (West effective July 1, 2020) (“Any person aggrieved by a violation of [the FCRA] may file a complaint with the commission within 365 days of the alleged violation . . . .”).

<sup>236</sup> *Id.* § 760.07 (West effective Sept. 4, 2020) (“If the statute prohibiting unlawful discrimination provides an administrative remedy, the action for equitable relief and damages provided for in this section may be initiated only after the plaintiff has exhausted his or her administrative remedy.”); *see Maggio*, 899 So. 2d at 1078.

<sup>237</sup> FLA. STAT. ANN. § 760.02(2) (West effective June 18, 2003).

<sup>238</sup> *Id.* § 760.11(1) (West effective July 1, 2020).

<sup>239</sup> *Id.* § 760.11(4) (West effective July 1, 2020).

<sup>240</sup> *Id.* § 760.11(5) (West effective July 1, 2020).

<sup>241</sup> *Id.* § 760.021(4) (West effective June 18, 2003); *see also id.* § 760.11(5) (West effective July 1, 2020) (specifically stating that “[i]t is the intent of the Legislature that this provision for attorney’s fees be interpreted in a manner consistent with federal case law involving a Title VII action”).

- The commission may refer complaints to another “agency of the state or of any other unit of government of the state (that) has jurisdiction (over) the subject matter of (the) complaint.” Such referral does not divest the commission of its jurisdiction.<sup>242</sup>
- Complaints Brought by the Attorney General:
  - Actions brought under Fla. Stat. Ann. § 760.021 may be filed in either “the circuit court of the county where the cause of action arises or in the circuit court of the Second Judicial Circuit, in and for Leon County.”<sup>243</sup>
- Generally:
  - Actions are to be brought in the Circuit Courts.<sup>244</sup>

## Florida Educational Equity Act (FEEA), Fla. Stat. Ann. § 1000.05

### Potential Defendants

Public educational institutions “that (receive) or (benefit) from federal or state financial assistance.”<sup>245</sup>

- Courts have interpreted the FEEA to authorize suits against “K-20 Educational Institutions—but not individual teachers.”<sup>246</sup>

### Bases of Discrimination

Race, color, national origin, sex and marital status.<sup>247</sup>

### Available Damages<sup>248</sup>

- *Compensatory damages (including emotional distress damages)*: available.<sup>249</sup>
- *Punitive damages*: generally available, except that punitive damages cannot be rewarded in claims brought against the state.<sup>250</sup>

### Damages Cap(s)

- *Compensatory damages*: generally uncapped, except that claims brought against the “state and its agencies and subdivisions” cannot exceed \$200,000 per person or a total of \$300,000.<sup>251</sup>

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<sup>242</sup> *Id.* § 760.11(2) (West effective July 1, 2020).

<sup>243</sup> *Id.* § 760.021(2) (West effective June 18, 2003).

<sup>244</sup> FLA. CONST. art. 5, § 5.

<sup>245</sup> FLA. STAT. ANN. § 1000.05(2)(a) (West 2024) (“Discrimination on the basis of race, color, national origin, sex, . . . or marital status against a student or an employee in the state system of public K-20 education is prohibited. No person in this state shall, on the basis of race, color, national origin, sex, . . . or marital status, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any public K-20 education program or activity, or in any employment conditions or practices, conducted by a public educational institution that receives or benefits from federal or state financial assistance.”); *see also Methelus v. Sch. Bd. of Collier Cnty.*, 243 F. Supp. 3d 1266, 1281 (M.D. Fla. 2017) (“the FEEA authorizes discrimination suits against ‘public educational institution[s].’”).

<sup>246</sup> *Falls v. DeSantis*, 609 F. Supp. 3d 1273, 1279 (N.D. Fla. 2022) (“Though no Florida court has confronted the issue, the FEEA, together with the IFA’s amendment to the FEEA’s definition of ‘discrimination,’ appear to authorize suits against K-20 educational institutions—but not individual teachers—if institutions allow teachers to ‘espouse[ ], promote[ ], advance[ ], inculcate[ ], or compel[ ] . . . [a] student or employee to believe any of the [prohibited] concepts.’”); *see also id.* at 1279 n.4 (explaining that the FEEA is patterned after Title IX and Title IX only applies to institutions).

<sup>247</sup> *See supra* note 245.

<sup>248</sup> *See supra* note 230.

<sup>249</sup> FLA. STAT. ANN. § 760.11(5) (West effective July 1, 2020).

<sup>250</sup> *See supra* note 232.

<sup>251</sup> *See supra* note 233.

- *Punitive damages*: where applicable, cannot exceed \$100,000.<sup>252</sup>

## Statute of Limitations

Four years.<sup>253</sup>

## Administrative Requirements

Administrative exhaustion required.<sup>254</sup>

## Fee-Shifting

Permissible.<sup>255</sup>

## Jurisdictional Issues

Actions are to be brought in the Circuit Courts.<sup>256</sup>

## Notes

- Educational discrimination cases under the Florida Educational Equity Act (the “FEEA”) have been brought in the athletics context and have been analyzed like Title IX claims.<sup>257</sup>
- State Constitutional Public Education Provision, Fla. Const. art. 9, §1: The Florida Constitution provides that the state has “a paramount duty . . . to make adequate provision for the education of all children (which) . . . shall be made by law for a *uniform*, efficient, safe, secure and high quality system of free public schools.”<sup>258</sup>
  - Historically, discrimination claims brought under this provision have been brought in conjunction with the Equal Protection Clause by teachers and employees, often concerning teacher pay.<sup>259</sup>
  - Discrimination claims brought by students, or representatives thereof, have recently attempted to assert that the State is breaching its duty under art. IX, § 1(a) to provide “a uniform . . . system of free public schools” via state-funding programs and allocation of resources that have a discriminatory effect on “economically deprived students,” disabled students, and “students in property-poor counties.”<sup>260</sup>

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<sup>252</sup> *See supra* note 234.

<sup>253</sup> FLA. STAT. ANN. § 95.11(3)(e) (West effective July 1, 2024).

<sup>254</sup> *See supra* note 219.

<sup>255</sup> FLA. STAT. ANN. § 1000.05(9) (West 2024) (“A person aggrieved by a violation of this section or a violation of a rule adopted under this section has a right of action for such equitable relief as the court may determine. The court may also award reasonable attorney’s fees and court costs to a prevailing party.”).

<sup>256</sup> FLA. CONST. art. 5, § 5.

<sup>257</sup> *Landon v. Sch. Bd. of Brevard Cnty.*, 132 F. Supp. 2d 958 (M.D. Fla. 2000).

<sup>258</sup> FLA. CONST. art. 9, § 1.

<sup>259</sup> *Reynolds v. Bd. of Pub. Instruction for Dade Cnty., Fla.*, 148 F.2d 754 (Fla. 1945).

<sup>260</sup> *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 129 (Fla. 2019).

# Georgia

## Protection to Person and Property; Equal Protection, GA. CONST. art. I, § I, ¶ II

The Georgia Constitution provides: “No person shall be denied the equal protection of the laws.” GA. CONST. art. I, § 1, ¶ 2. Courts have held that there is not private cause of action allowing plaintiffs to affirmatively sue for damages for violations the Georgia Constitution.<sup>261</sup> But plaintiffs may sue state officials for injunctive and declaratory in their individual capacities when they attempt to enforce a state statute that violates the Georgia Constitution.<sup>262</sup>

### Potential Defendants

- State officials in their individual capacities.

### Bases of Discrimination

Similar to federal Equal Protection Clause, including heightened scrutiny for race and sex.<sup>263</sup>

### Available Damages

*None.* Injunctive or declaratory relief only.

### Statute of Limitations

In general, two years for personal injuries.<sup>264</sup>

### Administrative Requirements

N/A

### Fee-Shifting

N/A

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<sup>261</sup> *Collins v. Schantz*, 369 Ga. App. 282, 286 (2023)

<sup>262</sup> *Lathrop v. Deal*, 301 Ga. 408, 434–35, 801 S.E.2d 867, 886 (2017) (“[O]fficial immunity generally is no bar to claims against state officers in their individual capacities for injunctive and declaratory relief from the enforcement of laws that are alleged to be unconstitutional, so long as the injunctive and declaratory relief is only prospective in nature.”); *accord Bd. of Commissioners of Lowndes Cnty. v. Mayor & Council of City of Valdosta*, 309 Ga. 899 (2020).

<sup>263</sup> *Franklin v. Hill*, 264 Ga. 302, 303 (1994) (“The protection of the equal protection clause in the State Constitution is similar to the protection provided in the Federal Constitution.”); *see also Patterson v. Butler*, 200 Ga. App. 657, 660 (Ga. Ct. App. 1991) (“[A] successful equal protection claim requires a showing of purposeful discrimination.”).

<sup>264</sup> *Id.* § 9-3-33 (West effective July 1, 2015).

# Guam

## Sex Discrimination in Education, 17 GUAM CODE §§ 2101 - 2108

“No person shall be subjected to discrimination on the basis of sex in any program or activity of an educational institution receiving or benefiting from government of Guam funds.”<sup>265</sup>

### Potential Defendants

Any program or activity of an educational institution<sup>266</sup> receiving or benefiting from government of Guam funds.<sup>267</sup>

### Bases of Discrimination

Sex.

### Available Damages

- *Attorney's fees and costs*: available.<sup>268</sup>
- *Compensatory damages*: available.<sup>269</sup>
- Educational institutions may lose part or all of state financial assistance.<sup>270</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

N/A.

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<sup>265</sup> 17 GUAM CODE ANN. § 2102(a) (2023).

<sup>266</sup> *Id.* § 2103(a) (2023) (“*Educational institution* means any preschool, elementary or secondary school, any institution of vocational, professional or higher education, or a public board of education, or other public authority legally constituted for either administrative control or direction of, or to perform a service function for public elementary or secondary schools on Guam.”).

<sup>267</sup> *Id.* § 2103(b)(i) (2023) (“*Government of Guam Financial Assistance* means: (i) The provision of funds authorized or appropriated pursuant to law provided by loan, grant, contract, tax rebate, formula, allocation or any other means for: operation or maintenance; acquisition, construction, renovation, restoration or repair of a building or facility or any portion thereof; scholarships, loans, grants, wages or other funds extended to any educational institution for payment to or on behalf of students admitted to such institutions, or extended directly to such students for such institution.”).

<sup>268</sup> *Id.* § 2108(c) (2023) (“In the case of any successful action by a complainant to enforce the provisions of this Chapter, the court shall award the costs of the action, together with a reasonable attorney's fee, as determined by the court to the complainant.”).

<sup>269</sup> *Id.* (“If a complaint with the Department of Education is dismissed by the Civil Service Commission or if, 180 days from the filing of the complaint, the Department of Education has not terminated government financial assistance or taken other action to remedy discrimination, the Department of Education shall notify the complainant and the state the reasons therefor and, within 180 days after the giving of such notice, the complainant **may bring a civil action for damages and injunctive and affirmative relief, against the educational institution.**” (emphasis added)).

<sup>270</sup> *Id.* § 2108(b) (2023) (“If an educational institution receiving a Notice of Probable Violation does not agree to take the remedial actions prescribed therein, the Civil Service Commission may issue a Notice of Violation and may, acting thereupon, terminate any or all state financial assistance to the institution.”).

## Administrative Requirements

- Administrative exhaustion not required.<sup>271</sup>
- Notice of claim:<sup>272</sup>
  - A written complaint must be filed with the Civil Service Commission within 180 days from the date of the alleged discrimination;
  - Civil Service Commission will make a prompt investigation;
  - If an investigation indicates that a violation has occurred, the Civil Service Commission shall issue a Notice of Probable Violation;
  - Recipient of a Notice of Probable Violation has 30 days to respond;
  - Within 30 days after such response, the Civil Service Commission shall arrange for a conference with the educational institution.
- If a complaint with the Department of Education is dismissed by the Civil Service Commission or if, 180 days from the filing of the complaint, the Department of Education has not taken action to remedy the discrimination, the Department of Education shall notify the complainant and, within 180 days after such notice, the complainant may bring a civil action for damages and injunctive and affirmative relief, against the educational institution.<sup>273</sup>

## Fee-Shifting

N/A.

## Jurisdictional Issues

- The Organic Act of Guam functions as Guam's constitution, though it was passed by Congress rather than by the citizens of Guam.<sup>274</sup>
- 48 U.S.C. § 1421b(n) is applicable only on Guam, and concerns local policy and cannot form the basis for federal question jurisdiction.<sup>275</sup>

## Notes

- Organic Act of Guam Claims, 48 U.S.C. § 1421b(n) extends the equal protection clause of the 14th Amendment to Guam.<sup>276</sup>
- A review of the caselaw did not find relevant examples of cases brought under these statutes.

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<sup>271</sup> *Id.* § 2108(d) (2023) (“The remedies provided by this Section shall be in addition to any other rights of a complainant at law or in equity.”).

<sup>272</sup> *Id.* § 2108(a) (2023).

<sup>273</sup> *Id.* § 2108(c) (2023).

<sup>274</sup> *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1089 (9th Cir. 2002); *Haeuser v. Dep’t of L., Gov’t of Guam*, 97 F.3d 1152, 1156 (9th Cir. 1996) (“The Organic Act serves the function of a constitution for Guam.”); *L. Offs. of Phillips and Bordallo, P.C. v. Guerrero*, No. CV 22-00020, 2023 WL 5075374, at \*5 (D. Guam Aug. 9, 2023).

<sup>275</sup> *Guerrero*, 2023 WL 5075374, at \*13.

<sup>276</sup> See *Paesta v. Gov’t of Guam*, No. CV 11-00008, 2013 WL 11241271, at \*7 (D. Guam Jan. 30, 2013).

# Hawaii

## State Constitutional Equality of Rights Claims, HAW. CONST. art. I, § 3

### Potential Defendants

By the language of the provision, state action is required: “Equality of rights under the law shall not be denied or abridged by the State on account of sex.”<sup>277</sup>

### Basis of Discrimination

Sex.<sup>278</sup>

### Available Damages

N/A. There is no constitutional right of action for monetary damages in Hawaii.<sup>279</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

Two years.<sup>280</sup>

### Administrative Requirements

- Administrative exhaustion: N/A.
- Notice of claim: N/A.

### Fee-Shifting

Not available except in the case of sanctions.<sup>281</sup>

### Jurisdictional Issues

The circuit courts of Hawaii have original jurisdiction of all tort actions on claims against the State.<sup>282</sup>

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<sup>277</sup> HAW. CONST. art. 1, § 3.

<sup>278</sup> *Id.*

<sup>279</sup> *Figueroa v. State*, 604 P.2d 1198 (Haw. 1979).

<sup>280</sup> HAW. REV. STAT. § 662-4 (2024).

<sup>281</sup> *Id.* § 662-12 (2024) (“The court rendering a judgment for the plaintiff pursuant to this chapter . . . may, as a part of such judgment, award, or settlement, determine and allow reasonable attorney's fees which shall not, however, exceed twenty-five per cent of the amount recovered . . . provided that such limitation shall not include attorney's fees and costs that the court may award the plaintiff as a matter of its sanctions.”).

<sup>282</sup> *Id.* § 662-3 (2024).

## **State Constitutional Equal Protection Claims, HAW CONST. art. I, § 5**

### Potential Defendants

The equal protection clause of the Hawaii Constitution applies only to state action.<sup>283</sup>

### Basis of Discrimination

Race, sex, ancestry.<sup>284</sup>

### Available Damages

N/A. There is no constitutional right of action for monetary damages in Hawaii.<sup>285</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

Two years.<sup>286</sup>

### Administrative Requirements

- Administrative exhaustion: N/A.
- Notice of claim: N/A.

### Fee-Shifting

Not available except in the case of sanctions.<sup>287</sup>

### Jurisdictional Issues

The circuit courts of Hawaii have original jurisdiction of all tort actions on claims against the State.<sup>288</sup>

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<sup>283</sup> *Leong v. Hilton Hotels Corp.*, 698 F. Supp. 1496, 1503 (D. Haw. 1988).

<sup>284</sup> HAW. CONST. art. 1, § 5.

<sup>285</sup> *Figueroa v. State*, 604 P.2d 1198 (Haw. 1979).

<sup>286</sup> See *supra* note 297.

<sup>287</sup> See *supra* note 298.

<sup>288</sup> See *supra* note 299.

## **State Constitutional Education Claims, HAW. CONST. art. X, § 1**

### Potential Defendants

“Public educational institutions.”<sup>289</sup>

### Basis of Discrimination

Race, sex, ancestry.<sup>290</sup>

### Available Damages

N/A. There is no constitutional right of action for monetary damages in Hawaii.<sup>291</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

Two years.<sup>292</sup>

### Administrative Requirements

- Administrative exhaustion: N/A.
- Notice of claim: N/A.

### Fee-Shifting

Not available except in the case of sanctions.<sup>293</sup>

### Jurisdictional Issues

The circuit courts of Hawaii have original jurisdiction of all tort actions on claims against the State.<sup>294</sup>

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<sup>289</sup> HAW. CONST. art. 10, § 1. *See also Lindsey v. Matayoshi*, 950 F. Supp. 2d 1159 (D. Haw. 2013) (including charter schools).

<sup>290</sup> *Id.*

<sup>291</sup> *Figueredo v. State*, 604 P.2d 1198 (Haw. 1979).

<sup>292</sup> *See supra* note 297.

<sup>293</sup> *See supra* note 298.

<sup>294</sup> *See supra* note 299.

## State Civil Rights Claims, HAW. REV. STAT. § 368-1 et seq.

The statute bans discrimination “because of race, color, religion, age, sex, including gender identity or expression, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving state financial assistance.”<sup>295</sup>

### Potential Defendants

It is ambiguous as to whether publicly funded educational institutions are “place[s] of public accommodation” under Section 368, but they are captured as “state agencies” and/or “program[s] or activit[ies] receiving state financial assistance.”<sup>296</sup>

### Basis of Discrimination

Race, color, sex, including gender identity or expression, sexual orientation, national origin, ancestry.<sup>297</sup>

### Available Damages

- *Compensatory damages*: Available.<sup>298</sup>
- *Emotional distress damages*: Presumably available.<sup>299</sup>
- *Punitive damages*: Not available against state actors.<sup>300</sup>

### Damages Cap(s)

Hawaii does not cap civil economic damages. It is unclear whether there is a cap for emotional distress damages; damages recoverable for pain and suffering are capped at \$375,000.<sup>301</sup>

### Statute of Limitations

Complaint must be filed within 180 days of the alleged unlawful discriminatory practice or of the last occurrence in a pattern of ongoing discriminatory practice.<sup>302</sup>

### Administrative Requirements

- Administrative exhaustion: not required, though filing of an administrative complaint with the Hawaii Civil Rights Commission (HCRC) is required.<sup>303</sup> Upon filing a complaint with the HCRC, a complainant may request that the HCRC issue a right to sue letter, which the HCRC may grant. The complainant has 90 days after the receipt of the right to sue letter to file a civil action. The HCRC “may intervene” in a civil action brought under this chapter if the case is of “general importance.”<sup>304</sup>
- Notice of claim: N/A.

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<sup>295</sup> HAW. REV. STAT. § 368-1 (2024).

<sup>296</sup> *Haw. Tech. Acad. v. L.E.*, 141 Hawai‘i 147, 407 P.3d 103, 115 (2017).

<sup>297</sup> HAW. REV. STAT. § 368-1 (2024).

<sup>298</sup> *Id.* § 368-17(a) (2024).

<sup>299</sup> *Id.* § 663-8.5(a) (2024).

<sup>300</sup> *Id.* § 662-2 (2024).

<sup>301</sup> *Id.* § 663-8.7 (2024).

<sup>302</sup> *Id.* § 368-11(c) (2024).

<sup>303</sup> *Id.* § 368D-1(b) (2024) (“Nothing in this chapter shall preclude a person who is aggrieved by a violation of this chapter from filing a civil action in a court of competent jurisdiction.”).

<sup>304</sup> *Id.* § 368-12 (2024).

## Fee-Shifting

Available.<sup>305</sup>

## Jurisdictional Issues

The HCRC has jurisdiction over “the subject of discriminatory practices” (with the exception of claims within the scope of the IDEA), and as stated above, requires that complainants file an administrative complaint before requesting a right to sue letter.<sup>306</sup> After issuance of a final HCRC order, a respondent may appeal to have the action tried *de novo* in circuit court,<sup>307</sup> though the HCRC’s decision “carries a presumption of validity and [the party seeking to reverse the agency’s decision] has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences.”<sup>308</sup>

## Notes

- HAW. REV. STAT. § 302A-461 (“Gender equity in sports”) provides that “No person, on the basis of sex, shall be excluded from participating in, be denied the benefits of, or be subjected to discrimination in athletics offered by a public high school,”<sup>309</sup> but there is no private right of action under this section.<sup>310</sup>
- State actors enjoy qualified immunity for claims based on discretionary acts,<sup>311</sup> unless the plaintiff can show “clear and convincing proof that [the] defendant was motivated by malice and not by an otherwise proper purpose.”<sup>312</sup>

## Idaho

Our research has not identified any viable anti-discrimination causes of action under Idaho law.

Additionally, Idaho does not have a state statute explicitly allowing plaintiffs to seek money damages in suits alleging violation of the state constitution.<sup>313</sup> The U.S. District Court for the District of Idaho has decided, without certifying the question to the Idaho Supreme Court, that such actions are not available under the Idaho Constitution.<sup>314</sup> The District of Idaho has accordingly dismissed plaintiffs’ state constitutional claims in more than twenty cases between 2006 and 2019.<sup>315</sup> No Idaho appellate court has addressed the issue of whether such causes of action are implied under the state constitution.

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<sup>305</sup> *Id.* § 368-17(a)(8); (9) (2024).

<sup>306</sup> *Id.* § 368-11(a) (2024).

<sup>307</sup> *SCI Mgmt. Corp. v. Sims*, 101 Haw. 438, 71 P.3d 389, 403 (2003) (Acoba, J. dissenting).

<sup>308</sup> *Steinberg v. Hoshijo*, 88 Haw. 10, 960 P.2d 1218, 1223 (1998).

<sup>309</sup> HAW. REV. STAT. § 302A-461(a) (2024).

<sup>310</sup> *Id.* § 302A-461(c) (2024).

<sup>311</sup> *Id.* § 662-15 (2024).

<sup>312</sup> *Medeiros v. Kondo*, 522 P.2d 1269, 1272 (Haw. 1974).

<sup>313</sup> See generally Michael Bowers, *The Implied Cause of Action for Damages Under the Idaho Constitution*, 56 ID. L. REV. 339 (2021).

<sup>314</sup> See *Boren v. City of Nampa*, No. CIV 04-084-S-MHW, 2006 WL 2413840, at \*10 (D. Idaho Aug. 18, 2006) (acknowledging that the Idaho Supreme Court had been silent on the issue of whether a private cause of action arises under the Idaho Constitution, but held it was “confident” Idaho courts would not recognize such a cause of action).

<sup>315</sup> See, e.g., *Kangas v. Wright*, No. 1:15-cv-00577-CWD, 2016 WL 6573943, at \*6 (D. Idaho Nov. 4, 2016) (citing five previous cases to support a finding that the District of Idaho “has repeatedly refused to recognize a ‘direct cause of action for violations of -the Idaho Constitution[J]’” (quoting *Campbell v. City of Boise*, No. CV-07-532-S-BLW, 2008 WL 2745121, at

## General Information for state common law claims

While courts have found there is no cause of action under this provision, the below provides information that generally applies to state common law claims.

### Available Damages

- *Compensatory damages*: available (including for emotional distress).<sup>316</sup>
- *Punitive damages*: not available.<sup>317</sup>

### Damages Cap

*Compensatory damages*: \$500,000 for single occurrence, but does not apply if action is caused by willful or reckless conduct.<sup>318</sup>

### Statute of Limitations

Two years.<sup>319</sup>

- Note: No minor person shall be required to present and file a claim against a governmental entity or its employee until “180 days after said person reaches the age of majority” or “six years from the date the claim arose or should reasonably have been discovered,” whichever is earlier.<sup>320</sup>

### Administrative Requirements

Tort claims against the State shall be filed with the Secretary of State within 180 days from when the claim arose.<sup>321</sup>

### Fee-Shifting

Available only when the opposing party engaged in bad faith conduct in the litigation.<sup>322</sup>

### Jurisdictional Issues

N/A. The Idaho state district court shall have jurisdiction over any action brought under the Idaho Tort Claims Act and such actions shall be governed by the Idaho Rules of Civil Procedure insofar as they are consistent with the Act.<sup>323</sup>

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\*1 (D. Idaho July 11, 2008)). Though opinions frequently do not distinguish between claims for money damages and equitable relief, *see id.*, at least one case has allowed state constitutional claims to proceed where the plaintiff sought an equitable remedy. *Hancock v. Idaho Falls Sch. Dist. No. 91*, No. CV-04-537-E-BLW, 2006 WL 2095264, at \*1–2 (D. Idaho July 27, 2006) (reconsidering summary judgment on a claim under the Idaho Constitution’s free speech provision after plaintiff clarified he was seeking equitable relief).

<sup>316</sup> IDAHO CODE ANN. §§ 6-926, 6-1601(5) (West 2024).

<sup>317</sup> *Id.* § 6-918 (West 2024).

<sup>318</sup> *Id.* §§ 6-926, 6-904 (West 2024).

<sup>319</sup> *Id.* § 6-911 (West 2024).

<sup>320</sup> *Id.* § 6-906A (West effective July 1, 2023).

<sup>321</sup> *Id.* § 6-905 (West 2024).

<sup>322</sup> *Id.* § 6-918A (West 2024).

<sup>323</sup> *Id.* 6-914 (West 2024).

## Notes

- Idaho's state constitution *does* contain anti-discrimination language, but as mentioned above, there is no private right of action to enforce this provision.<sup>324</sup>
- Idaho does not have an Equal Rights Amendment.<sup>325</sup>
- While the Idaho Constitution commands that "it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools," the Constitution does not guarantee students a "free and safe education" or an equivalent promise.<sup>326</sup>

## Illinois

### State Constitutional Equal Protection Claims, ILL. CONST. art. I, § 2

#### Potential Defendants

- The provision applies "only to governments and not to individuals," though it can apply to individuals exercising governmental authority.<sup>327</sup>
- The Illinois Tort Claims Act gives state government entities sovereign immunity to tort claims subject to limited exceptions.<sup>328</sup> Similarly, local government entities are subject to the Illinois Local Governmental Tort Immunity Act.<sup>329</sup>

#### Bases of Discrimination

Race, national origin, sex, and illegitimacy.<sup>330</sup>

#### Available Damages

- **Unclear.** Authority is divided over whether a private right of action exists under Article I, Section 2 of the Illinois constitution, and the Illinois Supreme Court not reached the question.<sup>331</sup> Additionally, it's unclear whether the Tort Immunity Act<sup>332</sup> limits such immunity only to tort claims or extends such immunity to non-tort claims (including constitutional

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<sup>324</sup> *Id.* § 67-5909 (2024) ("It shall be a prohibited act to discriminate against a person because of, or on a basis of, race, color, religion, sex or national origin, in any of the following subsections . . . for an education institution . . . to exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student . . .").

<sup>325</sup> See *State-Level Equal Rights Amendments*, BRENNAN CTR. FOR JUST. (Dec. 6, 2022), <https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments>.

<sup>326</sup> IDAHO CONST. art IX, § 1.

<sup>327</sup> *Aldridge v. Boys*, 424 N.E.2d 886, 889 (Ill. App. Ct. 1981); *Janes v. Albergo*, 626 N.E.2d 1127, 1131 (Ill. App. Ct. 1993).

<sup>328</sup> 705 ILL. COMP. STAT. 505 / 8 (West effective Nov. 27, 2018); *Janes*, 626 N.E.2d at 1131.

<sup>329</sup> 745 ILL. COMP. STAT. 10 / 1-206 (West effective Aug. 2, 2005) (Local public entities that can be defendants under this provision include school districts, school boards, educational service regions, regional boards of school trustees, trustees of schools of townships, community college districts, community college boards, and libraries, among other entities).

<sup>330</sup> *Comm. for Educ. Rts. v. Edgar*, 672 N.E.2d 1178, 1193 (Ill. 1996).

<sup>331</sup> See *Carter v. Bd. of Educ. Champaign Cnty. United Sch. Dist. #4*, No. 05-2162, 2005 WL 8164766, at \*5 (C.D. Ill. Dec. 6, 2005) (holding that a private right of action exists); *Teverbaugh ex rel. Duncan v. Moore*, 724 N.E.2d 225, 229 (Ill. App. Ct. 2000) (holding that no private right of action exists where the Illinois Human Rights Act provides a remedy for the complained of discrimination); *Towns v. Dethrow*, No. 13-cv-1269-MJR-SCW, 2016 WL 1639570, at \*10 (S.D. Ill. Apr. 26, 2016) (same).

<sup>332</sup> 745 ILL. COMP. STAT. 10 (West 2024).

claims).<sup>333</sup> The analysis in this section assumes that more recent authority (which holds that immunity under the Tort Immunity Act does extend to non-tort claims, including constitutional claims) represents the current state of the law. This more conservative assumption is relevant particularly because it impacts certain procedural requirements (including statutes of limitations) that would apply if the Tort Immunity Act encompassed constitutional claims against local public entities. Note: Even if a private right of action does exist and compensatory damages are available, punitive damages are not available in suits against a “local public entity” (including a school district).<sup>334</sup> This limitation does not apply to public employees who are sued for punitive damages in their individual capacity.<sup>335</sup>

## Damages Cap(s)

Damages against state defendants “in cases sounding in tort” are generally limited to \$2,000,000.<sup>336</sup>

## Statute of Limitations

- Claims against the State of Illinois (including public universities): Two years from the date the claim first accrues.<sup>337</sup>
- Claims against local public entities (which includes school districts): One year from the date of the act or omission forming the basis of the claim.<sup>338</sup>
- Note:
  - Two years from the age of majority or the date the disability ceases, for minors and people under legal disability at the time the claim accrues.<sup>339</sup>
  - Claims for personal injury must be brought within one year of the date of the injury.<sup>340</sup>

## Administrative Requirements

- Administrative exhaustion: N/A.
- Notice of claim: Plaintiffs making claims against the State of Illinois (including public universities) alleging any personal injury must first file, with the Attorney General of Illinois and the clerk of the Illinois Court of Claims, “the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, a brief description of how the accident occurred, and the name and address of the attending physician, if any.”<sup>341</sup>

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<sup>333</sup> *Compare Soc'y of Am. Bosnians and Herzegovinians v. City of Des Plaines*, No. 13 C 6594, 2017 WL 748528, at \*14 (N.D. Ill. Feb. 26, 2017) (“At least one appellate court has interpreted this to mean that constitutional claims and civil rights actions are also subject to the Act and thus that a plaintiff cannot pursue damages for such claims.”) and *Rozsavolgyi v. City of Aurora*, ¶ 115, 58 N.E.3d 65, 99 (Ill. App. Ct. 2016) (holding the Tort Immunity Act does not apply “only to tort actions” and rejecting the proposition that the Act does not apply “to constitutional claims”) *with Rozsavolgyi v. City of Aurora*, ¶ 34, 102 N.E.3d 162, 172 (Ill. 2017) (vacating the Illinois Appellate Court’s decision in *Rozsavolgyi*, 58 N.E.3d at 99, and declining to address the issue) and *People ex rel. Birkett v. City of Chicago*, 758 N.E.2d 25, 30 (Ill. App. Ct. 2001) (“[T]he Tort Immunity Act does not bar claims for constitutional violations . . . .”).

<sup>334</sup> 745 ILL. COMP. STAT. 10 / 2-102 (West 2024); *Doe 20 v. Bd. of Educ. of Cmty. Unit Sch. Dist. No. 5*, 680 F. Supp. 2d 957, 994 (C.D. Ill. 2010).

<sup>335</sup> *Bedenfield v. Shultz*, No. 01 C 7013, 2002 WL 1827631, at \*10 (N.D. Ill. Aug. 7, 2002).

<sup>336</sup> 705 ILL. COMP. STAT. 505 / 8(d) (West effective Nov. 27, 2018).

<sup>337</sup> *Id.* 505 / 22(h) (West effective May 13, 2022).

<sup>338</sup> 745 ILL. COMP. STAT. 10 / 8-101 (West effective June 4, 2003).

<sup>339</sup> 705 ILL. COMP. STAT. 505 / 22(h) (West effective May 13, 2022).

<sup>340</sup> *Id.* 505 / 22-1 (West 2024).

<sup>341</sup> *Id.*

## Fee-Shifting

Attorneys' fees unavailable for constitutional claims.<sup>342</sup>

## Jurisdictional Issues

Claims against the State of Illinois (including public universities) must be brought exclusively in the Illinois Court of Claims.<sup>343</sup>

## **State Constitutional Sex Discrimination Claims, ILL. CONST. art. I, § 18**

### Potential Defendants

The provision applies only to state action, not discrimination by private persons, though discrimination by private individuals exercising governmental authority may constitute state action.<sup>344</sup>

### Bases of Discrimination

Sex.<sup>345</sup>

### Available Damages

- **None.** No private right of action for damages exists under article I, section 18.<sup>346</sup>
- Note: Even if a private right of action did exist and compensatory damages were available, punitive damages are not available in suits against "local public entit[ies]" (including a school district).<sup>347</sup> This limitation does not apply to public employees who are sued for punitive damages in their individual capacity.<sup>348</sup>

### Damages Cap(s)

N/A

### Statute of Limitations

N/A

### Administrative Requirements

N/A.

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<sup>342</sup> See *Glenstone Homeowners Ass'n v. State Dep't of Transp.*, 48 Ill. Ct. Cl. 388, 401 (1996); *Douglas v. Dep't of Conservation* of the State of Ill., 32 Ill. Ct. Cl. 113, 114 (1977).

<sup>343</sup> 705 ILL. COMP. STAT. 505 / 8 (2024).

<sup>344</sup> *Aldridge v. Boys*, 424 N.E.2d 886, 889 (Ill. App. Ct. 1981); *Janes v. Albergo*, 626 N.E.2d 1127, 1131 (Ill. App. Ct. 1993); *Sanders v. A.J. Canfield Co.*, 635 F. Supp. 85, 87–88 (N.D. Ill. 1986).

<sup>345</sup> ILL. CONST. art. I, § 18.

<sup>346</sup> *Teverbaugh ex rel. Duncan v. Moore*, 724 N.E.2d 225, 230 (Ill. Ct. App. 2000).

<sup>347</sup> 745 ILL. COMP. STAT. 10 / 2-102 (West 2024); *Doe 20 v. Bd. of Educ. of Cnty. Unit Sch. Dist. No. 5*, 680 F. Supp. 2d 957, 994 (C.D. Ill. 2010).

<sup>348</sup> *Bedenfield v. Shultz*, No. 01 C 7013, 2002 WL 1827631, at \*10 (N.D. Ill. Aug. 7, 2002).

# Illinois Human Rights Act, 775 ILL. COMP. STAT. 5 / 1-101 to 5 / 10-105

## Potential Defendants

- Places of Public Accommodation, including “a non-sectarian nursery, day care center, elementary, secondary, undergraduate, or postgraduate school, or other place of education.”<sup>349</sup>
- “Institution[s] of Elementary, Secondary or Higher Education,” meaning “(1) a publicly or privately operated university, college, community college, junior college, business or vocational school, or other educational institution offering degrees and instruction beyond the secondary school level; or (2) a publicly or privately operated elementary school or secondary school.”<sup>350</sup>

## Bases of Discrimination

Race, color, religion, sex (including sexual harassment<sup>351</sup>), national origin, ancestry, age, order of protection status, marital status, sexual orientation, and pregnancy.<sup>352</sup>

## Available Damages

- Compensatory damages (including emotional distress damages):* available.<sup>353</sup>
- Punitive damages:* not available.<sup>354</sup>
- Note: Illinois has enacted the “Civil Rights Remedies Restoration Act,” effective January 1, 2024, in order to restore the availability of emotional distress damages for violations of federal antidiscrimination statutes in the wake of *Cummings v. Premier Rehab Keller, P.L.L.C.*<sup>355</sup> The Civil Rights Remedies Restoration Act occurs when a defendant violates:

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), Section 1557 of the Patient Protection and Affordable Care Act (42 U.S.C. 18116), Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12132 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or the provisions of any other federal statute prohibiting discrimination under a program or activity receiving federal financial assistance . . .<sup>356</sup>

For any violation of the Civil Rights Remedies Restoration Act, a defendant:

[I]s liable for each and every offense for all remedies available at law, including, but not limited to, damages for past, current, and future monetary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonmonetary losses, and any amount that may be determined by a jury, or a court sitting without a jury, but in no case less than \$4,000, and any attorney's fees, costs,

<sup>349</sup> 775 ILL. COMP. STAT. 5 / 5-101(A)(11) (West effective Aug. 14, 2018).

<sup>350</sup> *Id.* 5 / 5A-101(A) (West effective Aug. 1, 2024).

<sup>351</sup> *Frey v. Hotel Coleman*, 141 F. Supp. 3d 873, 879 (N.D. Ill. 2015).

<sup>352</sup> 775 ILL. COMP. STAT. 5 / 1-102(A) (West effective Aug. 1, 2024 to Dec. 1, 2024).

<sup>353</sup> *Id.* 5 / 8A-104(B) (West 2024) (stating “actual damages” are available for violations of the Illinois Human Rights Act); *Windsor Clothing Store v. Castro*, ¶ 47–48, 41 N.E.3d 983, 992 (Ill. Ct. App. 2015) (stating that emotional distress damages were appropriately awarded in a case where a place of public accommodation was found liable for unlawful discrimination).

<sup>354</sup> *Crittenden v. Cook Cnty. Comm'n of Hum. Rts.*, ¶ 32, 990 N.E.2d 1161, 1170 (Ill. 2013).

<sup>355</sup> 775 ILL. COMP. STAT. 60 / 5 (West effective Jan. 1, 2024).

<sup>356</sup> *Id.* 60 / 15 (West effective Jan. 1, 2024).

and expenses, including, but not limited to, expert witness fees, that may be determined by the court in addition thereto.<sup>357</sup>

The state of Illinois has waived sovereign immunity under the Civil Rights Remedies Restoration Act and claims for violations of the law may be brought in “any court of competent jurisdiction.”<sup>358</sup>

## Damages Cap(s)

Damages against state defendants “in cases sounding in tort” are generally limited to \$2,000,000.<sup>359</sup>

- Note:

- There is no case law demonstrating whether cases brought under the Illinois Human Rights Act are subject to this cap. However, the Illinois Appellate Court has upheld emotional distress damages of up to \$220,000 under the Act.<sup>360</sup> The Court has held that the state of Illinois has not waived sovereign immunity under the Illinois Human Rights Act, meaning that money damages are presumably not available under the Act for violations by the state.<sup>361</sup> However, the Civil Rights Remedies Restoration Act abrogates this decision, waiving sovereign immunity for violations of the Act and providing for monetary damages of at least \$4,000 and any attorneys’ fees.<sup>362</sup>
- With respect to local public entities (which includes school districts),<sup>363</sup> the Civil Rights Remedies Restoration Act waives immunity from suit under the Illinois Human Rights Act.<sup>364</sup> Thus, money damages may also be available for violations of the Act by local public entities.

There are otherwise no damage caps in the Act itself.<sup>365</sup>

## Statute of Limitations

Plaintiffs must file an administrative complaint within 300 days.<sup>366</sup>

## Administrative Requirements

- Administrative exhaustion is required.<sup>367</sup>

- Plaintiffs must file a complaint with the Illinois Department of Human Rights within 300 days after the alleged civil rights violation occurred and follow the procedures in Articles 7 and 8 of chapter 775 of the Illinois Statutes, prior to filing suit.<sup>368</sup>
- Within ten days of the date a complainant files a complaint with the Illinois Department of Human Rights, the Department must issue a notice of a complainant’s

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<sup>357</sup> *Id.* 60 / 20 (West effective Jan. 1, 2024).

<sup>358</sup> *Id.* 60 / 30 (West effective Jan. 1, 2024).

<sup>359</sup> 705 ILL. COMP. STAT. 505 / 8(d) (West effective Nov. 27, 2018).

<sup>360</sup> *Hobby Lobby Stores, Inc. v. Sommerville*, ¶ 57, 186 N.E.3d 67, 88 (Ill. Ct. App. 2021).

<sup>361</sup> *Lynch v. Dep’t of Transp.*, ¶ 30, 979 N.E.2d 113, 119 (Ill. Ct. App. 2012).

<sup>362</sup> 775 ILL. COMP. STAT. 60 / 30, 60 / 20 (West effective Jan. 1, 2024).

<sup>363</sup> 745 ILL. COMP. STAT. 10 / 1-206 (West effective Aug. 2, 2005).

<sup>364</sup> 775 ILL. COMP. STAT. 60 / 20 (West effective Jan. 1, 2024).

<sup>365</sup> See *Windsor Clothing Store v. Castro*, ¶ 48, 41 N.E.3d 983, 992 (Ill. Ct. App. 2015).

<sup>366</sup> 775 ILL. COMP. STAT. 5 / 7A-102(A)(1) (West effective Jan. 1, 2024).

<sup>367</sup> *Beaulieu v. Ashford Univ.*, 529 F. Supp. 3d 834, 851 (N.D. Ill. 2021).

<sup>368</sup> 775 ILL. COMP. STAT. 5 / 7A-102 (West effective Jan. 1, 2024).

right to opt out of the administrative procedure before the Department.<sup>369</sup> Within 60 days of this notice, a complainant may exercise this right to opt out of the administrative procedure before the department, at which time the complainant will have 90 days to commence an action with the appropriate circuit court or other court having jurisdiction over the complaint.<sup>370</sup>

- Notice of claim: Plaintiffs making claims against the State of Illinois (including public universities) alleging any personal injury must first file, with the Attorney General of Illinois and the clerk of the Illinois Court of Claims, “the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, a brief description of how the accident occurred, and the name and address of the attending physician, if any.”<sup>371</sup>

## Fee-Shifting

Available.<sup>372</sup>

## Jurisdictional Issues

Timely filing a complaint with the Illinois Human Rights Commission is jurisdictional.<sup>373</sup> For claims against state defendants, any judicial actions (including complaints following opt-out of Department of Human Rights procedures pursuant to 775 ILL. COMP. STAT. 5 / 7A-102(C-1) (2024)) must be brought in the Illinois Court of Claims.<sup>374</sup>

## Notes

**The Illinois Civil Rights Act of 2003:** Although it only applies to governmental units,<sup>375</sup> it permits disparate impact claims. For instance, in *Watkins v. Steiner*,<sup>376</sup> the Illinois Appellate Court has held that it should otherwise “be construed in the same manner as Title IX.”<sup>377</sup> *Id.* at \*5. Still, there is likely an argument that it allows emotional distress damages because the court also stated that “the proper way to interpret the law is in the light of the decisions involving the borrowed federal law *prior* to [the Act’s] adoption by the Illinois legislature” (2003), which was before *Cummings*, and the Act doesn’t pose the same Spending Clause issues.<sup>378</sup>

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<sup>369</sup> *Id.* 5 / 7A-102(B) (West effective Jan. 1, 2024).

<sup>370</sup> *Id.* 5 / 7A-102(C-1) (West effective Jan. 1, 2024).

<sup>371</sup> 705 ILL. COMP. STAT. 505 / 22-1 (West 2024).

<sup>372</sup> 775 ILL. COMP. STAT. 5 / 8A-104(G) (West 2024).

<sup>373</sup> *Allen v. Lieberman*, 836 N.E.2d 64, 69 (Ill. Ct. App. 2005).

<sup>374</sup> *Watkins v. Off. of State App. Def.*, ¶ 2, 976 N.E.2d 387, 390 (Ill. Ct. App. 2012).

<sup>375</sup> 740 ILL. COMP. STAT. 23 / 5 (West effective Jan. 1, 2008).

<sup>376</sup> 2013 IL App (5th) 110421-U, 2013 WL 166737, at \*4 (Ill. App. Jan. 14, 2013).

<sup>377</sup> *Id.* at \*5.

<sup>378</sup> *Id.* at \*4 (emphasis added).

# Indiana

## State Constitutional Education Claims, IND. CONST. art. 8, § 1

### Potential Defendants

It is unclear whether a student could successfully sue for injunctive relief under Article 8. In *Bonner ex Rel. Bonner v. Daniels*, the court said “[t]o the extent that an individual student may have a right, entitlement, or privilege to pursue public education, any such right derives from the enactments of the General Assembly, not from the Indiana Constitution.”<sup>379</sup> However, *Hoagland v. Franklin Twp.* implies that “when an action clearly violates a constitutional mandate,” the Supreme Court of Indiana may have the ability and/or duty to “establish requirements for this system of common schools.”<sup>380</sup>

### Basis of Discrimination

Without reference to protected classes, Art. 8, § 1 states “[I]t shall be the duty of the General Assembly . . . to provide, by law, for a general and uniform system of Common Schools . . . **equally open to all.**”<sup>381</sup>

### Available Damages

N/A. There is no private right of action for monetary damages.<sup>382</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

Two years after the cause of action accrues.<sup>383</sup>

### Administrative Requirements

N/A

### Fee-Shifting

Fee-shifting is available, at the court’s discretion, in cases where the non-prevailing party brought the action or defense on a frivolous claim or litigated in bad faith.<sup>384</sup> Additionally, if a plaintiff does not accept a settlement offer and the final judgment is less favorable than the offer, the court shall award attorney’s fees to the defendant.<sup>385</sup>

### Jurisdictional Issues

N/A.

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<sup>379</sup> *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009).

<sup>380</sup> *Hoagland v. Franklin Twp. Cnty. Sch. Corp.*, 27 N.E.3d 737, 738 (Ind. 2015).

<sup>381</sup> IND. CONST. art. 8, § 1.

<sup>382</sup> *Hoagland*, 27 N.E.3d at 749.

<sup>383</sup> IND. CODE ANN. § 34-11-2-4(a) (West 2024).

<sup>384</sup> *Id.* § 34-52-1-1 (West 2024).

<sup>385</sup> *Id.* § 34-50-1-6 (West effective July 1, 2024).

## Indiana Civil Rights Law Claims, IND. CODE § 22-9

### Potential Defendants

- “[I]ndividuals, partnerships, associations, organizations, limited liability companies, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons.”<sup>386</sup>
- Private, religiously affiliated schools.<sup>387</sup>

### Basis of Discrimination

Race, national origin, color, and sex.<sup>388</sup>

### Available Damages

- *Compensatory damages*: available.<sup>389</sup>
- *Emotional distress damages*: available.<sup>390</sup>
- *Punitive damages*: not available.<sup>391</sup>

### Damages Cap(s)

\$700,000 for injury to one plaintiff;<sup>392</sup> \$5,000,000 for injury to all persons in the occurrence.<sup>393</sup>

### Statute of Limitations

180 days (complaint must be filed to the Indiana Civil Rights Commission (ICRC)).<sup>394</sup>

### Administrative Requirements

- Exhaustion of administrative remedies is required.<sup>395</sup>
- Plaintiff must submit a written notice to a public school defendant and indicate a proposed remedy.<sup>396</sup>

### Fee-Shifting

Fee-shifting is available, at the court’s discretion, in cases where the non-prevailing party brought the action or defense on a frivolous claim or litigated in bad faith.<sup>397</sup> Additionally, if a plaintiff does not

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<sup>386</sup> *Id.* § 22-9-1-3(a) (West effective July 1, 2016).

<sup>387</sup> *Cardinal Ritter High Sch., Inc. v. Bullock*, 17 N.E.3d 281, 282 (Ind. App. 2014) (finding that the permitted a student to sue a private, religious high school in a student’s lawsuit alleging racial discrimination, as the legislature did not specifically exempt religious institutions from discrimination claims relating to education).

<sup>388</sup> IND. CODE ANN § 22-9-1-2(a); (b) (West effective July 1, 2014).

<sup>389</sup> *Id.* § 22-9-1-6(j)(1) (West effective July 1, 2019) (“losses incurred as a result of discriminatory treatment”).

<sup>390</sup> *Ind. C.R. Comm’n v. Alder*, 714 N.E.2d 632, 638 (Ind. 1999).

<sup>391</sup> *Id.*

<sup>392</sup> IND. CODE ANN. § 34-13-3-4(a)(1)(C) (West 2024).

<sup>393</sup> *Id.*

<sup>394</sup> IND. CODE ANN. § 22-9-1-3(p) (West effective July 1, 2016).

<sup>395</sup> *Id.* § 22-9-8-3 (West 2024).

<sup>396</sup> *Id.* § 34-13-3.5-4 (West effective July 1, 2018).

<sup>397</sup> *Id.* § 34-52-1-1 (West 2024).

accept a settlement offer and the final judgment is less favorable than the offer, the court shall award attorney's fees to the defendant.<sup>398399</sup>

## Jurisdictional Issues

This statute authorizes jurisdiction in “a circuit or superior court having jurisdiction in the county in which a discriminatory practice allegedly occurred,”<sup>400</sup> provided that both the complainant and the respondent “agree in writing to have the claims decided in a court of law.”<sup>401</sup> However, such an election may not be made if the ICRC “has begun a hearing on the record under this chapter with regard to a finding of probable cause.”<sup>402</sup>

## Notes

- The privileges and immunities provision of the IND. CONST. art. 1, § 23 is analogous to the equal protection provision of the Fourteenth Amendment, both being “designed to prevent the distribution of extraordinary benefits or burdens to any group.”<sup>403</sup> However, there is no private right of action for purported violations of the Indiana Constitution’s privileges and immunities provision.<sup>404</sup>
- State actors enjoy qualified immunity for claims based on discretionary acts within the scope of their public employment.<sup>405</sup>

## Iowa

### State Constitutional Equal Protection Claims, IOWA. CONST. art. I, § 6

#### Potential Defendants

- This provisions applies to “action[s] of the state.”<sup>406</sup>
- A private person can only commit a constitutional violation if they are “acting under color of state law[].”<sup>407</sup>

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<sup>398</sup> *Id.* § 34-50-1-6 (West effective July 1, 2024).

<sup>399</sup> *Id.* § 34-52-1-1 (West 2024).

<sup>400</sup> *Id.* § 22-9-1-17(a) (West effective July 1, 2012).

<sup>401</sup> *Id.* § 22-9-1-16(a) (West 2024).

<sup>402</sup> *Id.* § 22-9-1-16(b) (West 2024).

<sup>403</sup> *O'Brien v. State*, 422 N.E.2d 1266, 1270 (Ind. Ct. App. 1981).

<sup>404</sup> *Greater Indianapolis Chapter of N.A.A.C.P. v. Ballard*, 741 F. Supp. 2d 925, 934 (S.D. Ind. 2010).

<sup>405</sup> IND. CODE ANN. § 34-13-3-3(7) (West effective July 1, 2023).

<sup>406</sup> *Principal Cas. Ins. Co. v. Blair*, 500 N.W.2d 67, 70 (Iowa 1993).

<sup>407</sup> *Wagner v. State*, 952 N.W.2d 843, 853–54 (Iowa 2020).

## Bases of Discrimination

Race, national origin, sex,<sup>408</sup> and sexual orientation<sup>409</sup>.

## Available Damages

N/A. The Iowa Supreme Court has held that it does not “recognize a standalone cause of action for money damages under the Iowa Constitution unless authorized by the common law, an Iowa statute, or the express terms of a provision of the Iowa Constitution.”<sup>410</sup>

## Damages Cap(s)

N/A.

## Statute of Limitations

Two years.<sup>411</sup>

## Administrative Requirements

- Administrative exhaustion: not required.
- Notice of claim:
  - Claims must be filed within two years after the claim accrues.<sup>412</sup> As noted, a claim against the state of Iowa or an employee of the state must first be filed with the director of the state Department of Management, who will acknowledge receipt on behalf of the state.<sup>413</sup> The attorney general must then make a final disposition of the claim; if the attorney general fails to make a final disposition of the claim within six months, the claimant may withdraw the claim and commence suit in district court.<sup>414</sup>

## Fee-Shifting

Generally, attorneys’ fees are not recoverable unless the case is the “rare exception” in which “the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”<sup>415</sup>

## Jurisdictional Issues

Any suit must be brought in the district court for the district in which the plaintiff resides or in which the alleged act or omission occurred, or if the act occurred outside of Iowa and the plaintiff is a non-resident, then in the district court for Polk County.<sup>416</sup>

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<sup>408</sup> *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998) (“[A]rticle I, section 6 of the Iowa Constitution ‘puts substantially the same limitations on state legislation as does the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution.’” (quoting *Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776, 777 (Iowa 1989))); *id.* (“A party seeking to uphold a state statute based on gender must establish an ‘exceedingly persuasive justification’ for the classification.” (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

<sup>409</sup> *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (“[L]egislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution.”).

<sup>410</sup> *Burnett v. Smith*, 990 N.W.2d 289, 307 (Iowa 2023).

<sup>411</sup> IOWA CODE ANN. §§ 669.13(1), 670.5 (West effective July 1, 2007).

<sup>412</sup> *Id.* § 669.13 (West effective July 1, 2007).

<sup>413</sup> *Id.* § 669.3 (West effective July 1, 2006).

<sup>414</sup> *Id.* §§ 669.5 (West effective July 1, 2006), 669.13 (West effective July 1, 2007).

<sup>415</sup> *Baldwin v. City of Estherville*, 929 N.W.2d 691, 700 (Iowa 2019) (second quoting *Remer v. Bd. of Med. Exam’ns*, 576 N.W.2d 598, 603 (Iowa 1998)).

<sup>416</sup> IOWA CODE ANN. § 669.4(1) (West effective July 1, 2015).

# Iowa Civil Rights Act of 1965, IOWA CODE § 216

## Potential Defendants

- Educational institutions, which “includes any preschool, elementary or secondary school, community college, area education agency, or postsecondary college or university and their governing boards.”<sup>417</sup>
- The Act does not prohibit any “any bona fide religious institution from imposing qualifications based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose,” nor does it prohibit “any institution from admitting students of only one sex.”<sup>418</sup>

## Bases of Discrimination

Race, color, sex (including sexual harassment<sup>419</sup>), sexual orientation, gender identity, national origin, religion and disability.<sup>420</sup>

## Available Damages

- *Compensatory damages (including emotional distress damages)*: available.<sup>421</sup>
- *Punitive damages*: not available.<sup>422</sup>

## Damages Cap(s)

No cap for *compensatory damages*, likely including emotional distress damages.<sup>423</sup>

## Statute of Limitations

300 days.<sup>424</sup>

## Administrative Requirements

- Administrative exhaustion is required.
  - Plaintiffs must file a complaint with the Iowa Civil Rights Commission within 300 days after the alleged discriminatory or unfair practice occurred<sup>425</sup> and follow the

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<sup>417</sup> *Id.* § 216.9(2) (West effective July 1, 2008).

<sup>418</sup> *Id.*

<sup>419</sup> *Bruning ex rel. Bruning v. Carroll Cnty. Sch. Dist.*, 486 F. Supp. 2d 892, 919 (N.D. Iowa 2007).

<sup>420</sup> IOWA CODE ANN. § 216.9(1) (West effective July 1, 2008).

<sup>421</sup> *Id.* § 216.15(a)(8) (West effective July 1, 2024); *Simon Seeding & Sod, Inc. v. Dubuque Hum. Rts. Comm'n*, 895 N.W.2d 446, 471-72 (Iowa 2017) (“A plaintiff need not show physical injury, outrageous conduct or severe distress to obtain an award for emotional distress’ under the ICRA.” (quoting *Dutcher v. Randall Foods*, 546 N.W.2d 889, 894 (Iowa 1996))).

<sup>422</sup> *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013).

<sup>423</sup> *Van Horn v. Specialized Support Servs., Inc.*, 241 F. Supp. 2d 994, 1014 (S.D. Iowa 2003); *see* IOWA CODE ANN. § 147.136A(2) (West effective July 1, 2023) (implementing statutory cap on non-economic damages (including for emotional distress) but limiting the applicability of the cap to suits against a health care provider); McDonald Plosser, *Sky's the Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule> (“Iowa has no cap on either compensatory or punitive damages.”).

<sup>424</sup> IOWA CODE ANN. § 216.15(13) (West effective July 1, 2024); *Brandt v. City of Cedar Falls*, 37 F.4th 470, 482 (8th Cir. 2022) (“[B]efore a plaintiff may pursue a[n] [Iowa Civil Rights Act] claim, she must file a timely charge with the [Iowa Civil Rights Commission], and the [Iowa Civil Rights Act] imposes a 300-day limitations period for filing a claim.”).

<sup>425</sup> IOWA CODE ANN. § 216.15(13) (West effective July 1, 2024).

procedures in IOWA CODE § 216.15 and the Commission's procedural rules, prior to filing suit in court.<sup>426</sup>

- Following the timely filing of a complaint with the Iowa Civil Rights Commission, a plaintiff may not file suit until the commission issues a release or a right-to-sue letter no earlier than sixty days following the filing of the complaint with the commission.<sup>427</sup>
- Exhaustion of administrative remedies under the Iowa Civil Rights Act is jurisdictional.<sup>428</sup>
- Notice of claim:
  - Claims against the state or an employee of the state must be made in accordance with the notice procedures provided in the Iowa Tort Claims Act.

## Fee-Shifting

Available.<sup>429</sup>

## Jurisdictional Issues

Exhaustion of administrative remedies under the Iowa Civil Rights Act is jurisdictional.<sup>430</sup> Judicial review of a finding of the Iowa Civil Rights Commission (including a finding of no probable cause) must be filed within 30 days of the issuance of the final agency action.<sup>431</sup>

## Kansas

Our research has not identified any viable anti-discrimination causes of action under Kansas law.

## General Information for State Common Law Claims

Additionally, the information below may be useful in bringing common law claims on behalf of students or others. Under the Kansas Tort Claims Act, governmental entities shall be liable for damages caused by any negligent act or omission of any of its employees while acting within the scope of employment under circumstances where a private person would be liable.<sup>432</sup>

### Available Damages

- *Compensatory damages*: Yes, but the state's liability shall not exceed \$500,000 for claims arising out of a single occurrence or accident.<sup>433</sup>
- *Punitive damages*
  - Governmental entity: No punitive damages.<sup>434</sup>

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<sup>426</sup> *Id.* § 216.15 (West effective July 1, 2024).

<sup>427</sup> *Id.* § 216.16(2)(b) (West effective July 1, 2024); *Ritz v. Wapello Cnty. Bd. of Supervisors*, 595 N.W.2d 786, 789 (Iowa 1999).

<sup>428</sup> *Torres v. N. Fayette Cnty. Sch. Dist.*, 600 F. Supp. 2d 1026, 1029 (N.D. Iowa 2008).

<sup>429</sup> IOWA CODE ANN. § 216.15(9)(a)(8) (West effective July 1, 2024).

<sup>430</sup> *Torres*, 600 F. Supp. 2d at 1029.

<sup>431</sup> IOWA CODE ANN. § 216.17(1)(c) (West effective July 1, 2024).

<sup>432</sup> *Id.* § 75-6103 (West 2024).

<sup>433</sup> *Id.* § 75-6105(a) (West effective July 1, 2023).

<sup>434</sup> *Id.* § 75-6105(c) (West effective July 1, 2023).

- An employee acting within the scope of their employment: Punitive damages available only for act or omission of the employee because of “actual fraud or actual malice.”<sup>435</sup>

## Statute of Limitations

Two years.<sup>436</sup>

- Note: Because a minor plaintiff cannot negotiate or agree to a settlement on their own behalf, they have an extended statute of limitations, which is typically one year following their 18th birthday (but in no event more than eight years following the act giving rise to the injury).<sup>437</sup>

## Administrative Requirements

A notice of claim must be filed with the clerk or governing body of the entity prior to the filing of the claim.<sup>438</sup> A “municipality” includes school districts and community junior colleges.<sup>439</sup>

## Fee-Shifting

A Kansas court may not award attorney fees unless a statute authorizes the award or there is an agreement between the parties allowing attorney fees.<sup>440</sup> The Kansas Tort Claims Act does not permit attorney fees.<sup>441</sup> Note, however, that governmental entities might be subject to payment of attorney fees caused by their employees in defense of civil cases.<sup>442</sup>

## Notes

- The Kansas Constitution provides for “intellectual, educational, vocational, and scientific improvement by establishing and maintaining public schools,” but not for a “free and safe education” or an equivalent promise.<sup>443</sup>
- Kansas does not have an Equal Rights Amendment.<sup>444</sup>

## Kentucky

Our research has not identified any viable anti-discrimination causes of action under Kentucky law. The information below, however, may be useful in bringing common law claims.

## General Information for state common law claims

### Available Damages

- Compensatory damages: available.<sup>445</sup>

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<sup>435</sup> *Id.*

<sup>436</sup> KAN. STAT. ANN. § 60-513 (West 2024).

<sup>437</sup> *Id.* § 60-515 (West 2024).

<sup>438</sup> *Id.* § 12-105b(d) (West effective July 1, 2023).

<sup>439</sup> *Id.* § 12-105a(a) (West 2024).

<sup>440</sup> See *Snider v. Am. Fam. Mut. Ins. Co.*, 297 Kan. 157, 298 P.3d 1120 (2013).

<sup>441</sup> See generally Kan. Tort Claims Act (KAN. STAT. ANN. §§ 75-6101 to 75-6120).

<sup>442</sup> Kan. Stat. Ann. §§ 75-6116, 6103.

<sup>443</sup> See KAN. CONST. art. VI.

<sup>444</sup> See *State-Level Equal Rights Amendments*, BRENNAN CTR. FOR JUST. (last updated Dec. 6, 2022) <https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments>.

<sup>445</sup> Ky. CONST. § 54.

- *Punitive damages*: available.<sup>446</sup>

## Damages Caps

- *Compensatory damages*: uncapped for personal injury claims, except that claims brought in the Board of Claims (against the state, or agencies of the state, including public colleges and universities) may not exceed \$250,000 per person or a total of \$400,000.<sup>447</sup>
- *Punitive damages*: uncapped for personal injury claims.<sup>448</sup>

## Statute of Limitations

The statute of limitations for personal injury actions in Kentucky is one year.<sup>449</sup>

## Administrative Requirements

- None that are relevant here.<sup>450</sup>

## Fee-Shifting

Not available.<sup>451</sup>

## Jurisdictional Issues

- Negligence claims against the state of Kentucky (including public colleges and universities) and/or its employees must be filed in the Board of Claims.<sup>452</sup>

## Notes

- Kentucky's state constitution contains equal protection provisions, but no private right of action is available thereunder to students.<sup>453</sup>
- State actors enjoy official immunity or qualified immunity for claims based on discretionary acts.<sup>454</sup>

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<sup>446</sup> *Id.*; see also *Taylor v. King*, 345 S.W.3d 237, 242-43 (Ky. Ct. App. 2010) (explaining that the state General Assembly “has no authority to abolish or restrict a common law right of recovery for personal injury or wrongful death.”).

<sup>447</sup> KY. CONST. § 54; KY. REV. STAT. ANN. § 49.040(1); *id.* at § 49.020(5). Note, also, that it is not possible to sue school boards in the Board of Claims. *Yanero v. Davis*, 65 S.W.3d 510, 523-27 (Ky. 2001).

<sup>448</sup> KY. CONST. § 54.; *Taylor v. King*, 345 S.W.3d at 242-43 (Ky. Ct. App. 2010).

<sup>449</sup> KY. REV. STAT. ANN. § 413.140(1)(a).

<sup>450</sup> Notice of claim requirements do, however, apply to certain personal injury actions under Kentucky law. *See, e.g.*, KY. REV. STAT. ANN. § 411.10 (requiring notice of claim within 90 days of injury for actions against any city in Kentucky based on injuries resulting from a defective condition in a thoroughfare).

<sup>451</sup> *Stewart v. Est. of Cooper*, 102 S.W.3d 913, 918 (Ky. 2003) (Wintersheimer, J., dissenting).

<sup>452</sup> KY. REV. STAT. ANN §§ 49.020(5), 49.070(1).

<sup>453</sup> *Doe v. Logan*, 602 S.W.3d 177, 179 (Ky. Ct. App. 2020) (holding that student plaintiffs had “no private right of action under Kentucky’s Constitution”).

<sup>454</sup> *Nelson Cnty. Bd. of Educ. v. Forte*, 337 S.W.3d 617, 621 (Ky. 2011).

# Louisiana

## State Constitutional Equal Protection Claims, LA. CONST. art. I, § 3

### Potential Defendants

- This provision requires “state action” for conduct to be actionable. Private organizations that organize and regulate public school activities like sports may be considered a “state actor” in some circumstances.<sup>455</sup>
- A state program that furnishes textbooks, supplies, and other school aids to private schools without reference to whether such schools maintain racially discriminatory policies violates the equal protection guarantees of the Louisiana Constitution.<sup>456</sup>

### Bases of Discrimination

Race, birth, sex, culture.<sup>457</sup>

### Available Damages

N/A.

### Damages Cap(s)

N/A.

### Statute of Limitations

10 years.<sup>458</sup>

### Administrative Requirements

- Administrative exhaustion: presumptively not required.<sup>459</sup>
- Notice requirements: If the plaintiff is challenging the constitutionality of a law in a petition for declaratory relief, the state attorney general must be served as an indispensable party.<sup>460</sup> In all other proceedings where the constitutionality of a statute is contested, the attorney general should be served a copy of the pleading.<sup>461</sup>

### Fee-Shifting

N/A.

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<sup>455</sup> See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001).

<sup>456</sup> See *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975), order supplemented on other grounds, 425 F. Supp. 528 (E.D. La. 1976).

<sup>457</sup> LA. CONST. art I, § 3.

<sup>458</sup> LA. CIV. CODE art. 3499 (2024).

<sup>459</sup> *Hill v. Jindal*, 2014-1757 (La. App. 1 Cir 2015), 175 So. 3d 988, 1001 (“The party that raises the objection of prematurity has the burden of showing that an administrative remedy is available.”).

<sup>460</sup> See LA. REV. STAT. § 49:257 (effective Apr. 29, 2024).

<sup>461</sup> *Id.*

## Jurisdictional Issues

- Claims that a statute is unconstitutional must be “specially pleaded and the grounds for the claim particularized.”<sup>462</sup>
- A party must raise the unconstitutionality of the statute in trial court for any reviewing courts to consider the issue.<sup>463</sup>
- The validity or applicability of a rule promulgated by an administrative agency may be determined in an action for declaratory judgment in the district court of the parish in which the agency is located;<sup>464</sup> the agency must be made a party to the action. Such action for declaratory judgment may be brought only after:
  - the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question; and
  - the plaintiff shows that review of the validity and applicability of the rule in conjunction with review of a final agency decision in a contested adjudicated case would not provide an adequate remedy and would inflict irreparable injury.<sup>465</sup>

## Public Accommodation Discrimination Claims, La. Rev. Stat. § 51:2247

LA. REV. STAT. § 51:2231 grants the Louisiana Commission on Human Rights (LCHR) statutory authority to adjudicate discrimination matters based upon race, color, national origin, or sex.<sup>466</sup> Section 2247 deals specifically with public accommodations.<sup>467</sup> Any person injured by a violation of this section may file a complaint with the LCHR and also has a civil cause of action in district court.<sup>468</sup>

### Potential Defendants

A person who denies an individual the full and equal enjoyment of goods, services, or accommodations at any facility that is used by the public at large or which is supported directly or indirectly by government funds.<sup>469</sup> Private clubs, however, are exempt.<sup>470</sup>

### Bases of Discrimination

Race, color, sex, and national origin.

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<sup>462</sup> *Vallot v. Gayle Oil Co., Inc.*, 646 So.2d 859, 865 (La. 1994).

<sup>463</sup> *State v. Hatton*, 985 So.2d 709, 719 (La. 2008).

<sup>464</sup> LA. REV. STAT. § 49:968A(1) (effective June 6, 2023).

<sup>465</sup> *Id.* § 49:968D (effective June 6, 2023).

<sup>466</sup> *Id.* § 51:2231 (effective Aug. 1, 2014).

<sup>467</sup> *Id.* § 51:2247 (2024).

<sup>468</sup> *Id.* § 51:2264 (2024).

<sup>469</sup> Sovereign immunity is waived for actions against the government for injury to person or property or breach of contract, but this limited waiver does not seem to extend to discrimination claims. *See* LA. CONST. art. XII, § 10 (waiving sovereign immunity); *Fletcher v. La. Dep’t of Transp. & Dev.*, 19 F.4th 815, 818 (5th Cir. 2021) (explaining that Louisiana courts have limited the scope of the state’s sovereign immunity waiver to “traditional contract and tort suits”).

<sup>470</sup> LA. REV. STAT. § 51:2232(10) (effective Aug. 1, 2022).

## Available Damages

- *Compensatory damages* (including emotional distress damages)<sup>471</sup>: available.<sup>472</sup>
- *Punitive damages*: unavailable.<sup>473</sup>

## Damages Cap(s)

No cap for *compensatory damages*, including emotional distress damages.<sup>474</sup>

## Statute of Limitations

Two years, running from the date of the injury.<sup>475</sup>

## Administrative Requirements

- Administrative Exhaustion: not required.
  - Though a charge of discrimination may be filed with the LCHR, administrative exhaustion is not required.<sup>476</sup>
  - For complaints filed with the LCHR, should the agency find that a respondent engaged in an unlawful practice, an order shall be issued to enjoining the practice. The proceeding for enforcement of an order shall be initiated in the appropriate district court.<sup>477</sup>
  - Judicial review of an action by the LCHR may be sought in accordance with the Administrative Procedure Act.<sup>478</sup>
- Notice Requirement: None.<sup>479</sup>

## Fee-Shifting

Available.<sup>480</sup>

## Jurisdictional Issues

- Civil complaints against the state, a state agency, or a political subdivision must be brought in Louisiana state court.<sup>481</sup>
- Even if sovereign immunity is waived for discrimination claims by virtue of Article XII § 10 of the Louisiana Constitution, no judgment against the government may be recovered except from funds appropriated for that purpose by the state legislature or by the political subdivision against which the judgment is rendered.<sup>482</sup>

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<sup>471</sup> See *Lejeune v. Rayne Branch Hosp.*, 556 So.2d 559, 563 (La. 1990) (“Louisiana courts have long recognized that mental anguish damages are actual damages.” (internal citation omitted)).

<sup>472</sup> LA. REV. STAT. § 51:2264 (2024).

<sup>473</sup> *Devillier v. Fidelity & Deposit Co. of Md.*, 709 So.2d 277, 282 (La. App. 3 Cir. 1998) (“The LCHRA does not include a provision for punitive damages.”(internal citation omitted)).

<sup>474</sup> However, the collateral source rule applies in Louisiana. See *Bozeman v. State*, 879 So. 2d 692 (La. 2004).

<sup>475</sup> Louisiana Acts 2024, No. 423, § 2, eff. July 1, 2024.

<sup>476</sup> See *Coutcher v. La. Lottery Corp.*, 710 So. 2d 259, 259–60 (La. App. 1 Cir. 1997) (“[W]here the legislature had an opportunity to make it clear that an administrative remedy was required, they didn’t do so.”).

<sup>477</sup> LA. REV. STAT. §§ 51:2261(B), (E) (2024).

<sup>478</sup> *Id.* § 51:2265 (2024).

<sup>479</sup> *Id.* § 51:2264 (2024).

<sup>480</sup> *Id.*

<sup>481</sup> LA. REV. STAT. § 13:5106(A) (effective Aug. 1, 2018).

<sup>482</sup> *Id.*

# Maine

## State Constitutional Equal Protection Claims, Me. Const. art. I, § 6-A

This provision can be enforced through the Maine Civil Rights Act<sup>483</sup> in the same way one might enforce the federal equal protection clause through § 1983.<sup>484</sup> The only violations for which a private right of action is available under this provision are those where a person intentionally interferes or attempts to intentionally interfere with the exercise or enjoyment of a constitutional right by (1) physical force or violence, (2) damage or destruction of property or trespass on property, (3) threats of physical force or violence, (4) threats of damage or destruction of property or trespass on property, or (5) engaging in any conduct that would cause a reasonable person to suffer emotional distress or to fear death or bodily injury to that person or to a close relation.<sup>485</sup>

### Potential Defendants

- This provision requires state action for conduct to be actionable.<sup>486</sup> However, the provision does not define state action so its outer bounds are unclear.
- Elsewhere, Maine law defines state action as action of “an agency or individual employee of the State or state-related agency.”<sup>487</sup>

### Bases of Discrimination

Race, color, national origin, and sex (not including sexual orientation).<sup>488</sup>

### Available Damages

- *Compensatory damages* (including emotional distress damages): available.<sup>489</sup>
- *Punitive damages*: unclear.<sup>490</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

Me. Stat. Rev. tit. 5, § 4682 does not contain any statute of limitations and the Supreme Judicial Court of Maine has declined to address the question.<sup>491</sup> Generally, civil actions in Maine have a statute of limitations of six years, which may apply here.<sup>492</sup>

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<sup>483</sup> ME. REV. STAT. ANN., tit. 5, § 4682.

<sup>484</sup> *Johnson v. City of Biddeford*, 454 F. Supp. 3d. 75, 92 (D. Me. 2020).

<sup>485</sup> ME. REV. STAT. ANN. tit. 5, § 4682.

<sup>486</sup> *Fintanides v. City of Saco*, 843 A.2d 8, 13 (Me. 2004).

<sup>487</sup> ME. REV. STAT. ANN. tit. 5, § 784.

<sup>488</sup> The Maine constitution’s guarantee of equal protection is co-extensive with that of the Fourteenth Amendment. *State v. Mosher*, 58 A.3d 1070, 1073 (Me. 2012). As of this writing, sexual orientation is not a suspect class under Maine’s Equal Protection Clause. *Solmitz v. Me. Sch. Admin. Dist. No. 59*, 495 A.2d 812, 820 (Me. 1985).

<sup>489</sup> ME. REV. STAT. ANN. tit. 5, § 4682.

<sup>490</sup> Legal relief is available under § 4682. ME. REV. STAT. ANN. tit. 5, § 4682. Maine courts have not addressed whether “legal relief” includes punitive damages for the purpose of this provision. See *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1238 (D. Me. 1996). In Maine, punitive damages are available upon a showing that the defendant acted with malice. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985); see *Werman v. Malone*, 750 F. Supp. 21, 24 (D. Me. 1990).

<sup>491</sup> ME. REV. STAT. ANN. tit. 5, § 4682; *Doe v. Graham*, 977 A.2d 391, 400 n. 8 (Me. 2009).

<sup>492</sup> ME. REV. STAT. ANN. tit. 14, § 752.

## Administrative Requirements

- Administrative exhaustion: not required.<sup>493</sup>
- Notice of claim: not required.<sup>494</sup>

## Fee-Shifting

Reasonable attorney's fees and costs may be awarded to the prevailing party.<sup>495</sup>

## Jurisdictional Issues

The Superior Court for the county where the alleged violator resides or has a principal place of business has exclusive jurisdiction.<sup>496</sup>

## **Maine Human Rights Act, Me. Rev. Stat. Ann. tit. 5, § 4601**

### Potential Defendants

Any public school or educational program, any public postsecondary institution, any private school or educational program "approved for tuition purposes"<sup>497</sup> by the Maine Department of Education, and the governing body of each such school or program.<sup>498</sup>

### Bases of Discrimination

Sex, sexual orientation, gender identity, national origin, race, and color.<sup>499</sup>

### Available Damages

- *Compensatory damages*: available.<sup>500</sup>
- *Punitive damages*: unclear.<sup>501</sup>

### Damages Cap(s)

Civil penalties are capped at \$20,000 for an initial violation, \$50,000 for a second violation, and \$100,000 for a third or subsequent violation.<sup>502</sup> It is not clear whether damages in addition to the civil penalties may apply under this law.<sup>503</sup>

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<sup>493</sup> ME. REV. STAT. ANN. tit. 5, § 4682.

<sup>494</sup> Only the Maine Tort Claims Act requires a notice of claim. ME. REV. STAT. ANN. tit. 14, § 8107.

<sup>495</sup> ME. REV. STAT. ANN. tit. 5, § 4683; *id.* at § 4681.

<sup>496</sup> ME. REV. STAT. ANN. tit. 5, § 4682.

<sup>497</sup> ME. REV. STAT. ANN. tit. 20-A, § 2951.

<sup>498</sup> ME. REV. STAT. ANN. tit. 5, § 4553; *id.* at § 4601.

<sup>499</sup> ME. REV. STAT. ANN. tit. 5, § 4601.

<sup>500</sup> ME. REV. STAT. ANN. tit. 5, § 4613(2)(B). It is unclear whether emotional distress damages are available under this statute outside of the employment context. *Compare id.* (stating that compensatory damages are available) *with* (

<sup>501</sup> The Maine Human Rights Act expressly provides for recovery of punitive damages in employment discrimination cases, but does not do so for other forms of discrimination. ME. REV. STAT. tit. 5 § 4613. Punitive damages may not be included in a judgment or award against a governmental entity. ME. REV. STAT. tit. 14 § 8105. Maine courts have not addressed whether "civil penal damages" includes punitive damages for the purpose of this provision as of this writing.

<sup>502</sup> ME. REV. STAT. ANN. tit. 5, § 4613(2)(B).

<sup>503</sup> *Id.*

## Statute of Limitations

Either 2 years after the act of unlawful discrimination or 90 days after the Maine Human Rights Commission has (a) dismissed the case due to lack of reasonable grounds to believe that unlawful discrimination has occurred or administratively dismissed the case, (b) failed, within 90 days after finding reasonable grounds to believe that unlawful discrimination occurred, to enter into a conciliation agreement to which the plaintiff was a party, (c) issued a right-to-sue letter, or (d) dismissed the case in error, whichever is later.<sup>504</sup>

## Administrative Requirements

- Administrative exhaustion: **required within 300 days.** Before filing a civil action, the plaintiff must first file a complaint with the Maine Human Rights Commission within 300 days of the alleged act of unlawful discrimination.<sup>505</sup> The Human Rights Commission must either (a) dismiss the case due to lack of reasonable grounds to believe that unlawful discrimination has occurred or administratively dismissed the case, (b) fail, within 90 days after finding reasonable grounds to believe that unlawful discrimination occurred, to enter into a conciliation agreement to which the plaintiff was a party, (c) issue a right-to-sue letter, or (d) dismiss the case in error before a civil action may be filed.<sup>506</sup> If the commission has not filed a civil action in the case or has not entered into a conciliation agreement in the case more than 180 days after the complaint was filed with the commission, the complainant may submit a written request for a right-to-sue letter and the commission shall issue the requested right-to-sue letter.<sup>507</sup>
- Notice of claim: not required.<sup>508</sup>

## Fee-Shifting

Available.<sup>509</sup>

## Jurisdictional Issues

Actions must be filed in Maine Superior Court.<sup>510</sup>

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<sup>504</sup> ME. REV. STAT. ANN. tit. 5, § 4613; *id.* at §§ 4612(2), 4612(2-A), 4622, 4553.

<sup>505</sup> ME. REV. STAT. ANN. tit. 5, § 4611.

<sup>506</sup> ME. REV. STAT. ANN. tit. 5, §§ 4622, 4612(2), 4612(2-A), 4553.

<sup>507</sup> ME. REV. STAT. ANN. tit. 5, § 4612.

<sup>508</sup> Only the Maine Tort Claims Act requires that a notice of claim be filed. ME. REV. STAT. ANN. tit. 14, § 8107.

<sup>509</sup> ME. REV. STAT. ANN. tit. 5, § 4614.

<sup>510</sup> ME. REV. STAT. ANN. tit. 5, § 4621.

# Maryland

## State Constitutional Equal Protection Claims, MD. CONST. DECL. OF RTS. art. 24<sup>511</sup>

Article 24 of the Maryland Declaration of Rights (included in Maryland's state constitution) embodies the concept of equal protection.<sup>512</sup> There are some decisions that have recognized discrimination claims made under Article 24.<sup>513</sup> However, there are none that have centered on student-based discrimination against schools through Article 24. This pathway, however, could potentially be used for such claims in the future. In Maryland, state constitutional claims are brought as common law actions, and common law remedies are available.<sup>514</sup>

### Potential Defendants

Article 24 requires "state action" for conduct to be actionable.<sup>515</sup> However, the provision does not define "state action" so the outer bounds of this provision are unclear. But state action requires "sufficient governmental involvement in the action."<sup>516</sup>

### Bases of Discrimination

Suspect classifications, including race, gender, religion, or national origin.<sup>517</sup>

### Available Damages<sup>518</sup>

- *Compensatory damages*: available.<sup>519</sup>
- *Punitive damages*: available.<sup>520</sup> But local government may not be liable for punitive damages.<sup>521</sup>

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<sup>511</sup> MD. CONST. DECL. OF RTS. art. XXIV ("That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.").

<sup>512</sup> *Murphy v. Edmonds*, 325 Md. 342, 353-54 (1992) (explaining that "[a]lthough the Maryland Constitution contains no express equal protection clause, it is settled that the Due Process Clause of the Maryland Constitution, contained in Article 24 of the Declaration of Rights, embodies the concept of equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment").

<sup>513</sup> See *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 363, 758 A.2d 95 (2000) (holding that "the equal protection component of Article 24, standing alone, embraces a prohibition against gender based discrimination in public employment at least to the extent found in the Fourteenth Amendment to the United States"); See *Ashton v. Brown*, 339 Md. 70, 100-01, 660 A.2d 447 (1995) (explaining that "the plaintiffs' evidence regarding racial discrimination appears to be sufficient to present a triable issue concerning a violation of their rights protected by the equal protection component of Article 24").

<sup>514</sup> See *Prince George's Cnty. Md. v. Longtin*, 190 Md. App. 97, 118 (2010).

<sup>515</sup> *Breard v. Homeland Ass'n, Inc.*, No. 735, Sept. Term, 2020, 2020 WL 10055365, at \*8 (Md. Ct. Spec. App. June 15, 2020).

<sup>516</sup> See *Wassif v. N. Arundel Hosp. Ass'n, Inc.*, 85 Md. App. 71, 78 (1990) (noting that the protections found in Article 24 of the Maryland Declaration of Rights "only apply to actions occurring *under color of state law or sufficiently controlled by the state* as to be considered state action." (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (emphasis added))).

<sup>517</sup> *Pizza di Joey, LLC v. Mayor of Balt.*, 470 Md. 308, 346, 235 A.3d 873 (2020) (explaining that "[w]hen a statute creates a distinction based upon "clearly suspect" criteria (such as race, gender, religion, or national origin), or when it infringes on a "fundamental" right, we apply strict scrutiny when considering a substantive due process or equal protection challenge to it").

<sup>518</sup> *Widgeon v. E. Shore Hosp. Ctr.*, 300 Md. 520, 523, 479 A.2d 921 (1984) (recognizing a common-law action for money damages for violations of Article 14 of the Maryland Constitution).

<sup>519</sup> *Ritchie v. Donnelly*, 324 Md. 344, 370, 597 A.2d 432 (1991) ("This Court has consistently held that a public official who violates the plaintiff's rights under the Maryland Constitution is personally liable for compensatory damages.").

<sup>520</sup> See *Prince George's Cnty. Md. v. Longtin*, 190 Md. App. 97, 145, 988 A.2d 20 (2010) (recognizing a punitive damage award made against a detective under the Maryland Declaration of Rights Article 24).

<sup>521</sup> MD. CODE ANN., Cts. & Jud. Proc. § 5-303 (West effective Oct. 1, 2023).

## Damages Cap(s)

- *Compensatory damages:*
  - Noneconomic: capped for personal injury claims.<sup>522</sup>
- *Punitive damages:* uncapped.<sup>523</sup>

## Statute of Limitations

Three years.<sup>524</sup>

## Administrative Requirements

None that are relevant here.

## Fee-Shifting

Likely not available.<sup>525</sup>

## Jurisdictional Issues

Absent legislative waiver, sovereign immunity precludes a damages action against the State for violations of Article 24.<sup>526</sup>

## **Inclusive Schools Act, MD. CODE, Educ. § 26-704<sup>527</sup>**

Among other things, the statute provides that public schools and schools that receive state funds may not “(1) Discriminate against a current student, a prospective student, or the parent or guardian of a current or prospective student on the basis of race, ethnicity, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability; (2) Refuse enrollment of a prospective student, expel a current student, or withhold privileges from a current student, a prospective student, or the parent or guardian of a current or prospective student because of an individual’s race, ethnicity, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability; or (3) Discipline, invoke a penalty against, or take any other retaliatory action against a student or parent or guardian of a student who files a complaint alleging that the program or school discriminated against the student, regardless of the outcome of the complaint.” The statute was recently enacted in 2022, and it is unclear whether it conveys a private cause of action.

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<sup>522</sup> *Id.* § 11-108(a)(2) (West 2024).

<sup>523</sup> *Id.*

<sup>524</sup> MD. CODE ANN., Cts. & Jud. Proc. § 5-101 (West effective July 1, 2024) (“A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.”).

<sup>525</sup> *Nova Sch., Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 445, 952 A.2d 275 (2008) (stating that “Maryland follows the common law “American Rule,” which states that, generally, a prevailing party is not awarded attorney’s fees “unless (1) the parties to a contract have an agreement to that effect, (2) there is a statute that allows the imposition of such fees, (3) the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, or (4) a plaintiff is forced to defend against a malicious prosecution”).

<sup>526</sup> *Ritchie v. Donnelly*, 324 Md. 344, 369 (1991).

<sup>527</sup> MD. CODE ANN., Educ. § 26-704.

## Potential Defendants

A county board, public prekindergarten program, public primary or secondary school, nonpublic prekindergarten program that receives State funds, and a nonpublic primary or secondary school that receives State funds.<sup>528</sup>

## Bases of Discrimination

Race, ethnicity, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability.<sup>529</sup>

## Notes

- Maryland public and publicly funded schools and school program must operate in compliance with Title VI of the federal Civil Rights Act of 1964.<sup>530</sup>

# Massachusetts

## Massachusetts Civil Rights Act, M.G.L. c. 12, §§ 11H-11I

This statute prohibits any state or private actor to “interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured” under the U.S. Constitution or laws or under the Massachusetts Constitution.<sup>531</sup> It provides a private cause of action for damages.<sup>532</sup>

## Potential Defendants

Both public and private actors, including schools and school districts.

## Bases of Discrimination

All bases under federal and state constitutions, including race and sex.

## Available Damages

Compensatory damages.<sup>533</sup>

## Damages Cap(s)

N/A.

## Statute of Limitations

Three years.<sup>534</sup>

## Administrative Requirements

- N/A

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<sup>528</sup> MD. CODE ANN., Educ. § 26-704(a) (West effective July 1, 2022).

<sup>529</sup> *Id.* § 26-704(b)(1).

<sup>530</sup> *Id.* § 26-704(c) (West effective July 1, 2022).

<sup>531</sup> M.G.L. c. 12, §§ 11H.

<sup>532</sup> M.G.L. c. 12, §§ 11I.

<sup>533</sup> M.G.L. c. 12, §§ 11I.

<sup>534</sup> MASS. GEN. LAWS ANN. ch. 260, § 4 (West effective Dec. 2, 2014).

## Fee-Shifting

Available to prevailing party.<sup>535</sup>

## Jurisdictional Issues

None.

# **Mass. Equal Rights Act (MERA), MASS. GEN. LAWS ch. 93, §§ 102 & 103**

## Potential Defendants

Any person or governmental entity.<sup>536</sup>

## Bases of Discrimination

Sex, race, color, and national origin.<sup>537</sup>

## Available Damages

- *Compensatory damages* (including emotional distress damages)<sup>538</sup>: available.<sup>539</sup>
- *Punitive damages*: available.<sup>540</sup>

## Damages Cap(s)

N/A.

## Statute of Limitations

Three years.

## Administrative Requirements

- Administrative Exhaustion: not required.
- Notice of claim: not required.

## Fee-Shifting

Available. An aggrieved person who prevails in an action under the statute shall be entitled to an “award of the costs of the litigation and reasonable attorneys’ fees in an amount to be fixed by the court.”<sup>541</sup>

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<sup>535</sup> M.G.L. c. 12, §§ 11I.

<sup>536</sup> *Brooks v. Martha’s Vineyard Transit Auth.*, 433 F. Supp. 3d 65, 72 (D. Mass. 2020).

<sup>537</sup> MA. CONST. pt. 1, art. I.

<sup>538</sup> *Buckley Nursing Home, Inc. v. Mass. Comm’n Against Discrimination*, 20 Mass. App. Ct. 172, 182 (1985).

<sup>539</sup> MASS. GEN. LAWS ANN. ch. 93, § 102 (b) (West 2024) (“A person whose rights under the provisions of subsection (a) have been violated may commence a civil action for injunctive and other appropriate equitable relief, including the award of compensatory and exemplary damages.”).

<sup>540</sup> *Id.*

<sup>541</sup> MASS. GEN. LAWS ANN. ch. 93, § 102(d) (West 2024).

## Jurisdictional Issues

The civil action shall be instituted “either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.”<sup>542</sup>

## Right to Freedom from Sexual Harassment, MASS. GEN. LAWS ch. 214, § 1C

Chapter 214 provides: “A person shall have the right to be free from sexual harassment, as defined in chapter[s] [151B and 151C].”<sup>543</sup> Chapter 151C in turn defines “sexual harassment” to include “verbal or physical conduct of a sexual nature” that “ha[s] the purpose or effect of unreasonably interfering with an individual's education by creating an intimidating, hostile, humiliating or sexually offensive educational environment.”<sup>544</sup> Thus, sexual harassment that “unreasonably interfer[es]” with a student's “educational environment” states a claim under Chapter 214 § 1C.<sup>545</sup>

### Potential Defendants

Educational institutions but not individuals.<sup>546</sup>

### Bases of Discrimination

Sex.<sup>547</sup>

### Available Damages

- *Compensatory damages* (including emotional distress)<sup>548</sup>: available.<sup>549</sup>
- *Punitive damages*: available.<sup>550</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

Three years.<sup>551</sup>

### Administrative Requirements

- Administrative exhaustion not required.<sup>552</sup>

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<sup>542</sup> *Id.* ch. 93, § 102(b) (West 2024).

<sup>543</sup> *Id.* ch. 214, § 1C (West effective Nov. 5, 2002).

<sup>544</sup> *Id.* ch. 151C, § 1(e)(ii) (West 2024).

<sup>545</sup> *Id.*

<sup>546</sup> *Doe v. Bradshaw*, 203 F. Supp. 3d 168, 188-89 (D. Mass. 2016) (“Chapter 214 merely expands who is protected by ch. 151C and the remedies available to them, while ch. 151C remains the source of the substantive law. Thus, suit may only be brought under chapter 214 against educational institutions, rather than individuals, based on limitations rooted in chapter 151C.” (internal citations omitted)).

<sup>547</sup> MASS. GEN. LAWS ANN. ch. 151C, § 1(e) (West 2024).

<sup>548</sup> *Czerwinski v. Harvard Univ.*, 666 F. Supp. 3d 49, 75 (D. Mass. 2023).

<sup>549</sup> See *supra* note 539.

<sup>550</sup> *Id.*

<sup>551</sup> *Ruffino v. State St. Bank & Tr. Co.*, 908 F. Supp. 1019, 1042 (D. Mass. 1995).

<sup>552</sup> *Doe No. 99 v. Cheffit*, 105 Mass. App. Ct. 704, 707 (2025).

## Fee-Shifting

Available.<sup>553</sup>

## Jurisdictional Issues

When this statute fully applies to a claim of sexual harassment, it is the exclusive remedy, and plaintiffs may not proceed with other statutory or common-law actions for sexual harassment. But the remedy is not exclusive when the plaintiff's claim extends to conduct not covered by the statute.<sup>554</sup>

## Michigan

### State Constitutional Equal Protection Claims, Mich. Const. art. I, § 2

#### Potential Defendants

- This provision requires “state action” for conduct to be actionable.<sup>555</sup> The provision does not define “state action” so the outer bounds of this provision are unclear. But “the mere act of receiving state funds is not enough governmental involvement to constitute state action.”<sup>556</sup>
- Other constitutional provisions suggest that the following actors are state actors, and therefore may be defendants under this provision: public colleges or universities, community colleges, school districts,<sup>557</sup> the state of Michigan, any Michigan city, any Michigan county, or other political subdivision or government instrumentality of Michigan.<sup>558</sup>

#### Bases of Discrimination

Race, color, national origin, sex.<sup>559</sup>

#### Available Damages

**N/A.** The Michigan Supreme Court has held that there is no private cause of action for damages under Article 1, Section 2 of the Michigan constitution “because the plain language of this constitutional provision leaves its implementation to the Legislature.”<sup>560</sup>

#### Damages Cap(s)

N/A.

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<sup>553</sup> MASS. GEN. LAWS ANN. ch. 214, § 1C (West effective Nov. 5, 2002) (providing that “[t]he superior court shall have the jurisdiction to enforce this right and to award the damages and other relief provided in the third paragraph of section 9 of chapter 151B,” which includes “reasonable attorney’s fees and costs”).

<sup>554</sup> *Czerwinski v. Harvard Univ.*, 666 F. Supp. 3d 49, 97 (D. Mass. 2023).

<sup>555</sup> *Litka v. Univ. of Detroit Dental Sch.*, 610 F. Supp. 80, 81 n.1 (E.D. Mich. 1985).

<sup>556</sup> *Id.*

<sup>557</sup> MICH. CONST. art I, § 26(1).

<sup>558</sup> *Id.* art I, § 26(3).

<sup>559</sup> *Doe v. Dep’t of Social Servs.*, 487 N.W.2d 166, 174 (Mich. 1992) (“[A] review of the jurisprudence and constitutional history of this state suggests . . . that our Equal Protection Clause was intended to duplicate the federal clause and to offer similar protection”). Notably, it appears that this provision does not protect against sexual orientation- or gender identity-based discrimination. *E.g., Nat'l Pride at Work, Inc. v. Governor of Mich.*, 732 N.W.2d 139, 154-56 (Mich. Ct. App. 2008) (finding now-defunct constitutional amendment prohibiting same-sex marriage was not an equal protection violation).

<sup>560</sup> *Lewis v. State*, 629 N.W.2d 868, 868 (Mich. 2001); see MICH. CONST. art. I, § 2 (“The legislature shall implement this section by appropriate legislation.”).

## Statute of Limitations

Three years.<sup>561</sup>

## Administrative Requirements

- Administrative exhaustion not required.<sup>562</sup>
- Notice of claim:
  - Typically, a notice of claim for claims against the state must be filed within one year after the claim has accrued in the office of the clerk of the Court of Claims, even if the claim will ultimately be filed in the circuit court.<sup>563</sup>
  - If the claim concerns property damage or personal injuries, the notice of claim must be filed in the same office within six months.<sup>564</sup>

## Fee-Shifting

If the state puts the claimant's right to recover at issue in the Court of Claims, the claimant is entitled to recover attorney's fees in the same way they are entitled to do so in circuit court.<sup>565</sup>

## Jurisdictional Issues

If the complaint is against the state "or any of its departments or officers," it must be brought in the Court of Claims.<sup>566</sup> However, no one may file a claim against the state "or any department, commission, board, institution, arm or agency thereof" in the court of claims if there is an alternate adequate remedy in federal court.<sup>567</sup>

## State Constitutional Education Discrimination Claims, Mich. Const. art. I, § 26

This provision is titled "Affirmative action programs," but the language of the provision—which prevents "discriminat[ion] against, or grant [of] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public education" is necessarily broader.<sup>568</sup> However, a review of the case law does not reveal any cases wherein a cause of action has been assessed on the merits under this provision regarding a challenge to something other than an affirmative action policy.

## Potential Defendants

- The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district.<sup>569</sup>

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<sup>561</sup> MICH. COMP. LAWS § 600.6452(1) (2024).

<sup>562</sup> MICH. CONST. art. V, § 29 ("Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.").

<sup>563</sup> MICH. COMP. LAWS § 600.6431 (2024); Christie v. Wayne State Univ., 993 N.W.2d 203, 209 (Mich. 2023).

<sup>564</sup> MICH. COMP. LAWS § 600.6431(4) (2024).

<sup>565</sup> *Id.* § 600.6449.

<sup>566</sup> *Id.* § 600.6419; *see also* Silverman v. Univ. of Mich. Bd. of Regents, 516 N.W.2d 54, 58 (Mich. 1994), *disapproved of on other grounds*, Parkwood Ltd. Dividend Housing Ass'n v. State Housing Dev't Auth., 664 N.W.2d 185, 191 (Mich. 2003) (explaining that the Court of Claims is the sole and exclusive forum for *all* claims against the state).

<sup>567</sup> MICH. COMP. LAWS § 600.6440 (2024).

<sup>568</sup> MICH. CONST. art I, §§26(1)-(2).

<sup>569</sup> *Id.* § 26(1).

- The state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan.<sup>570</sup>

## Bases of Discrimination

Race, color, national origin, ethnicity, sex<sup>571</sup> (excluding bona fide qualifications on the basis of sex).<sup>572</sup>

## Available Damages

- *Compensatory damages* (including emotional distress damages): presumptively available.<sup>573</sup>
- *Punitive damages*: presumptively unavailable.<sup>574</sup>

## Damages Cap(s)

No cap for *compensatory damages*, likely including emotional distress damages.<sup>575</sup>

## Statute of Limitations

Three years.<sup>576</sup>

## Administrative Requirements

- Administrative exhaustion not required.<sup>577</sup>
- Notice of claim:
  - Typically, a notice of claim for claims against the state must be filed within one year after the claim has accrued in the office of the clerk of the Court of Claims, even if the claim will ultimately be filed in a state circuit court.<sup>578</sup>
  - If the claim concerns property damage or personal injuries, the notice of claim must be filed in the same office within six months.<sup>579</sup>

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<sup>570</sup> *Id.* § 26(3).

<sup>571</sup> *Id.* § 26(2). Case law has not yet addressed whether this provision's sex-discrimination prohibition includes a prohibition of sexual orientation and/or gender identity discrimination.

<sup>572</sup> *Id.* § 26(5).

<sup>573</sup> This constitutional provision incorporates the remedies that are available for violations of Michigan's other antidiscrimination laws, which presumably refers to the Elliott-Larsen Civil Rights Act. MICH. CONST. art. I, § 26(6). *See Moll v. Parkside Livonia Credit Union*, 525 F. Supp. 786, 790 (E.D. Mich. 1981) (permitting a plaintiff to recover emotional distress damages under Michigan's Elliott Larsen Civil Rights Act); *Freeman v. Kelvinator, Inc.*, 469 F. Supp. 999, 1003-04 (E.D. Mich. 1979); *see also Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 211 (6th Cir. 1990) (finding award of \$150,000 in emotional distress damages not to be excessive).

<sup>574</sup> *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 (Mich. 2004) ("[P]unitive damages are available in Michigan only when expressly authorized by the Legislature. Here, the Civil Rights Act does not authorize punitive damages . . . .").

<sup>575</sup> *See McDonald Plosser, United States: Sky's The Limit? A 50-State Survey Of Damages Caps And The Collateral Source Rule*, Mondaq (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule> (explaining that "[C]ompensatory damages are not capped in Michigan (except in medical malpractice cases)"); *Pain and Suffering Damages in Michigan*, FindLaw (Dec. 6, 2018), <https://www.findlaw.com/state/michigan-law/pain-and-suffering-damages-in-michigan.html> (detailing caps only for medical malpractice and product liability cases for pain and suffering damages).

<sup>576</sup> MICH. COMP. LAWS § 600.6452(1) (2024).

<sup>577</sup> MICH. CONST. art. V, § 29.

<sup>578</sup> MICH. COMP. LAWS § 600.6431 (2024); *Christie v. Wayne State Univ.*, 993 N.W.2d 203, 209 (Mich. 2023).

<sup>579</sup> MICH. COMP. LAWS § 600.6431(4) (2024).

## Fee-Shifting

Presumably available.<sup>580</sup>

## Jurisdictional Issues

If the complaint is against the state “or any of its departments or officers,” it must be brought in the Court of Claims.<sup>581</sup> However, no one may file a claim against the state “or any department, commission, board, institution, arm or agency thereof” in the court of claims if there is an alternate remedy in federal court.<sup>582</sup>

## **Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.2101-37.2804**

### Potential Defendants

- Educational institutions, both public and private, including: academies, colleges, elementary or secondary schools, extension courses, kindergartens, nurseries, local school systems, universities, business, nursing, professional, secretarial, technical, or vocational schools, agents of any of the above.<sup>583</sup>
- Religious schools are exempt,<sup>584</sup> as are historically single-sex schools from the sex-discrimination prohibitions.<sup>585</sup>

### Bases of Discrimination

Race, color, national origin, sex<sup>586</sup> (including sexual harassment,<sup>587</sup> sexual orientation,<sup>588</sup> gender identity,<sup>589</sup> and gender expression.<sup>590</sup> Covers negligent response to peer sexual harassment.<sup>591</sup>

### Available Damages

- *Compensatory damages (including emotional distress damages):* available.<sup>592</sup>

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<sup>580</sup> MICH. CONST. art. I, § 26(6) (“The remedies available for violations of this section shall be the same, regardless of the injured party’s race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan anti-discrimination law.”); MICH. COMP. LAWS §§ 37.2801, 37.2802 (2024) (providing for fee-shifting in cases based on violations of the Elliott-Larsen Civil Rights Act).

<sup>581</sup> *Id.* § 600.6419; *see also* Silverman v. Univ. of Mich. Bd. of Regents, 516 N.W.2d 54, 68 (Mich. 1994), *disapproved of on other grounds*, Parkwood Ltd. Dividend Hous. Ass’n v. State Hous. Dev’t Auth., 664 N.W.2d 185, 773 (Mich. 2003) (clarifying that the Court of Claims is the sole and exclusive forum for *all* claims against the state).

<sup>582</sup> MICH. COMP. LAWS § 600.6440 (2024).

<sup>583</sup> *Id.* § 37.2401.

<sup>584</sup> *Id.* § 34.2403.

<sup>585</sup> *Id.* § 34.2404; *see also id.* § 37.2404a (permitting single-gender schools, classes, or programs).

<sup>586</sup> *Id.* § 37.2402.

<sup>587</sup> *Id.* § 37.2103 (“Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature . . . .”).

<sup>588</sup> *Rouch World, LLC v. Dep’t of C.R.*, 987 N.W.2d 501, 514 (Mich. 2022).

<sup>589</sup> The Michigan Court of Claims, but not the Michigan Supreme Court, has held that this statute’s prohibition of sex discrimination includes a prohibition of gender-identity discrimination. *Id.* at 408-09 (describing the Court of Claims holding).

<sup>590</sup> 2023 Mich. Legis. Serv. P.A. 6 (S.B. 4), available here: <http://www.legislature.mi.gov/documents/2023-2024/publicact/pdf/2023-PA-0006.pdf>.

<sup>591</sup> *Doe by Next Friend Kolokithas v. Alpena Pub. Sch. Dist.*, No. 359190, 2025 WL 1112610 (Mich. Ct. App. Apr. 14, 2025).

<sup>592</sup> *E.g., Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 211 (6th Cir. 1990) (affirming award of compensatory damages for economic loss); *Moll v. Parkside Livonia Credit Union*, 525 F. Supp. 786, 790 (E.D. Mich. 1981) (permitting a plaintiff to recover emotional distress damages under Michigan’s Elliott Larsen Civil Rights Act); *Freeman v. Kelvinator, Inc.*, 469 F. Supp. 999, 1003-04 (E.D. Mich. 1979).

- *Punitive damages*: not available.<sup>593</sup>

## Damages Cap(s)

No cap for *compensatory damages*, likely including emotional distress damages.<sup>594</sup>

## Statute of Limitations

Three years.<sup>595</sup>

## Administrative Requirements

- Administrative exhaustion not required.<sup>596</sup>
- Notice of claim:
  - Typically, a notice of claim for claims against the state must be filed within one year after the claim has accrued in the office of the clerk of the Court of Claims, even if the claim is ultimately filed in a state circuit court.<sup>597</sup>
  - If the claim concerns property damage or personal injuries, the notice of claim must be filed in the same office within six months.<sup>598</sup>

## Fee-Shifting

Available.<sup>599</sup>

## Jurisdictional Issues

This statute explicitly authorizes jurisdiction in state trial courts (circuit courts).<sup>600</sup> Claims may also be brought in the Court of Claims and federal court.<sup>601</sup>

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<sup>593</sup> *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 (Mich. 2004).

<sup>594</sup> See McDonald Plosser, *United States: Sky's The Limit? A 50-State Survey Of Damages Caps And The Collateral Source Rule*, Mondaq (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule> (explaining that “[C]ompensatory damages are not capped in Michigan (except in medical malpractice cases)”; *Pain and Suffering Damages in Michigan*, FindLaw (Dec. 6, 2018), <https://www.findlaw.com/state/71ichigan-law/pain-and-suffering-damages-in-michigan.html> (detailing caps only for medical malpractice and product liability cases for pain and suffering damages)).

<sup>595</sup> *Wright v. AutoZone Stores, Inc.*, 951 F. Supp. 2d 973, 993 (W.D. Mich. 2013) (“Regarding [plaintiff’s] ELCRA claim, a three-year statute of limitation applies.”); *see also* MICH. COMP. LAWS § 600.6452(1) (2024).

<sup>596</sup> MICH. COMP. LAWS § 37.2803 (2024).

<sup>597</sup> MICH. COMP. LAWS § 600.6431; *Christie v. Wayne State Univ.*, 993 N.W.2d 203, 209 (Mich. 2023).

<sup>598</sup> MICH. COMP. LAWS § 600.6431(4).

<sup>599</sup> *Id.* §§ 37.2801, 37.2802.

<sup>600</sup> *Id.* § 37.2801 (“An action . . . may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.”).

<sup>601</sup> *E.g., Reyes v. Univ. of Mich.*, No. 324124, 2016 WL 515139, at \*3 (Mich. Ct. App. Feb. 9, 2016) (plaintiff brought claims in circuit court and Court of Claims, which were consolidated in the former, and in federal court); *Emeagwali v. Univ. of Mich. Bd. of Regents*, No. 209841, 1999 WL 33433560, at \*2 n.1 (Mich. Ct. App. Oct. 29, 1999) (plaintiff brought claims in circuit court and Court of Claims, which were consolidated in the former).

## Minnesota

### State Constitutional Equal Protection Claims, Minn. Const. art. I, § 2<sup>602</sup>

#### Potential Defendants

State action is necessary to implicate this amendment;<sup>603</sup> the analysis is implied by case law to be contiguous with the state action requirements of the federal 14<sup>th</sup> Amendment.<sup>604</sup> The Minnesota courts have entertained claims for injunctive relief under this provision.<sup>605</sup>

#### Bases of Discrimination

Race,<sup>606</sup> color, national origin, sex, and gender identity.<sup>607</sup>

#### Available Damages

N/A.

#### Damages Cap(s)

N/A.

#### Statute of Limitations

N/A.

#### Administrative Requirements

- Administrative exhaustion: not required.

#### Fee-Shifting

N/A

#### Jurisdictional Issues

N/A.

### State Constitutional Education Discrimination Claims, MINN. CONST. art. 13, § 1

This provision titled “Uniform System of Public Schools” provides for the establishment and funding of a system of public schools in Minnesota.<sup>608</sup>

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<sup>602</sup> MINN. CONST. art. 1, § 2. (“No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.”).

<sup>603</sup> *Unborn Child v. Evans*, 310 Minn. 197, 202–03, 245 N.W.2d 600 (1976); *Claude v. Collins*, 507 N.W.2d 452, 457 (Minn. Ct. App. 1993), *rev’d*, 518 N.W.2d 836 (Minn. 1994).

<sup>604</sup> *State v. Johnson*, 813 N.W.2d 1, 11 (Minn. 2012) (“Both clauses have been analyzed under the same principles.”).

<sup>605</sup> *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020)

<sup>606</sup> *Cruz-Guzman v. State*, 980 N.W.2d 816 (Minn. Ct. App. 2022), *remanded to 998 N.W.2d 262* (Minn. 2023).

<sup>607</sup> *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020) (applying intermediate scrutiny to equal protection claims related to a transgender high-schooler plaintiff’s claims of gender discrimination).

<sup>608</sup> MINN. CONST. art. XIII, § 1.

## Potential Defendants

School districts<sup>609</sup> and state of Minnesota.<sup>610</sup>

## Bases of Discrimination

No explicit categories, however, discrimination that interferes with the ability of individual students to receive an education can be found to violate this provision. So far, this has been used successfully to allege claims beyond a motion to dismiss in claims involving *de jure*<sup>611</sup> and implied segregation.<sup>612</sup>

## Available Damages

Unclear; equitable relief may be the only available remedy.

## Damages Cap(s)

N/A.

## Statute of Limitations

N/A.

## Administrative Requirements

- Administrative exhaustion: not required.
- Notice of claims: not required.

## Fee-Shifting

Unclear.

## Jurisdictional Issues

N/A.

# **Minnesota Human Rights Act, Minn. Stat. Ann. § 363A.13**

## Potential Defendants

- Educational institutions, including both public and private institutions such as academies, colleges, elementary or secondary schools, extension courses, kindergartens, nurseries, school systems and a business, nursing, professional, secretarial, technical, or vocational schools. This provision also reaches the agents of educational institutions.<sup>613</sup>
- Religious institutions,<sup>614</sup> academic achievement or qualification standards, and single sex private institutions are exempted.<sup>615</sup>

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<sup>609</sup> *Sageborn v. Indep. Sch. Dist. No. 728*, 122 F. Supp. 3d 842 (D. Minn. 2015).

<sup>610</sup> *Cruz-Guzman v. State*, 916 N.W.2d 1 (Minn. 2018).

<sup>611</sup> *Id.*

<sup>612</sup> *Id.*

<sup>613</sup> MINN. STAT. ANN. § 363A.03 (West effective Aug. 1, 2024).

<sup>614</sup> *Id.* § 363A.26 (West effective Aug. 1, 2024).

<sup>615</sup> *Id.* § 363A.23 (West 2024).

## Bases of Discrimination

Race,<sup>616</sup> color, national origin,<sup>617</sup> sex,<sup>618</sup> gender identity,<sup>619</sup> marital status, and sexual orientation.<sup>620</sup> The Minnesota courts have read the Civil Rights Act's provision on education discrimination is read consistently with Title VI of the Civil Rights Act of 1964.<sup>621</sup>

## Available Damages

- *Compensatory damages (including emotional distress damages)*: available.<sup>622</sup>
- *Treble damages* available.<sup>623</sup>
- *Punitive damages*: available, but only upon clear and convincing evidence of the deliberate disregard for the rights of others.<sup>624</sup>

## Damages Cap(s)

No cap for *compensatory damages*, including emotional distress damages;<sup>625</sup> \$25,000 cap for punitive damages against political subdivisions.<sup>626</sup>

## Statute of Limitations

One year.<sup>627</sup>

## Administrative Requirements

- Administrative exhaustion: not required<sup>628</sup>.
- Notice of claim: not required.<sup>629</sup>

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<sup>616</sup> *T.B. by & through Bursch v. Indep. Sch. Dist.* 112, 620 F. Supp. 3d 818 (D. Minn. 2022); *see also K.R. by & through Proctor v. Duluth Pub. Sch. Acad.*, 591 F. Supp. 3d 418 (D. Minn. 2022); *Verrett v. Indep. Sch. Dist. #625*, CV No. 18-2513(DSD/BRT), 2019 WL 2870076 (D. Minn. July 3, 2019); *Doe v. Blake Sch.*, 310 F. Supp. 3d 969 (D. Minn. 2018).

<sup>617</sup> *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 793 (8th Cir. 2010).

<sup>618</sup> *Doe by & through Doe v. Saint Paul Conservatory for Performing Artists*, CV No. 17-5032 (DWF/FLN), 2017 WL 6389686 (D. Minn. Dec. 13, 2017).

<sup>619</sup> *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020).

<sup>620</sup> MINN. STAT. ANN. § 363A.13 (West effective July 1, 2023);

<sup>621</sup> *Verrett v. Indep. Sch. Dist. #625*, Civ. No. 18-2513 (DSD/BRT), 2019 WL 2870076, at \*4 (D. Minn. July 3, 2019) (“The MHRA is typically construed in accordance with federal precedent concerning analogous federal statutes.” (quoting *Mumid v. Abraham Lincoln High School*, 618 F.3d 789, 793 (8th Cir. 2010))); *see also Brantley By and Through Brantley v. Indep. Sch. Dist. No. 625, St. Paul Pub. Schs.*, 936 F. Supp. 649, 657 n.16 (D. Minn. 1996) (citation omitted). Courts, therefore, apply the Title VI standard to race discrimination claims brought under both Title VI and the MHRA. *See id. Bursch*, 620 F. Supp. 3d at 829.

<sup>622</sup> MINN. STAT. ANN. § 363A.33 (West effective Aug. 1, 2024).

<sup>623</sup> MINN. STAT. ANN. § 363A.33 (West effective Aug. 1, 2024).

<sup>624</sup> *Id.*; *see also* MINN. STAT. ANN. § 549.20, subd. 1(a) (West 2024)

<sup>625</sup> *Id.*

<sup>626</sup> *Id.*

<sup>627</sup> MINN. STAT. ANN. § 363A.28, subd. 3 (West effective Aug. 1, 2024).

<sup>628</sup> *See St. Martin v. City of St. Paul*, 680 F.3d 1027, 1034 (8th Cir. 2012) (“In contrast to his ADA claim, St. Martin need not exhaust his administrative remedies so long as he files an administrative charge or brings a lawsuit within one year of the alleged discrimination. MINN. STAT. § 363A.28, subd. 3 (2005). St. Martin commenced this suit in July 2009, within one year of the alleged discrimination in May 2009.”).

<sup>629</sup> *See* MINN. STAT. ANN. § 363A.28 (West effective Aug. 1, 2024) (requiring notice by commissioner in the event of administrative action, but not requiring any specific notice by the parties).

## Fee-Shifting

Available.<sup>630</sup>

## Jurisdictional Issues

This statute explicitly authorizes jurisdiction in state administrative courts (for claims filed by the commissioner)<sup>631</sup> and state district courts.<sup>632</sup> Cases have also been litigated in federal courts.<sup>633</sup>

## Notes

- Minnesota uses a ministerial versus discretionary dichotomy to determine whether state common law claims of “sovereign immunity” are applicable to an individual defendant,<sup>634</sup> and uses a policy-based approach for public institutions that essentially duplicates the previous test.<sup>635</sup>

## Mississippi

Our research has not identified any viable anti-discrimination causes of action under Mississippi law. The information below, however, may be useful in bringing common law claims on behalf of students or others.

## General Information for State Common Law Claims

### Available Damages

- *Compensatory damages*: Available.<sup>636</sup>
- *Punitive damages*: Not available against public entities.<sup>637</sup>

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<sup>630</sup> *Id.* § 363A.33 (West effective Aug. 1, 2024).

<sup>631</sup> *Id.* § 363A.29 (West effective Aug. 1, 2024).

<sup>632</sup> *Id.* § 363A.33 (West effective Aug. 1, 2024).

<sup>633</sup> See e.g., *Reyes v. Univ. of Mich.*, No. 324124, 2016 WL 515139, at \*3 (Mich. Ct. App. Feb. 9, 2016) (plaintiff brought claims in circuit court and Court of Claims, which were consolidated in the former, and in federal court); *Emeagwali v. Univ. of Mich. Bd. of Regents*, No. 209841, 1999 WL 33433560, at \*2 n.1 (Mich. Ct. App. Oct. 29, 1999) (plaintiff brought claims in circuit court and Court of Claims, which were consolidated in the former).

<sup>634</sup> *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004) (under Minnesota’s common-law doctrine of official immunity, a public official who takes action that requires “the exercise of his judgment or discretion” is generally not personally liable for damages resulting from that action. Conversely, official immunity does not protect public officials from liability arising from “the execution of ministerial, rather than discretionary, functions.”); but see *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 505 (Minn. 2006) (holding that state actors who “willful[ly] . . . violate[ ] a known right” are not protected by sovereign immunity).

<sup>635</sup> Vicarious official immunity extends to public entities if the court concludes that public policy warrants such an extension. See *Schroeder*, 708 N.W.2d at 508 (“Ultimately, the extension of vicarious official immunity is a policy question for the court.”). The courts have interpreted this broadly. As the Minnesota Supreme Court explained, “[g]enerally, if a public official is found to be immune from suit on a particular issue, his or her government employer will be vicariously immune from a suit arising from the employee’s conduct and claims against the employer are dismissed without explanation.” *Anderson*, 678 N.W.2d at 663–64; see also *Schroeder*, 708 N.W.2d at 508 (extending sovereign immunity to state entity); *Anderson*, 678 N.W.2d at 664 (same, for a claim against a school district).

<sup>636</sup> MISS. CODE ANN. § 11-46-15 (West 2024).

<sup>637</sup> *Id.*

## Damages Cap(s)

\$500,000 against public entities.<sup>638</sup>

## Statute of Limitations

One year.<sup>639</sup>

## Administrative Requirements

- Administrative exhaustion unclear.<sup>640</sup>
- Notice of claim:
  - Typically, a notice of claim for claims against the state must be filed 90 days before initiating a suit with the chief executive officer of the governmental entity, in person or by certified mail.<sup>641</sup>

## Fee-Shifting

Not available.<sup>642</sup>

## Jurisdictional Issues

Claims should probably be filed under the Mississippi Tort Claims Act alleging negligence or other tort claims against the district, as well as common law tort claims, under the anti-bullying provision.<sup>643</sup>

## Notes

- Mississippi has specific sovereign immunity protections for school employees that is codified in statute for injuries that occur during the reasonable administration of punishment and discipline, except when the action was found to be “outside the course and scope” of employment, or if the action was with “criminal intent.”<sup>644</sup> However, these protections will **not** apply if injury occurs via a student who was not properly restrained, rather than an administrator.<sup>645</sup>
  - The further doctrines of the Mississippi Tort Claims Act<sup>646</sup> does not apply to the violation of the duty imposed by the Antibullying Statute as it is a ministerial duty and the protections of the MTCA are discretionary.<sup>647</sup> The duty is imposed by the statute.

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<sup>638</sup> *Id.*

<sup>639</sup> MISS. CODE ANN. § 11-46-11(3)(a) (West 2024).

<sup>640</sup> See *Smith ex rel. Smith v. Leake Cnty. Sch. Dist.*, 195 So.3d 771, 780-81, ¶¶ 33-34 (Miss. 2016) (ruling that the issue of the administrative exhaustion was “irrelevant” because the trial court dismissed the action on other grounds than the exhaustion of administrative remedies).

<sup>641</sup> MISS. CODE ANN. § 11-46-11 (West 2024).

<sup>642</sup> MISS. CODE ANN. § 11-46-15 (West 2024).

<sup>643</sup> See *Smith*, 195 So.3d at 773-74, ¶ 4.

<sup>644</sup> See MISS. CODE ANN. § 37-11-57(1) (West effective July 1, 2019) (“The local school board shall provide any necessary legal defense to a teacher, assistant teacher, principal, or assistant principal . . . who was acting within the course and scope of his employment in any action which may be filed against such school personnel.”).

<sup>645</sup> Compare *Smith*, 195 So.3d at 780, ¶ 32, with *Pigford v. Jackson Pub. Sch. Dist.*, 910 So.2d 575 (Miss. Ct. App. 2005) (distinguishing that the injury in *Smith* was caused by another student, while the injury in *Pigford* was suffered by a student directly under the school official who was exercising control and discipline).

<sup>646</sup> MISS. CODE ANN. § 11-46-9 (West 2024).

<sup>647</sup> See *Smith*, 195 So.3d at 779, ¶ 27 (“[H]olding students to strict account for disorderly conduct and preventing acts of bullying [ ] is ministerial. And . . . Sections 37-11-67 and 37-11-69 . . . do not provide discretion as to *whether* to prevent bullying. Nor do these statutes override the ministerial statutory duty . . . to provide a safe school environment.”).

# Missouri

## Missouri Human Rights Act, MO. REV. STAT. § 213.065

The Missouri Human Rights Act prohibits discrimination in housing, employment, and places of public accommodation.

### Potential Defendants

Any place of public accommodations,<sup>648</sup> including public schools<sup>649</sup> and private schools,<sup>650</sup> as long as they are not religiously affiliated.<sup>651</sup>

### Bases of Discrimination

Race, color, national origin, ancestry, and sex.<sup>652</sup>

### Available Damages

- *Compensatory damages (including emotional distress):* available.<sup>653</sup>
- *Punitive damages:* available.<sup>654</sup>

### Damages Cap(s)

Damages cap determined by the number of individuals employed by the defendant.<sup>655</sup>

### Statute of Limitations

180 days.<sup>656</sup>

### Administrative Requirements

- Administrative exhaustion: Complainant must first file a discrimination claim with the Missouri Commission on Human Rights to “give the agency the opportunity to determine the validity of the claim, to investigate and to determine if there is probable cause.”<sup>657</sup>
  - After 180 days from the filing of the complaint with the commission, the commission is obligated to issue a letter if the commission has not completed its administrative processing. At this point, the complainant has the right to bring an action for damages or other relief against the respondent within 90 days of the letter.<sup>658</sup>
- Notice of claims: Not required.

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<sup>648</sup> MO. REV. STAT. § 213.065 (effective Aug. 28, 2017).

<sup>649</sup> Doe *ex rel.* Subia v. Kansas City, Mo. Sch. Dist., 372 S.W.3d 43, 48-49 (Mo. Ct. App. 2012).

<sup>650</sup> State *ex rel.* Washington Univ. v. Richardson, 396 S.W.3d 387, 396 (Mo. Ct. App. 2013).

<sup>651</sup> *Wirth v. Coll. of the Ozarks*, 26 F. Supp. 2d 1185, 1187 (W.D. Mo. 1998) (holding that private Christian college fell squarely within the MHRA’s religious exemption).

<sup>652</sup> MO. REV. STAT. § 213.065(1) (effective Aug. 28, 2017).

<sup>653</sup> *Id.* § 213.111(2) (effective Aug. 28, 2017); *Mo. Comm'n on Hum. Rts. v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 171 (Mo. Ct. App. 1999).

<sup>654</sup> MO. REV. STAT. § 213.111 (effective Aug. 28, 2017).

<sup>655</sup> *Id.* § 213.111(4) (effective Aug. 28, 2017).

<sup>656</sup> *Id.* § 213.111(1) (effective Aug. 28, 2017); *see also* Igoe v. Dep’t of Lab. and Indus. Rels. of State of Mo., 152 S.W.3d 284, 287 n.5 (Mo. 2005) (en banc).

<sup>657</sup> *State ex rel. Washington Univ. v. Richardson*, 396 S.W.3d 387, 396 (Mo. Ct. App. 2013) (quoting *Igoe*, 153 S.W.3d at 287).

<sup>658</sup> MO. REV. STAT. § 213.111 (effective Aug. 28, 2017); *see also* *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 90 (Mo. 2003) (en banc) (quoting *State, ex rel. Martin-Erb v. Mo. Comm'n on Hum. Rts.*, 77 S.W.3d 600 (Mo. 2002) (en banc)).

### Fee-Shifting

The court may award court costs and reasonable attorney fees to the prevailing complainant, other than a state agency, commission, or a local commission.<sup>659</sup>

### Jurisdictional Issues

School districts cannot be liable for discrimination in public accommodation in the absence of an express waiver of sovereign immunity.<sup>660</sup> Rather, the persons directly or indirectly responsible for the discriminatory practice can be held liable.<sup>661</sup>

## Montana

### State Constitutional Equal Protection Claims, MONT. CONST. art. II, § 4

Article II, Section 4 of the Montana Constitution expressly prohibits discrimination by the State or by “any person, firm, corporation, or institution” acting under color of state law on the basis of enumerated protected characteristics.<sup>662</sup>

#### Potential Defendants

Only “state action” may be challenged.<sup>663</sup>

#### Bases of Discrimination

Race, color, sex, culture, social origin or condition.<sup>664</sup>

#### Available Damages

**N/A.** No private right to damages for discrimination claims except under the Montana Human Rights Act (MHRA) (see “*Discrimination in Education*, MONT. CODE ANN. § 49-2-307” below).

#### Damages Cap(s)

N/A.

#### Statute of Limitations

Five years.<sup>665</sup>

#### Administrative Requirements

**N/A.** See below section for administrative procedure required for civil actions arising out of discrimination.

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<sup>659</sup> MO. REV. STAT. § 213.111(2) (effective Aug. 28, 2017).

<sup>660</sup> *State ex rel. Blue Springs Sch. Dist. v. Grate*, 576 S.W.3d 262, 271 (Mo. Ct. App. 2019).

<sup>661</sup> *Id.* at 267-68, 271.

<sup>662</sup> MONT. CONST. art. II, § 4.

<sup>663</sup> *Gazelka v. St. Peter's Hosp.*, 420 P.3d 528, 533 (2018) (citing MONT. CONST. art. II, § 4).

<sup>664</sup> MONT. CONST. art. II, § 4; see *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 491 (Mont. 1989).

<sup>665</sup> MONT. CODE ANN. § 27-2-231 (West 2024).

## Fee-Shifting

Plaintiffs raising constitutional challenges may seek recovery of their attorneys' fees pursuant to the private attorney general doctrine.<sup>666</sup> Courts consider three factors<sup>667</sup>:

- The strength or societal importance of the public policy vindicated by the litigation;
- The necessity for private enforcement and the magnitude of the resulting burden; and
- The number of people who benefit.

## Jurisdictional Issues

To state a meritorious equal protection claim, the plaintiff must allege and demonstrate that the State is responsible for discrimination against the plaintiff "on account of race, color, sex, culture, social origin or condition."<sup>668</sup>

## **State Constitution Equality of Educational Opportunity, MONT. CONST. art. X, § 1**

Article X, Section 1 of the Montana Constitution recognizes the right to public education as a civil right. Section 1(1) guarantees "[e]quality of educational opportunity . . . to each person of the state."<sup>669</sup> This includes the right to participate in extracurricular activities.<sup>670</sup>

### Potential Defendants

Only "state action" may be challenged. This constitutional provision applies to all three branches of government, whether at the state, local, or school district level.<sup>671</sup>

### Bases of Discrimination

Not enumerated in the constitutional provision, presumably includes race, sex and social origin or condition.<sup>672</sup>

### Available Damages

**N/A.** No private cause of action for damages for discrimination claims except under the MHRA (see "*Discrimination in Education, MONT. CODE ANN. § 49-2-307*" below). Claims for injunctive relief may be brought.<sup>673</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

Five years.

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<sup>666</sup> W. Tradition P'ship, Inc. v. Mont. A.G., 291 P.3d 545,549 (Mont. 2012).

<sup>667</sup> *Id.* (citing [Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs](#), 989 P.2d 800, 811-12, ¶ 66 (Mont. 1999)).

<sup>668</sup> *Gazelka*, 420 P.3d at 533.

<sup>669</sup> MONT. CONST. art. X, § 1(1).

<sup>670</sup> *Moran v. Sch. Dist. #7, Yellowstone Cnty.*, 350 F. Supp. 1180, 1184 (D. Mont. 1972) ("[T]he present Montana Supreme Court has recognized the importance of extracurricular activities as an integral part of the total education process.").

<sup>671</sup> *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989).

<sup>672</sup> See MONT. CONST. art. II, § 4.

<sup>673</sup> See *Moran*, 350 F. Supp. at 1187.

## Administrative Requirements

**N/A.** See below section for administrative procedure required for civil actions arising out of discrimination.

## Fee-Shifting

As explained above, Plaintiffs raising constitutional challenges may seek recovery of their attorneys' fees pursuant to the private attorney general doctrine. Courts consider three factor:

- The strength or societal importance of the public policy vindicated by the litigation;
- The necessity for private enforcement and the magnitude of the resulting burden; and
- The number of people who benefit.

## Jurisdictional Issues

Constitutional standing may be established by showing that plaintiffs are intended beneficiaries of this article (e.g., that they are part of the public school system and that a policy or legislation deprives them of equal educational opportunity).<sup>674</sup>

## **Montana Human Rights Act (“MHRA”), MONT. CODE ANN. § 49-2-307**

- This provision of the MHRA enumerates practices by educational institutions that would constitute unlawful discriminatory practices.<sup>675</sup>
- Under Subsection 2, added in 2023, it is **not** an unlawful discriminatory practice for a student to deadname another student who is trans or to intentionally and repeatedly address them by the wrong pronouns.<sup>676</sup> However, by its plain language, this subsection only covers students and not teachers, staff or other school employees.<sup>677</sup>

## Potential Defendants

- A public or private institution; academy; college; elementary or secondary school; extension course; kindergarten; nursery; school system; university; business, nursing, professional, secretarial, technical, or vocational school; or agent of an educational institution.<sup>678</sup>
- Although the Montana Constitution waives sovereign immunity for government entities in civil suits for injury to person or property,<sup>679</sup> a statute provides sovereign immunity from suits for damages arising out of legislative acts or omissions<sup>680</sup> (which is defined to include actions by a school board that result in the adoption of school board policies).<sup>681</sup>

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<sup>674</sup> See Order on Cross-Motions for Summary Judgment, Steve Barrett v. State of Mont., No. DV-21-581B, at \*3 (Mont. 18th Jud. Dist. Ct. Sept. 14, 2022), <https://apps.montanafreepress.org/montana-legislature-lawsuit-tracker/filings/18-DV-21-0581/2022-09-14-order.pdf>.

<sup>675</sup> MONT. CODE ANN. § 49-2-307 (West effective Apr. 25, 2023).

<sup>676</sup> *Id.*

<sup>677</sup> *Id.*

<sup>678</sup> MONT. CODE ANN. § 49-2-101(9) (West effective Oct. 1, 2023).

<sup>679</sup> MONT. CONST. art. II, § 18.

<sup>680</sup> MONT. CODE ANN. § 2-9-111 (West 2024).

<sup>681</sup> See *id.* § 20-3-323 (West effective July 1, 2023).

## Bases of Discrimination

Race, sex, color and national origin.<sup>682</sup>

## Available Damages

- *Compensatory damages* (including emotional distress damages): May be available in both administrative proceedings before the Montana Human Rights Commission (HRC) and in civil actions compliant with required administrative exhaustion.<sup>683</sup>
- *Punitive damages*: Unavailable for discrimination claims other than housing discrimination claims.<sup>684</sup>

## Damages Cap(s)

- The HRC may assess a civil penalty if it finds that a party against whom a complaint was filed engaged in the discriminatory practice alleged.<sup>685</sup> The only limitation in the statute is that the penalty must be “reasonable.”<sup>686</sup>
- For civil actions in which sovereign immunity is waived, public entities or public employees cannot be held liable for an amount greater than \$750,000 for each claim and \$1.5 million for each occurrence.<sup>687</sup>

## Statute of Limitations

180 days from the alleged discriminatory practice occurred or was discovered.<sup>688</sup>

- Note: If the HRC issues a notice of dismissal, a civil action must be brought within 90 days or the claim is barred.<sup>689</sup>

## Administrative Requirements

- Administrative exhaustion: A plaintiff must bring a claim before the HRC before filing a lawsuit.<sup>690</sup>
  - The HRC has 12 months to hold a contested case hearing before a case may be filed in district court.
  - Within 90 days after the department has issued a notice of dismissal, the charging party may commence a civil action in the district court in the district in which the alleged violation occurred.<sup>691</sup>
- Notice of claims: No separate notice of claims is required.

## Fee-Shifting

For civil actions in compliance with the required administrative procedures, the court may in its discretion allow the prevailing party reasonable attorney fees and costs.<sup>692</sup>

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<sup>682</sup> *Id.* § 49-2-307 (West effective Apr. 25, 2023).

<sup>683</sup> *Id.* §§ 49-2-506(1)(b), 512(3) (West 2024).

<sup>684</sup> *Id.* § 49-2-506(2) (West 2024).

<sup>685</sup> *Id.* § 49-2-506(1) (West 2024).

<sup>686</sup> *Id.* § 49-2-506(1)(b) (West 2024).

<sup>687</sup> *Id.* § 2-9-108(1) (West 2024).

<sup>688</sup> *Id.* § 49-2-501(4)(a) (West 2024).

<sup>689</sup> *Id.* § 49-2-512(3) (West 2024).

<sup>690</sup> See *Stricker v. Blaine Cnty.*, 538 P.3d 394, 400 (Mont. 2023); *Dupuis v. Bd. of Trs.*, 128 P.3d 1010, 1013 (Mont. 2006).

<sup>691</sup> MONT. CODE ANN. § 49-2-512(3) (West 2024).

<sup>692</sup> *Id.*

## Jurisdictional Issues

If a plaintiff's state torts claim arises from allegations of racial or sexual discrimination or harassment, then the MHRA's exclusive remedy provision controls.<sup>693</sup>

# Nebraska

## State Constitutional Equal Protection Claims, Neb. Const. art. I, § 3.

### Potential Defendants

- *Directly*: School districts and the state board of education, among other potential government actors.<sup>694</sup>
- *Through Neb. Rev. Stat. Ann. § 20-148*: “Any person or company, . . . except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by . . . the Constitution and laws of the State of Nebraska . . . .”<sup>695</sup>
  - Political subdivisions include villages, cities, counties, school districts, community colleges, “and all other units of local government.”<sup>696</sup>
  - This statute “does not reach individuals acting in their capacities as public officials.”<sup>697</sup>
  - Nebraska courts have interpreted the statute to be limited to “private acts of discrimination by private employers, thus excluding the state.”<sup>698</sup>

### Bases of Discrimination

Race, national origin, sex.<sup>699</sup>

### Available Damages

Compensatory damages available for suits under Neb. Rev. Stat. Ann. § 20-148.

### Damages Cap(s)

N/A.

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<sup>693</sup> *Johnson v. Dodson Pub. Schs., Dist. No. 2-A(C)*, 463 F. Supp. 2d 1151, 1159 (D. Mont. 2006) (holding that the MHRA's exclusive remedy provision controlled over a state law assault-and-battery claim against a schoolteacher who forced a fourth-grade Native American student to stand in the corner with his hands bound behind his back and duct tape over his mouth, and who allegedly also hit him in the back of the head on another occasion).

<sup>694</sup> Nebraska case law does not define “the state” for the purposes of its equal-protection provision, but plaintiffs have successfully sued a school district and the state board of education. *See, e.g., Citizens of Decatur for Equal Educ. v. Lyons-Decatur Sch. Dist.*, 739 N.W.2d 742, 762 (Neb. 2007) (assessing a claim for violation of the Equal Protection Clause against a school district on the merits); *Sch. Dist. No. 8 of Sherman Cnty. v. State Bd. of Ed.*, 127 N.W.2d 458 (Neb. 1964) (stating a claim for violation of the Due Process Clause (of the same constitutional provision) against the state board of education); *see also* *See, e.g., Citizens of Decatur for Equal Educ.*, 739 N.W.2d at 749-50 (seeking injunctive relief).

<sup>695</sup> NEB. REV. STAT. ANN. § 20-148 (2024).

<sup>696</sup> *Id.* § 13-1612.

<sup>697</sup> *Anderson v. Nebraska*, No. 4:17-CV-3073, 2018 WL 4599832, at \*7 (D. Neb. Sept. 25, 2018) (collecting cases).

<sup>698</sup> *Wiseman v. Keller*, 358 N.W.2d 768, 771 (1984); *see also Sinn v. City of Seward*, 423 N.W.2d 39, 50 (Neb. Ct. App. 1994) (relying on *Wiseman*); *Buzek v. Pawnee Cnty.*, 207 F.Supp.2d 961, 965 & n.3 (D. Neb. 2002).

<sup>699</sup> “The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.” *Citizens of Decatur for Equal Educ.*, 739 N.W.2d at 762.

## Statute of Limitations

Two years.<sup>700</sup>

## Administrative Requirements

- Administrative exhaustion not required.<sup>701</sup>
- Notice of claim not required.<sup>702</sup>

## Fee-Shifting

N/A.<sup>703</sup>

# State Constitutional Discrimination Claims, Neb. Const. art. I, § 30

## Potential Defendants

- *Directly*:
  - Public institutions of higher education, public schools, school agencies, boards of education, school districts, the Nebraska Department of Education,<sup>704</sup> cities, counties, school districts, and community colleges.<sup>705</sup>
  - Individual defendants<sup>706</sup> and the Board of Regents of the University of Nebraska<sup>707</sup> are not directly liable under this provision.
- *Through* *Neb. Rev. Stat. Ann. § 13-1612*: “Any person or company . . . who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by . . . the Constitution and laws of the State of Nebraska . . . ”<sup>708</sup>
  - This provision “does not reach individuals acting in their capacities as public officials.”<sup>709</sup>

## Bases of Discrimination

Race, color, national origin, ethnicity, sex.<sup>710</sup>

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<sup>700</sup> NEB. REV. STAT. ANN. § 25-218 (2024) (“Every claim and demand against the state shall be forever barred unless action is brought thereon within two years after the claim arose.”).

<sup>701</sup> Nebraska equal-protection jurisprudence only requires exhaustion for habeas corpus claims and in the due process context. *See, e.g., Wagner v. Campbell*, No. 4:13CV3006, 2013 WL 12121993, at \*5 n.7, \*7 (D. Neb. June 19, 2013) (explaining that the similarity of the Nebraska constitution to the federal constitution means “there is no need to analyze the [state constitutional claim] separately” and that the exhaustion requirement applies only in procedural due process cases).

<sup>702</sup> While Equal Protection Claims don’t require a notice of claims, such a notice is required for tort claims against state entities. *See* NEB. REV. STAT. ANN. § 13-919.

<sup>703</sup> Attorneys’ fees are only available to private plaintiffs for claims brought under the state Administrative Procedure Act or for damages claims brought for \$4,000 or less. NEB. REV. STAT. ANN. § 25-1803(1). Because damages claims are not available under the Nebraska constitution’s Equal Protection Clause, attorneys’ fees are also unavailable.

<sup>704</sup> NEB. CONST. art. I, § 30(6).

<sup>705</sup> *Id.* § 30(6)(d) (including “any political subdivision of or within the state”); NEB. REV. STAT. ANN. § 13-612 (2024) (defining “political subdivision”).

<sup>706</sup> *Libault v. Mamo*, No. 4:22-CV-3096, 2023 WL 3011259, at \*13 (D. Neb. Mar. 20, 2023) (“[I]ndividual defendants cannot be liable under Article I § 30 of the Nebraska Constitution because the provision applies to Nebraska state entities, not individuals.”).

<sup>707</sup> *Id.* at \*12-13 (holding constitutional discrimination claim not directly available against the Nebraska Board of Regents).

<sup>708</sup> NEB. REV. STAT. ANN. § 20-148 (2024).

<sup>709</sup> *Anderson v. Nebraska*, No. 4:17-CV-3073, 2018 WL 4599832, at \*7 (D. Neb. Sept. 25, 2018) (collecting cases).

<sup>710</sup> NEB. CONST. art. I, § 30(1).

## Available Damages

- *Compensatory damages (including emotional distress damages):* presumptively available.
  - This provision incorporates the remedies “otherwise available for violations of Nebraska’s antidiscrimination law.”<sup>711</sup> Under Nebraska’s Fair Employment Practice Act—which is a state antidiscrimination law—compensatory damages, including emotional distress damages, are available.<sup>712</sup>
- *Punitive damages:* not available.<sup>713</sup>

## Damages Cap(s)

None.<sup>714</sup>

## Statute of Limitations

Two years.<sup>715</sup>

## Administrative Requirements

- Administrative exhaustion not required.<sup>716</sup>
- Notice of claim not required.<sup>717</sup>

## Fee-Shifting

If the lawsuit against the state is for \$4,000 in damages or less, the prevailing party’s attorneys are entitled to fees of \$10 plus 10% of the judgment between \$50 and \$4,000.<sup>718</sup>

## Other

- “Nothing in this section prohibits bona fide qualifications based on sex that are reasonably necessary to the normal operation of . . . public education . . . .”<sup>719</sup>

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<sup>711</sup> *Id.* § 30(7) (“The remedies available for violations of this section shall be the same, regardless of the injured party’s race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Nebraska’s antidiscrimination law.”).

<sup>712</sup> See NEB. REV. STAT. ANN. § 48-1119 (2023) (“[A]ny successful complainant [under the Nebraska Fair Employment Practice Act] shall be entitled to appropriate relief, including temporary or permanent injunctive relief, general and special damages, reasonable attorney’s fees, and costs.”); *see also* Pedersen v. Casey’s Gen. Stores, Inc., 978 F. Supp. 926, 935 (D. Neb. 1997) (in Nebraska Fair Employment Practice Act case, awarding plaintiff \$25,076.51 in back pay, \$7,411.17 in front pay, and \$10,000 in “emotional suffering and related damages”).

<sup>713</sup> Punitive damages are unconstitutional under the Nebraska Constitution. *See* Miller v. Kingsley, 230 N.W.2d 472 (Neb. 1975).

<sup>714</sup> *See* McDonald Plosser, *United States: Sky’s The Limit? A 50-State Survey Of Damages Caps And The Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule> (explaining that in Nebraska “there is no general cap on compensatory damages (except in medical malpractice cases”); *Pain and Suffering Damages in Nebraska*, FINDLAW (Dec. 11, 2018) (“Nebraska doesn’t cap pain and suffering, or even non-economic damages generally, in all cases. However, in a subset of cases, there is an outright cap on all damages, economic and non-economic: medical malpractice claims.”).

<sup>715</sup> NEB. REV. STAT. ANN. § 25-218 (2023) (“Every claim and demand against the state shall be forever barred unless action is brought thereon within two years after the claim arose.”); *but see* Olson v. City of Atkinson, No. 4:18-CV-3017, 2018 WL 6421723, at \*2 (D. Neb. Dec. 6, 2018) (applying the four-year statute of limitations under NEB. REV. STAT. ANN. § 25-212 (2024) to claims brought under NEB. CONST. art. I, § 30 against a city); *id.* at \*3 (“Olson’s federal constitutional claims are time-barred. The same reasoning applies to Olson’s state constitutional claim.”).

<sup>716</sup> NEB. CONST. art. I, § 30(8).

<sup>717</sup> Only the Political Subdivisions Tort Claims Act requires a notice of claim. NEB. REV. STAT. ANN. § 13-919 (2023).

<sup>718</sup> NEB. REV. STAT. ANN. § 25-1801(3) (2024).

<sup>719</sup> NEB. CONST. art. I, § 30(3).

# Nebraska Equal Opportunity in Education Act, Neb. Rev. Stat. Ann. § 79-2(l)

## Potential Defendants

- *Directly*: Public schools (including preschools, elementary schools, and secondary schools), educational service units, and the State Department of Education.<sup>720</sup>
- *Through* *Neb. Rev. Stat. Ann. § 13-1612*: “Any person or company, . . . except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by . . . the Constitution and laws of the State of Nebraska . . .”<sup>721</sup>
  - Political subdivisions include villages, cities, counties, school districts, community colleges, “and all other units of local government.”<sup>722</sup>
  - This provision “does not reach individuals acting in their capacities as public officials.”<sup>723</sup>

## Bases of Discrimination

Sex.<sup>724</sup> The act clarifies that “[t]he application of any rule which discriminates on the basis of (a) the pregnancy of any person, (b) the marital status of any person, or (c) the condition of being a parent” is included in the practices barred by its sex-discrimination prohibition.<sup>725</sup>

## Available Damages

- *Compensatory damages* (potentially including emotional distress damages): available.
  - Compensatory damages writ large are available under the statute.<sup>726</sup> Nebraska courts have not addressed the specific question of whether emotional distress damages are available under this act, but other Nebraska case law indicates that damages for pain and suffering are considered part of compensatory damages in analogous tort and employment discrimination actions.<sup>727</sup>

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<sup>720</sup> NEB. REV. STAT. ANN. § 79-2,115(1) (2024) (defining “educational institution”); *id.* § 79-2,116 (“The Legislature finds and declares that it shall be an unfair or discriminatory practice for any educational institution to discriminate on the basis of sex in any program or activity.”).

<sup>721</sup> *Id.* § 20-148.

<sup>722</sup> *Id.* § 13-1612.

<sup>723</sup> *Anderson v. Nebraska*, No. 4:17-CV-3073, 2018 WL 4599832, at \*7 (D. Neb. Sept. 25, 2018) (collecting cases).

<sup>724</sup> *Id.* § 79-2,116.

<sup>725</sup> *Id.* § 79-2,116(4).

<sup>726</sup> *Id.* § 79,120 (specifying that, post-disposition from the governing board, the claimant may file a complaint “for equitable relief and compensatory money damages” in court).

<sup>727</sup> See, e.g., *Kant v. Altayar*, N.W.2d 537, 540 (Neb. 2005) (“The victim of a battery may recover *compensatory damages, including pain and suffering*, determined by the nature of the injury.”) (emphasis added); *Lacey v. State ex rel. Nebraska Dep’t of Corr. Servs.*, 768 N.W.2d 132, 136, 139 (Neb. 2009) (affirming jury award of “\$0 for lost wages and benefits and \$60,000 for other compensatory damages” in case alleging “sexual harassment, retaliatory discharge, and retaliatory failure to hire” as violations of the Nebraska Fair Employment Practice Act and Title VII); *Nelson-Holst v. Iverson*, 479 N.W.2d 759, 762 (Neb. 1992) (“We have held that [t]he measure of recovery in a case of assault and battery is limited to compensatory damages. Such damages include the nature of the injuries, and pain and suffering.”) (internal citations omitted)); cf. *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 80 (Neb. 2003) (Gerrard, J., concurring) (“There are two separate types of compensatory damages, economic and noneconomic. . . . Noneconomic losses include claims for pain and suffering, mental anguish, injury and disfigurement not affecting earning capacity, and losses which cannot be easily expressed in dollars and cents.”) (collecting cases)).

- *Punitive damages:* unavailable.<sup>728</sup>

## Damages Cap(s)

None.<sup>729</sup>

## Statute of Limitations

- *If the governing board disposes of the complaint:* **180 days** after the disposition.<sup>730</sup>
- *If the governing board fails to dispose of the complaint within 180 days:* **Two years** after the filing of the complaint.<sup>731</sup>

## Administrative Requirements

- **Administrative exhaustion required within 180 days.**<sup>732</sup> Plaintiffs have 180 days after the alleged violation to file a complaint with the governing board of the educational institution committing the violation.<sup>733</sup> The “governing board” is “the duly constituted board of any public school system of elementary or secondary schools, any educational service unit board, [or] the State Board of Education.”<sup>734</sup> “The governing board may take such action as may be necessary to correct such violation,” including terminating the practice/policy alleged to constitute the violation and/or awarding compensatory monetary damages.<sup>735</sup> The governing board must dispose of the complaint and notify the claimant of its finding,<sup>736</sup> at which point the claimant may accept the disposition (within 60 days of receipt)<sup>737</sup> or file a complaint “in the district court of the judicial district where such educational institution is located” for “compensatory monetary damages” within 180 days.<sup>738</sup> (If the governing board fails to dispose of the complaint within 180 days of filing, the claimant may proceed with filing this complaint in court within 2 years of the initial complaint).<sup>739</sup>
- Notice of claim not required.<sup>740</sup>

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<sup>728</sup> Nebraska has declared punitive damages to be unconstitutional. *See* *Miller v. Kingsley*, 230 N.W.2d 472 (Neb. 1975).

<sup>729</sup> *See McDonald Plosser, United States: Sky's The Limit? A 50-State Survey Of Damages Caps And The Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule> (explaining that in Nebraska “there is no general cap on compensatory damages (except in medical malpractice cases”); *Pain and Suffering Damages in Nebraska*, FINDLAW (Dec. 11, 2018) (“Nebraska doesn’t cap pain and suffering, or even non-economic damages generally, in all cases. However, in a subset of cases, there is an outright cap on all damages, economic and non-economic: medical malpractice claims.”).

<sup>730</sup> NEB. REV. STAT. ANN. § 79-2,120.

<sup>731</sup> *Id.* § 79-2,121.

<sup>732</sup> *Id.* § 79-2,122 (“No original action asserting a violation of the Nebraska Equal Opportunity in Education Act may be filed in any district court unless a complaint asserting such violation is first filed with the governing board of the educational institution committing such discriminatory act or practice and disposed of or withdrawn as provided in the act.”).

<sup>733</sup> *Id.* § 79-2,118(1).

<sup>734</sup> *Id.* § 79-2,115(2).

<sup>735</sup> *Id.* § 79-2,118(2).

<sup>736</sup> *Id.* § 79-2,118(3).

<sup>737</sup> *Id.* § 79-2,119.

<sup>738</sup> *Id.* § 79-2,120.

<sup>739</sup> *Id.* § 79-2,121.

<sup>740</sup> Only the Political Subdivisions Tort Claims Act requires a notice of claim to be filed. *Id.* § 13-919 (2023).

## Fee-Shifting

If the lawsuit is for \$4,000 in damages or less, the prevailing party's attorneys are entitled to fees of \$10 plus 10% of the judgment between \$50 and \$4,000.<sup>741</sup>

## Other

- The act exempts “athletic programs” from the programs and activities wherein exclusion is prohibited,<sup>742</sup> although it prohibits the “[d]enial of comparable opportunity in intramural and interscholastic athletic programs.”<sup>743</sup>
- “The Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes.”<sup>744</sup>

## Nevada

### **State Constitutional Equal Protection Claims, NEV. CONST. art. I, § 24**

#### Potential Defendants

- This provision states that “[E]quality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of . . .”<sup>745</sup>
- A “political subdivision” includes “a school district, the governing body of a charter school, any other special district that performs a governmental function, even though it does not exercise general governmental powers, and the governing body of a university school for profoundly gifted pupils.”<sup>746</sup>

#### Bases of Discrimination

Race, color, sex, sexual orientation, gender identity or expression, ancestry or national origin.<sup>747</sup>

#### Available Damages

Potentially.

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<sup>741</sup>*Id.* § 25-1801(3).

<sup>742</sup>*Id.* § 79-2,116(1).

<sup>743</sup>*Id.* § 79-2,116(2).

<sup>744</sup>*Id.* § 79-2,124.

<sup>745</sup> NEV. CONST. art. I, § 24.

<sup>746</sup> NEV. REV. STAT. ANN. § 41.0305 (West effective June 3, 2019).

<sup>747</sup> NEV. CONST. art. I, § 24.

- In *Mack v. Williams*,<sup>748</sup> the Supreme Court of Nevada stated that self-executing<sup>749</sup> provisions of the Nevada Constitution “contain[] a private cause of action to enforce its proscription, regardless of any affirmative legislative authorization.”<sup>750</sup>
- If the self-executing hurdle has been met, *Mack v. Williams* creates a three-step framework for whether monetary damages is an appropriate remedy for violations of self-executing provisions of the Nevada Constitution.<sup>751</sup>

## Damages Cap(s)

Unknown.<sup>752</sup>

## Statute of Limitations

Two years.<sup>753</sup>

## Administrative Requirements

- Administrative exhaustion: not required.<sup>754</sup>
- Notice requirements:
  - A summons and copy of the complaint must be served upon (i) the Attorney General within two years<sup>755</sup> and (ii) the person serving in the office of administrative head of the named agency.<sup>756</sup>

## Fee-Shifting

Not Available.<sup>757</sup>

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<sup>748</sup> *Mack v. Williams*, 522 P.3d 434 (Nev. 2022).

<sup>749</sup> *Id.* at 442 (explaining that self-executing language “imposes ‘a limitation,’ as opposed to ‘an affirmative obligation,’ on a state actor’s ‘power to act,’ rendering this provision prohibitory.” (quoting *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989)); *See also* Austin Barnum, *What Landmark Ruling Means for Civil Rights Suits in Nevada*, LAW360 (Feb. 24, 2023, 5:48 PM), <https://www.law360.com/articles/1579441/what-landmark-ruling-means-for-civil-rights-suits-in-nevada> (discussing which provisions in the Nevada Constitution may or may not contain prohibitive language making them self-executing).

<sup>750</sup> *Mack*, 522 P.3d at 442.

<sup>751</sup> *Id.* at 445.

<sup>752</sup> NEV. REV. STAT. ANN. § 41.035 (West effective July 1, 2022) states that “an action sounding in tort” is capped at \$200,000. However, whether a constitutional violation sounds in tort has not been decided. *See Mack*, 522 P.3d at 449 n.8 (quoting *Echeverria v. State*, 495 P.3d 471, 491 n.6 (Nev. 2021)) (“While this matter does not present the need to reach whether the damages action we recognize today falls within the statutory cap’s ambit, we observe that the issue of whether such an action ‘sound[s] in tort has the potential to affect the extent of the State’s [damages] liability.’”).

<sup>753</sup> While this issue has not been addressed for state constitutional violations, most Nevada tort actions have a two-year statute of limitations. *See* NEV. REV. STAT. ANN. § 11.190(4)(e) (West effective July 1, 2023). Courts have also deemed that other civil rights violations are capped at two years; *See generally Perez v. Seavers*, 869 F.2d 425, 426 (9th Cir. 1989) (“Under the applicable Nevada statute of limitations, [plaintiff] had two years within which to commence his section 1983 claim.”); *Ward v. State, Dep’t of Corrs.*, 129 Nev. 1160, 2013 WL 5373727, at \*1 (2013) (affirming that a section 1983 civil rights action would have a two-year statute of limitations).

<sup>754</sup> NEV. REV. STAT. ANN. § 41.036(1)–(2) (West 2024).

<sup>755</sup> *Id.*

<sup>756</sup> *Id.* § 41.031(2)(b) (West 2024).

<sup>757</sup> While there is no case on point, “Nevada follows the American rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing such award.” *Thomas v. City of N. Las Vegas*, 127 P.3d 1057, 1063 (Nev. 2006). Since this is a judicially created cause of action, there is not a statute that authorizes attorney fees for it.

## Jurisdictional Issues

When the action is against the State of Nevada or any political subdivision, it “must be filed in the county where the cause or some part thereof arose or in Carson City.”<sup>758</sup>

## Notes

- This provision of the Nevada constitution was ratified in 2022. As such, there is very limited case law flowing from this provision.
- If an action is against the State of Nevada or any political subdivision, it must be brought in the “name of the State of Nevada on relation of the particular department, commission, board or any other agency of the State whose actions are the basis for the suit.”<sup>759</sup>

## Public Accommodation Statute, NEV. REV. STAT. ANN. § 651.070<sup>760</sup>

### Potential Defendants

Any place considered a public accommodation including “[a]ny nursery, private school or university or other place of education.”<sup>761</sup>

### Bases of Discrimination

Race, color, national origin, sexual orientation, sex or gender identity or expression.<sup>762</sup>

### Available Damages

- *Compensatory damages:* available.<sup>763</sup>
  - Emotional distress damages: Likely available if the plaintiff can “present evidence of a[ ] physical manifestation of emotional distress.”<sup>764</sup>
- *Punitive damages:* Unclear.<sup>765</sup>

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<sup>758</sup> NEV. REV. STAT. ANN. § 41.031(2) (West 2024).

<sup>759</sup> *Id.*

<sup>760</sup> While this statute seems to be primarily aimed at disability discrimination, it is written broadly and could possibly be used for gender and racial discrimination claims; *See A Title IX for Nevada: Increasing Protections Against Discriminatory Harassment and Improving Processes in K-12 and Higher Education*, NEVADA COALITION TO END DOMESTIC AND SEXUAL VIOLENCE, [https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=38699&fileDownloadName=SenLOE710%20SB332%20Title%20IX%20for%20NV\\_Sara%20Adler\\_Principal%20Silver%20State%20Gov%20Relations.pdf](https://www.leg.state.nv.us/App/NELIS/REL/80th2019/ExhibitDocument/OpenExhibitDocument?exhibitId=38699&fileDownloadName=SenLOE710%20SB332%20Title%20IX%20for%20NV_Sara%20Adler_Principal%20Silver%20State%20Gov%20Relations.pdf) (suggesting NEV. REV. STAT. ANN. § 651.070 could help prevent discriminatory harassment).

<sup>761</sup> NEV. REV. STAT. ANN. § 651.050(4)(k) (West effective Oct. 1, 2021); *see also Clark Cnty. Sch. Dist. v. Buchanan*, 924 P.2d 716, 719 (Nev. 1996) (concluding that a public elementary school was a place of public accommodation).

<sup>762</sup> NEV. REV. STAT. ANN. § 651.070 (West effective Oct. 1, 2011).

<sup>763</sup> *Id.* § 651.090(1); *See also Davis v. Beling*, 278 P.3d 501, 505, 514 (Nev. 2012) (concluding that actual damages are synonymous with compensatory damages and that in some cases, compensatory damages includes consequential damages).

<sup>764</sup> *Betsinger v. D.R. Horton, Inc.*, 232 P.3d 433, 434 (Nev. 2010). Nevada courts have not reached the question of whether emotional distress damages are available for violations of this statute. That said, where other Nevada laws permit recovery of compensatory damages, plaintiffs can recover emotional distress damages if there was some physical manifestation of the emotional distress. *Id.*; *see also Borenstein v. Animal Found.*, 526 F. Supp. 3d 820, 833 (D. Nev. 2021) (showing where the plaintiff filed a § 651.090 claim and intentional infliction of emotional distress claim simultaneously).

<sup>765</sup> It is unclear whether punitive damages are available for claims stemming from sex and race discrimination. *See* NEV. REV. STAT. ANN. § 651.090 (West 2024) (neither expressly permitting nor disallowing punitive damages). *Cf. Id.* § 651.075(8)(b) (West effective Oct. 1, 2015) (expressly permitting punitive damages for certain types of disability discrimination). However, the statute permits courts to “[g]rant any equitable relief it considers appropriate.” *Id.* § 651.090(2)(a) (West 2024). Regardless, for state actors, punitive damages are prohibited. *Id.* § 41.035(1) (West effective July 1, 2022).

## Damages Cap(s)

- No cap for compensatory damages for a nonstate actor.<sup>766</sup>
- \$200,000 for state actors.<sup>767</sup>

## Statute of Limitations

One year.<sup>768</sup>

## Administrative Requirements

- Administrative exhaustion: no known requirement.<sup>769</sup>
- Notice requirements:
  - A summons and copy of the complaint must be served upon (i) the Attorney General within two years<sup>770</sup> and (ii) the person serving in the office of administrative head of the named agency.<sup>771</sup>

## Fee-Shifting

Available.<sup>772</sup>

## Jurisdictional Issues

- As explained above, if the action is against the State of Nevada or any political subdivision, “must be filed in the county where the cause or some part thereof arose or in Carson City.”<sup>773</sup> In terms of the format for filing, the complaint must be brought in the “name of the State of Nevada on relation of the particular department, commission, board or any other agency of the State whose actions are the basis for the suit.”<sup>774</sup>
- If the action is against a private party, it must be brought “in a court in and for the county in which the infringement . . . occurred or in which the defendant resides.”<sup>775</sup>

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<sup>766</sup> See *Guaranty Nat'l Ins. Co. v. Potter*, 912 P.2d 267, 272 (Nev. 1996) (quoting *Miller v. Schnitzer*, 371 P.2d 824, 828 (Nev. 1962)) (“Generally, this court will affirm an award of compensatory damages unless the award is so excessive that it appears to have been ‘given under the influence of passion or prejudice.’”).

<sup>767</sup> NEV. REV. STAT. ANN. § 41.035(1) (West effective July 1, 2022); See also Cnty. of Clark *ex rel.* Univ. Med. Ctr. v. Upchurch, 961 P.2d 754, 761 (Nev. 1998) (clarifying that the statutory damage limitation is for each cause of action).

<sup>768</sup> NEV. REV. STAT. ANN. § 651.120 (West 2024). However, the limitation is tolled during the pendency of a complaint before the Nevada Equal Rights Commission. *Id.*

<sup>769</sup> While NEV. REV. STAT. ANN. § 651.110 (West effective Oct. 1, 2021) states that a person *may* file a claim with the Nevada Equal Rights Commission, it doesn’t state in § 651.090 (West 2024) that it is required prior to filing a civil action. Cf. *Pope v. Morel 6*, 114 P.3d 277, 280 (Nev. 2005) (stating that with regard to claims for employment discrimination, one must exhaust all of their administrative remedies before filing a lawsuit).

<sup>770</sup> *Id.*

<sup>771</sup> *Id.* § 41.031(2)(b) (West 2024).

<sup>772</sup> NEV. REV. STAT. ANN. § 651.090(2)(b) (West 2024).

<sup>773</sup> See NEV. REV. STAT. ANN. § 41.031(2) (West 2024).

<sup>774</sup> See *id.*

<sup>775</sup> NEV. REV. STAT. ANN. § 651.090(1) (West 2024).

## **Provision of Safe and Respectful Learning Environment (Anti-Bullying Statute), NEV. REV. STAT. ANN. §§ 388.121—1259**

### Potential Defendants<sup>776</sup>

Governing bodies,<sup>777</sup> administrators,<sup>778</sup> and teachers of public schools.<sup>779</sup> Private schools may comply, but it is “wholly voluntary, and no liability attaches to any failure to comply.”<sup>780</sup>

### Bases of Discrimination

- Race, color, culture, religion, language, ethnicity, national origin,<sup>781</sup> ancestry, religion, gender identity or expression, sexual orientation, physical or mental disability of a person, sex or any other distinguishing characteristic or background of a person; or association of a person with another person having one or more of those actual or perceived characteristics.<sup>782</sup>
- “Race” includes “traits associated with race, including hair texture and protective hairstyles.”<sup>783</sup>

### Available Damages

Unclear. Although the primary remedy is that a parent or guardian may petition for a writ of mandamus, however, the statute states that “[n]othing in this section shall be deemed to preclude a parent or guardian of a pupil from seeking any remedy available at law or in equity.”<sup>784</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

Four years.<sup>785</sup>

### Administrative Requirements

- Administrative exhaustion: no known requirement.
- Notice of claims: not required.

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<sup>776</sup> *Id.* § 388.1321(1) (West effective July 1, 2021).

<sup>777</sup> *Id.* § 388.126 (West effective July 1, 2017) (“‘Governing body’ means the board of trustees of a school district or the governing body of a charter school.”). NEV. REV. STAT. ANN.

<sup>778</sup> *Id.* § 388.1215 (West effective July 1, 2017) (“‘Administrator’ means the principal, administrator or other person in charge of a school.”).

<sup>779</sup> *Id.* § 388.020 (West effective June 3, 2019) (public schools include elementary schools, junior high or middle schools, high schools, special schools, charter schools and universities “for profoundly gifted pupils”).

<sup>780</sup> *Id.* § 388.1322 (West effective July 1, 2021).

<sup>781</sup> *Id.* § 388.1235(1) (West effective July 1, 2021).

<sup>782</sup> *Id.* § 388.122(1)(c)(1)–(2) (West effective July 1, 2023) (the bases of discrimination can be “actual or perceived”).

<sup>783</sup> *Id.* § 388.1267 (West effective June 2, 2021).

<sup>784</sup> *Id.* § 388.1321(2)–(3) (West effective July 1, 2021). While these do not provide for damages, they could possibly be helpful in supporting other claims; *See Cox v. Lewis*, No. 2:20-CV-1792 JCM (DJA), 2021 WL 4340502, at \*4 (D. Nev. Sept. 23, 2021) (using NEV. REV. STAT. ANN. §§ 388.122, .1321, and .132 to deny a motion to dismiss for a First Amendment retaliation case); *Johnson v. Washoe Cnty. Sch. Dist.*, No. 3:22-cv-00520-LRH-CLB, 2024 WL 196523, at \*8 (D. Nev. Jan. 18, 2024) (using NEV. REV. STAT. ANN. § 388.1351 as evidence of a negligence action).

<sup>785</sup> NEV. REV. STAT. ANN. § 11.220 (West effective May 27, 2021).

## Fee-Shifting

Not Available.<sup>786</sup>

## Jurisdictional Issues

Petitions for writ of mandamus must be filed in a court of competent jurisdiction.<sup>787</sup>

# New Hampshire

## State Constitutional Equal Protection Claims, N.H. Const. Pt. 1, Art. 2d

### Potential Defendants

The provision requires “State action.”<sup>788</sup> The determination of what acts qualify as “State action” must be established on a case-by-case basis, and the court may look to federal cases for guidance.<sup>789</sup>

### Bases of Discrimination

Race, alienage, national origin, sex, illegitimacy.<sup>790</sup>

### Available Damages

It depends. The Supreme Court of New Hampshire has held that “denial of equal protection demands some vindication in the law.”<sup>791</sup> And “where no established remedy exists or established remedies would be meaningless,” the court “will not hesitate to exercise [its] authority to create an appropriate remedy.”<sup>792</sup> Although it “ultimately has the authority to fashion a common law remedy for the violation of a particular constitutional right, [the Court] will avoid such extraordinary exercise where established remedies, be they statutory, common law, or administrative, are adequate.”<sup>793</sup>

### Damages Cap(s)

- *Compensatory damages:* Damages against the state have a statutory cap of \$475,000 per claimant and \$3,750,000 per any single incident for claims arising out of any single incident against any agency for damages in tort actions.<sup>794</sup> The tort limitation likely applies because no other statute provides that such claims are exempt from the caps.<sup>795</sup>

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<sup>786</sup> See *supra* note 757.

<sup>787</sup> NEV. REV. STAT. ANN. § 388.1321(2) (West effective July 1, 2021). The writ may be issued by a district court, judge of a district court, Court of Appeals or the Supreme Court. *Id.* § 34.160 (West effective Jan. 1, 2015).

<sup>788</sup> *In re Certain Scholarship Funds*, 575 A.2d 1325, 1327 (N.H. 1990); *see also In re Dumaine*, 600 A.2d 127 (N.H. 1991) (“Absent some action that may fairly be attributed to the State, there can be no constitutional violation, since the equal protection clauses of the State and Federal constitutions erect no shield against merely private conduct, however discriminating or wrongful”).

<sup>789</sup> *In re Certain Scholarship Funds*, 575 A.2d at 1327.; *see Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715 (1961).

<sup>790</sup> *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

<sup>791</sup> *Khater v. Sullivan*, 999 A.2d 377, 379 (N.H. 2010).

<sup>792</sup> *Id.* (quoting *Marquay v. Eno*, 662 A.2d 272 (N.H. 1995)).

<sup>793</sup> *Marquay*, 662 A.2d at 722; *see Khater*, 999 A.2d at 379 (declining to create new remedy for equal protection claim when zoning appeals statute provided adequate alternative remedy).

<sup>794</sup> N.H. Rev. Stat. § 541-B:14(I) (2024).

<sup>795</sup> *See Victor Virgin Construction Co., v. N.H. Department of Transportation*, 75 A.3d 1136, 1139 (N.H. 2013).

## Statute of Limitations

Three years from the date of the injury, or the date the plaintiff discovers (or should have discovered) the injury and its causal relationship to the act or omission complained of.<sup>796</sup>

## Administrative Requirements

- Administrative exhaustion: N/A
- Notice of claim: Plaintiffs making claims against the State of New Hampshire must provide written notice to the applicable agency within 180 days after the time of injury or damage as to the date, time, and location the injury or damage occurred.<sup>797</sup>

## Fee-Shifting

A prevailing party may be awarded attorneys' fees when recovery of fees is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees.<sup>798</sup>

However, in claims against the state, attorneys' fees must first be approved by the board of claims (the "board") for the State of New Hampshire or the superior court, as the case may be.<sup>799</sup>

## Jurisdictional Issues

The New Hampshire board of claims has original and exclusive jurisdiction on all claims against the state not exceeding \$5,000.<sup>800</sup> The board has concurrent jurisdiction with the superior court on all claims against the state in excess of \$5,000, but not exceeding \$50,000.<sup>801</sup> The superior court has original and exclusive jurisdiction of all claims against the state in excess of \$50,000.<sup>802</sup>

## Law Against Discrimination, N.H. Rev. Stat. § 354-A:1

This statute prohibits discrimination in "places of public accommodation," which may include private schools. N.H. Rev. Stat. § 354-A-16(XIV).

## Potential Defendants

- Public schools or school districts.<sup>803</sup>
- Possibly private schools, colleges, and universities.<sup>804</sup>

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<sup>796</sup> N.H. Rev. Stat. § 508.4 (2022).

<sup>797</sup> N.H. Rev. Stat. § 541-B:14 (2024). Lack of written notice will not bar a claim unless the agency can show by a preponderance of the evidence that its ability to defend against the action was substantially prejudiced thereby. *Id.*

<sup>798</sup> *In re Mason*, 58 A.3d 1153 (N.H. 2012) ("We have recognized exceptions where an individual is forced to seek judicial assistance to secure a clearly defined and established right if bad faith can be established; where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct; as compensation for those who are forced to litigate in order to enjoy what a court has already decreed; and for those who are forced to litigate against an opponent whose position is patently unreasonable") (quoting *Clipper Affiliates v. Checorich*, 138 N.H. 271, 278, 638 A.2d 791 (1994) (citation modified)).

<sup>799</sup> N.H. Rev. Stat. § 541-B:18 (2024).

<sup>800</sup> N.H. Rev. Stat. § 541-B:9(II) (2024).

<sup>801</sup> N.H. Rev. Stat. § 541-B:9(III) (2024).

<sup>802</sup> N.H. Rev. Stat. § 541-B:9(IV) (2024).

<sup>803</sup> N.H. Rev. Stat. § 354-A:28 (2024).

<sup>804</sup> New Hampshire courts have yet to reach the issue since the statute was amended in 2018.

## Bases of Discrimination

Sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, and national origin.<sup>805</sup>

## Available Damages

- *Compensatory damages*: available.<sup>806</sup>
- *Punitive damages*: not available.<sup>807</sup>
- Defendants may also be subject to fines through the administrative process.<sup>808</sup>
  - If the case is brought to court, the court may award enhanced compensatory damages in lieu of an administrative fine.<sup>809</sup>

## Damages Cap(s)

Damages against the state have a statutory cap of \$475,000 per claimant and \$3,750,000 per any single incident for claims arising out of any single incident against any agency for damages in tort actions.<sup>810</sup> The tort limitation likely applies because no statute states otherwise.<sup>811</sup>

## Statute of Limitations

Within 180 days after the alleged act of discrimination.<sup>812</sup>

## Administrative Requirements

- Administrative exhaustion: Plaintiff must file with the commission a verified complaint in writing.<sup>813</sup> Thereafter, one of the commissioners will make a prompt investigation. At the expiration of 180 days after the timely filing of the complaint, or sooner if the commission assents in writing, but not later than 3 years after the alleged unlawful practice occurred, the plaintiff may bring a civil action for damages or injunctive relief or both.<sup>814</sup>
- Notice of claim: Plaintiffs making claims against the State of New Hampshire must provide written notice to the applicable agency within 180 days after the time of injury or damage as to the date, time, and location the injury or damage occurred.<sup>815</sup>

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<sup>805</sup> N.H. Rev. Stat. § 193:38; *see also* N.H. Rev. Stat. § 354-A:27 (2024).

<sup>806</sup> N.H. Rev. Stat. § 354-A:21(II)(d) (2024).

<sup>807</sup> *Brown v. Town of Allenstown*, 648 F. Supp. 831, 840 (D.N.H. 1986). Note, however, that New Hampshire does recognize the remedy of enhanced compensatory damages (“When the act involved is wanton, malicious, or oppressive, the compensatory damages may reflect the aggravating circumstances”).

<sup>808</sup> *Id.* (In addition to compensatory damages, in order to vindicate the public interest, the commission may also order the respondent to pay an administrative fine. The administrative fine shall be deposited in the general fund.) *See also* N.H. Rev. Stat. § 354-A:21(d)(1)-(3) (2024).

<sup>809</sup> N.H. Rev. Stat. § 354-A:21-a (2024) (“A court in cases so removed may award all damages and relief which could have been awarded by the commission, except that in lieu of an administrative fine, enhanced compensatory damages may be awarded when the court finds the respondent's discriminatory conduct to have been taken with willful or reckless disregard of the charging party's rights under this chapter”).

<sup>810</sup> N.H. Rev. Stat. § 541-B:14(I).

<sup>811</sup> *Victor Virgin Construction Co., Inc. v. N.H. Department of Transportation*, 75 A.3d 1136 (N.H. 2013).

<sup>812</sup> N.H. rev. Stat. §354-A:21(III) (2024).

<sup>813</sup> N.H. Rev. Stat. § 354-A:21 (2024).

<sup>814</sup> N.H. Rev. Stat. § 354-A:21-a (2024).

<sup>815</sup> N.H. Rev. Stat. Ann. § 541-B:14. Note, however, that lack of written notice will not bar a claim unless the agency can show by a preponderance of the evidence that its ability to defend against the action was substantially prejudiced thereby.

## Fee-Shifting

Unclear, but likely available. Under prior law, the Supreme Court of New Hampshire concluded that the Commission could award attorney's fees to the complainant (though, at that time, the Commission lacked authority to award compensatory damages).<sup>816</sup>

Generally, a prevailing party may be awarded attorneys' fees when recovery of fees is authorized by statute, an agreement between the parties, or an established judicial exception to the general rule that precludes recovery of such fees.<sup>817</sup> However, in claims against the state, attorneys' fees must first be approved by the board or the superior court, as the case may be.<sup>818</sup>

## Jurisdictional Issues

The board of claims for the state of New Hampshire has original and exclusive jurisdiction on all claims against the state not exceeding \$5,000.<sup>819</sup> The board has concurrent jurisdiction with the superior court on all claims against the state in excess of \$5,000, but not exceeding \$50,000.<sup>820</sup> The superior court has original and exclusive jurisdiction of all claims against the state over \$50,000.<sup>821</sup>

## Civil Rights Act, N.H. Rev. Stat § 354.B

The New Hampshire Civil Rights Act permits the New Hampshire Attorney General to bring discrimination claims on behalf of individuals against any person who interferes or attempts to interfere with the rights secured in this chapter when such actual or threatened conduct is motivated by any of the bases of discrimination listed below.<sup>822</sup> But there does not appear to be a private right of action under this law.<sup>823</sup>

Compensatory damages are available for actual expenses only, and emotional distress damages are not available.<sup>824</sup> Punitive damages are not available.<sup>825</sup> The attorney general may also seek civil penalties of up to \$5,000 for each violation.<sup>826</sup> The court may impose a civil penalty of up to \$5,000 per violation.<sup>827</sup>

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<sup>816</sup> *E.D. Swett, Inc. v. New Hampshire Comm'n for Human Rights*, 470 A.2d 921 (N.H. 1983).

<sup>817</sup> *In re Mason*, 58 A.3d 1153 (N.H. 2012) (“We have recognized exceptions where an individual is forced to seek judicial assistance to secure a clearly defined and established right if bad faith can be established; where litigation is instituted or unnecessarily prolonged through a party’s oppressive, vexatious, arbitrary, capricious or bad faith conduct; as compensation for those who are forced to litigate in order to enjoy what a court has already decreed; and for those who are forced to litigate against an opponent whose position is patently unreasonable”) (quoting *Clipper Affiliates v. Checovich*, 138 N.H. 271, 278, 638 A.2d 791 (1994) (brackets, citation, and quotations omitted)).

<sup>818</sup> N.H. Rev. Stat. § 541-B:18 (2024).

<sup>819</sup> N.H. Rev. Stat. § 541-B:9(II) (2024).

<sup>820</sup> N.H. Rev. Stat. § 541-B:9(III) (2024).

<sup>821</sup> N.H. Rev. Stat. § 541-B:9(IV) (2024).

<sup>822</sup> N.H. Rev. Stat. § 354-B:1 (2024) (“the right to engage in lawful activities and to exercise and enjoy the rights secured by the United States and New Hampshire Constitutions and the laws of the United States and New Hampshire without being subject to actual or threatened physical force or violence against them or any other person or by actual or threatened damage to or trespass on property...”). Note, may include a person under the age of 17. (N.H. Rev. Stat. § 354-B:5 (2024)).

<sup>823</sup> *See id.*

<sup>824</sup> N.H. Rev. Stat. § 354-B:3 (2024) (called “restitution” but, for the purposes of the paragraph, means “out-of-pocket expenses incurred by the person damaged by the violation to the extent not covered by other sources”).

<sup>825</sup> *Brown v. Town of Allenstown*, 648 F. Supp. 831 (D.N.H. 1986). Note, however, that New Hampshire does recognize the remedy of enhanced compensatory damages (“When the act involved is wanton, malicious, or oppressive, the compensatory damages may reflect the aggravating circumstances”).

<sup>826</sup> N.H. Rev. Stat. § 354-B:3(I) (2024).

<sup>827</sup> N.H. Rev. Stat. § 354-B:3(I) (2024).

# New Jersey<sup>828</sup>

## New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.)

### Potential Defendants

- “[A]ny ... primary and secondary school, ... high school, ... or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.”<sup>829</sup>

### Bases of Discrimination

- Prohibits discrimination and bias-based harassment based on actual or perceived race, color, religion, creed, national origin, nationality, ancestry, sex, pregnancy, breastfeeding, sexual orientation, gender identity, gender expression, disability, marital status, domestic partnership/civil union status, and liability for military service.

### Available Damages

- Compensatory damages: available.<sup>830</sup>
  - Probably including emotional distress damages: “All remedies available in common law tort actions shall be available to prevailing plaintiffs . . . in addition to any provided by this act or any other statute.”<sup>831</sup>
- Punitive damages: available.<sup>832</sup>

### Damages Cap(s)

- None.<sup>833</sup>

### Statute of Limitations

- Two years, subject to the continuing violations doctrine.<sup>834</sup>

### Administrative Requirements

- Can be filed administratively or without exhausting administrative remedies.<sup>835</sup>

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<sup>828</sup> New Jersey also has the Anti-Bullying Bill of Rights Act, which does not create or alter any tort liability, N.J. STAT. ANN. § 18A:37-37, but does require each school district to adopt a policy prohibiting harassment, intimidating, or bullying on school property. *Id.* at § 18A:37-15(a).

<sup>829</sup> N.J. STAT. ANN. § 10:5-5(l) (2023).

<sup>830</sup> *Id.* § 10:5-3.

<sup>831</sup> *Id.* § 10:5-12.11.

<sup>832</sup> *Id.*

<sup>833</sup> *Lockley v. State of New Jersey Dep't of Corr.*, 828 A.2d 869, 879 (2003) (“Although LAD actions specifically are excluded from the statutory cap, N.J.S.A. 2A:15-5.14c, ‘its general requirements for procedural and substantive fairness are mandat[ory]’ in future LAD cases.”).

<sup>834</sup> *Smith v. Twp. of E. Greenwich*, 519 F. Supp. 2d 493, 505 (D.N.J. 2007).

<sup>835</sup> N.J. STAT. ANN. § 10:5-13 (2023).

## Fee-Shifting

- Prevailing plaintiff “shall be awarded reasonable attorney fees and costs.”<sup>836</sup>

## Other Relevant Provisions

- Covers disparate impact, as well as disparate treatment.<sup>837</sup>
- Includes student-on-student harassment.<sup>838</sup>
- NJ has released guidance on how this law applies to discipline.<sup>839</sup>

## New Jersey Civil Rights Act<sup>840</sup>

### Potential Defendants

- “Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.”<sup>841</sup>
- That is: The New Jersey Civil Rights Act (NJCRA) allows individuals to file suit against the government for civil rights violations by government agents or employees. Similar to § 1983.

### Bases of Discrimination

- Religion, race, color, ancestry or national origin.<sup>842</sup>

### Available Damages

- Compensatory damages: Available.<sup>843</sup>
- Punitive damages: Unavailable.<sup>844</sup>

### Damages Cap(s)

- N/A

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<sup>836</sup> *Id.* § 10:5-12.11.

<sup>837</sup> *Nat'l Ass'n for the Advancement of Colored People v. N. Hudson Reg'l Fire & Rescue*, 742 F. Supp. 2d 501, 528 (D.N.J. 2010).

<sup>838</sup> *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 915 A.2d 535, 546 (2007).

<sup>839</sup> Guidance on Discrimination in School Discipline, N.J. DIV. ON CIVIL RIGHTS,

<https://www.nj.gov/oag/dcj/agguide/pdfs/2023-0817-Rec-3-School-Discipline-Guidance.pdf> (Aug. 2023).

<sup>840</sup> See *George v. Bd. of Educ. of the Twp. of Millburn*, 34 F. Supp. 3d 442, 458 (D.N.J. 2014) (“New Jersey Civil Rights Act provides a cause of action to address violations of rights conferred by the New Jersey Constitution.”); N.J. STAT. ANN. § 10:6-1 (2023).

<sup>841</sup> N.J. STAT. ANN. § 10:6-2 (2023).

<sup>842</sup> N.J. CONST., art. I.

<sup>843</sup> N.J. STAT. ANN. § 10:6-2 (2023).

<sup>844</sup> See *George v. Bd. of Educ. of Millburn*, 34 F. Supp. 3d 442, 462 (D.N.J. 2014) (“Unlike Section 1983 and the New Jersey Civil Rights Act, the LAD allows plaintiffs to recover punitive damages against a municipality.”).

## Statute of Limitations

- Two years.<sup>845</sup>

## Fee-Shifting

- In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c of this section, the court may award the prevailing party reasonable attorney's fees and costs.<sup>846</sup>

## Additional Notes

- The statute is generally interpreted in parallel with 42 U.S.C. § 1983.<sup>847</sup>

# New Mexico

## State Constitutional Equal Rights Claims, New Mexico Constitution article II, section 18

The New Mexico Civil Rights Act (NMCRA) establishes a private cause of action for constitutional violations by a “public body or person acting on behalf of, under color of, or within the scope of the authority of a public body.”<sup>848</sup>

## Potential Defendants

- Claims may only be brought against a public body.<sup>849</sup>
- The state has waived sovereign immunity for claims brought pursuant to the NMCRA.<sup>850</sup> The waiver of sovereign immunity is limited to actions commenced in New Mexico district court.<sup>851</sup>

## Bases of Discrimination

Race, alienage,<sup>852</sup> or sex.<sup>853</sup>

## Available Damages

- *Compensatory damages (including emotional distress damages):* Available.<sup>854</sup>
- *Punitive damages:* May be available if the jury finds the wrongdoer's conduct to be willful, wanton, malicious, reckless, oppressive, grossly negligent, or fraudulent and in bad faith.<sup>855</sup>

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<sup>845</sup> See, e.g., *Dean v. Deptford Twp.*, 2015 WL 13640263, at \*1 (D.N.J. Apr. 1, 2015); *Johnson v. Passaic Cty.*, 2014 WL 2203842, at \*9 (D.N.J. May 23, 2014).

<sup>846</sup> N.J. STAT. ANN. § 10:6-2.

<sup>847</sup> See, e.g., *Johnson*, 2014 WL 2203842, at \*9 (noting that state statute was modeled after Section 1983 and has been interpreted in parallel with Section 1983).

<sup>848</sup> N.M. STAT. ANN. § 41-4A-3 (2024).

<sup>849</sup> *Id.*

<sup>850</sup> N.M. STAT. ANN. § 41-4A-9 (2024).

<sup>851</sup> *Valdez v. Grisham*, 559 F.Supp.3d 1161, 1181 (N.M. 2021).

<sup>852</sup> See *Vandolsen v. Constructors, Inc.* 678 P.2d 1184, 1187 (N.M. Ct. App. 1984) (identifying race and alienage as suspect classes).

<sup>853</sup> N.M. CONST. art. II, §18.

<sup>854</sup> N.M. STAT. ANN. §41-4A-3 (2024).

<sup>855</sup> See *Sanchez v. Clayton*, 877 P.2d 567, 573 (N.M. 1994); *Gonzales v. Sansoy*, 703 P.2d 904, 906 (N.M. Ct. App. 1984).

## Damages Cap(s)

\$2 million per claimant, inclusive of the claimant's attorney fees and costs.<sup>856</sup>

## Statute of Limitations

3 years, running from the date a claim can be brought for the deprivation of a right, privilege or immunity provided by the New Mexico bill of rights.<sup>857</sup>

## Administrative Requirements

- Administrative exhaustion: not required for claims of constitutional violations brought under the NMCRA<sup>858</sup> (though it is required for discrimination claims brought under the New Mexico Human Rights Act (NMHRA); see “*Unlawful Discrimination Claims, §28-1-7(F)*” below).
- Notice of claim:
  - Written notice stating the time, place and circumstances of the loss or injury must be provided to the public body against whom the complaint is filed within one year after the occurrence of the injury.<sup>859</sup>

## Fee-Shifting

Courts may, in their discretion, allow reasonable attorney fees and costs.<sup>860</sup>

## Jurisdictional Issues

- None.

## **Unlawful Discrimination Claims, §28-1-7(F)**

This provision of the NMHRA makes it unlawful for a person in any public accommodation,<sup>861</sup> including public schools,<sup>862</sup> to make any distinction in offering its services, facilities, accommodations or goods to any person on the basis of enumerated characteristics.<sup>863</sup> The plain language of the statute defining “public accommodation” implies that private schools would also be considered public accommodations because they do not restrict their services in such a way that could be said to be by its nature and use distinctly private, although we did not locate a case that explicitly says this.<sup>864</sup>

## Bases of Discrimination

Race, color, national origin, ancestry, sex, sexual orientation, gender or gender identity.<sup>865</sup>

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<sup>856</sup> N.M. STAT. ANN. § 41-4A-6 (2024).

<sup>857</sup> N.M. STAT. ANN. § 41-4A-7 (2024).

<sup>858</sup> N.M. STAT. ANN. §41-4A-3(E) (2024).

<sup>859</sup> N.M. STAT. ANN. §41-4A-13 (2024).

<sup>860</sup> N.M. STAT. ANN. §41-4A-5 (2024).

<sup>861</sup> As defined in N.M. Stat. Ann. §28-1-2(H): “any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private.”

<sup>862</sup> *Johnson v. Board of Educ. for Albuquerque Pub. Schools*, 535 P.3d 687, 691-92. (N.M. Ct. App. 2023).

<sup>863</sup> N.M. STAT. ANN. §28-1-7(F) (2024).

<sup>864</sup> *Johnson*, 535 P.3d at 691-92.

<sup>865</sup> *Id.*

## Potential Defendants

- Any person who engages in unlawful discrimination described in the NMHRA.<sup>866</sup>
- Sovereign immunity is waived for public entities for any liability imposed by the Human Rights Commission (HRC) or by a district court on appeal from an HRC decision for violations of the NMHRA.<sup>867</sup>

## Available Damages

- *Compensatory damages* (including emotional distress damages): presumably available.<sup>868</sup>
- *Punitive damages*: May be available if the jury finds the wrongdoer's conduct to be willful, wanton, malicious, reckless, oppressive, grossly negligent, or fraudulent and in bad faith.<sup>869</sup>

## Damages Cap(s)

N/A.

## Statute of Limitations

- 300 days from the alleged act to file a written complaint with the HRC, a division of the state labor department.<sup>870</sup>
- 90 days from the service of an HRC order to bring the claim in New Mexico district court.<sup>871</sup>

## Administrative Requirements

- Administrative exhaustion: required.<sup>872</sup>
  - Claimants must first file a complaint with the HRC. After filing, they may request an order of nondetermination after HRC's receipt of the complaint and, in jointly filed cases, after the federal complaint has been closed. The order of nondetermination may be appealed as described below.<sup>873</sup>
  - Complainant may seek trial in district court instead of a hearing before the HRC if complainant seeks from the HRC director a written waiver of complainant's right to hearing within 60 days of written notice of a probable cause determination.<sup>874</sup>
  - Claimants may obtain trial *de novo* by filing a notice of appeal in the district court of the county where the discriminatory practice occurred or where the respondent does business within 90 days from the date of service of the HRC order.<sup>875</sup>
- Notice of claim:
  - Written complaint shall state the name and address of the person alleged to have engaged in the discriminatory practice, all information relating to the discriminatory practice and any other information that may be required by the HRC.

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<sup>866</sup> N.M. STAT. ANN. §28-1-10 (2024).

<sup>867</sup> *Luboyeski v. Hill*, 872 P.2d 353, 357-8 (N.M. 1994); N.M. Stat. Ann. §28-1-13(D).

<sup>868</sup> N.M. STAT. ANN. §§28-1-12 and 28-1-13 (2024).

<sup>869</sup> See *Sanchez v. Clayton*, 877 P.2d 567, 573 (N.M. 1994); *Gonzales v. Sansoy*, 703 P.2d 904, 906 (N.M. Ct. App. 1984).

<sup>870</sup> N.M. STAT. ANN. §28-1-10 (2024).

<sup>871</sup> N.M. STAT. ANN. §28-1-13 (2024).

<sup>872</sup> N.M. STAT. ANN. §28-1-10 (2024).

<sup>873</sup> N.M. STAT. ANN. §28-1-10(D) (2024).

<sup>874</sup> N.M. STAT. ANN. §28-1-10(J) (2024).

<sup>875</sup> N.M. STAT. ANN. §28-1-13 (2024).

## Fee-Shifting

Courts may, in their discretion, allow reasonable attorney fees.<sup>876</sup>

## Jurisdictional Issues

None.

# New York

## State Constitutional Equal Protection Claims, N.Y. Const. art 1, § 11

A plaintiff may be able to pursue constitutional claims under this provision unless the claimant can also pursue common law tort claims in the New York Court of Claims or parallel § 1983 claims under the U.S. Constitution (i.e., if there are other adequate remedies).<sup>877</sup>

## Potential Defendants

Public schools, school districts, boards of education, boards of cooperative educational services, or officers thereof in New York state.<sup>878</sup>

## Bases of Discrimination

Race, color, religion.<sup>879</sup>

## Available Damages

- *Compensatory damages (including emotional distress damages)*: available.<sup>880</sup>
- *Punitive damages*: unavailable.<sup>881</sup>

## Damages Cap(s)

None.<sup>882</sup>

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<sup>876</sup> N.M. STAT. ANN. §28-1-13(D) (2024).

<sup>877</sup> *Brown v. State of New York*, 89 N.Y.2d 172, 183 (N.Y. 1996); *Buari v. City of New York*, 530 F. Supp. 3d 356, 408-09 (S.D.N.Y. 2021); *see also Bogg v. State*, 25 N.Y.S.3d 545, 379 (N.Y. Ct. Cl. 2015); *Lyles v. State of New York*, No. 2002-10356 (N.Y. App. Div. Dec. 9, 2003).

<sup>878</sup> N.Y. CONST. art. 1, § 11 (referring to “the state or any agency or subdivision of the state”); *see also Brown v. State of New York*, 89 N.Y.2d 172, 183 (N.Y. 1996) (mandating “enabling legislation” for constitutional claims against private entities, but not public ones).

<sup>879</sup> N.Y. CONST. art. 1, § 11.

<sup>880</sup> *See supra* note 877.

<sup>881</sup> *See, e.g., Zito v. State*, No. 112980, 2007 WL 1013555, at \*2 (N.Y. Ct. Cl. Mar. 05, 2007) (“[T]he State of New York is not subject to punitive damages.”) (citation omitted).

<sup>882</sup> *See* N.Y. C.P.L.R. § 4545 (2023); W. McDonald Plosser, *United States: Sky's The Limit? A 50-State Survey Of Damages Caps And The Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule> (“New York does not cap either compensatory or punitive damages.”); *cf. Baldwin v. City of Estherville*, 915 N.W.2d 259, 269 (Iowa 2018) (“New York . . . subjects constitutional tort claims to the statutory framework applicable to other tort claims against the state.”) (citing *Brown v. State of New York*)).

## Statute of Limitations

**One or three years.** Typically, the statute of limitations for New York state constitutional claims is three years.<sup>883</sup> However, in 2013, the Second Circuit affirmed a lower court decision holding that N.Y. Educ. Law § 3813 provides for only a one-year statute of limitations for claims against schools, school districts, boards of education, boards of cooperative educational services, or any officer thereof in a case regarding NYSHRL claims.<sup>884</sup> Since state constitutional claims were not at issue in that case, the court there did not pronounce on the applicability of N.Y. Educ. Law § 3813 to state constitutional claims in terms of the relevant statute of limitations.

## Administrative Requirements

- Administrative exhaustion not required.<sup>885</sup>
- Notice of claim must be filed within 90 days for damages actions.<sup>886</sup> The notice-of-claim requirement applies to causes of action seeking damages for violations of the New York State Constitution.<sup>887</sup> While this requirement exempts “those actions that seek vindication of a public interest,” any action for damages does not fall into this exemption.<sup>888</sup>

## Fee-Shifting

The court may award a prevailing party, other than the state, attorney fees incurred in the action against the state “unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust.”<sup>889</sup>

## Jurisdictional Issues

Claims for damages under the New York State Constitution must be brought in the New York Court of Claims.<sup>890</sup>

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<sup>883</sup> See *Brown v. State*, 250 A.D.2d 314, 318-19 (N.Y. App. Div. 1998).

<sup>884</sup> See *Sotomayor v. City of New York*, 862 F. Supp. 2d 226, 248-49 (E.D.N.Y. 2012), *aff'd*, 713 F.3d 163 (2d Cir. 2013).

<sup>885</sup> Exhaustion for constitutional claims is only required for incarcerated individuals. *See, e.g., Gill v. State*, No. 111941, 2006 WL 2955945, at \*1 n.1 (N.Y. Ct. Cl. Aug. 28, 2006); *Jones v. State*, 171 A.D.3d 1362, 1364 n.5 (N.Y. App. Div., Apr. 18, 2019).

<sup>886</sup> N.Y. GEN. MUN. §§ 50-e, 50-i.

<sup>887</sup> 423 S. Salina St., Inc. v. City of Syracuse, 68 N.Y. 2d 474, 489 n.5 (N.Y. 1986); *see also Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 146 (N.D.N.Y. 2011) (citing 423 S. Salina St.); *G.D.S. ex rel. Slade v. Northport-East Northport Union Free Sch. Dist.*, 915 F. Supp. 2d 268, 280 (E.D.N.Y. 2012).

<sup>888</sup> *G.D.S.*, 915 F. Supp. at 281 (“[T]he public interest exception does not apply when plaintiffs are seeking money damages for the sole purpose of redressing plaintiffs’ individual injuries.” (quoting *Atkins v. Cnty. of Orange*, 251 F. Supp. 2d 1225, 1235 (S.D.N.Y. 2003))).

<sup>889</sup> N.Y. C.P.L.R. § 8601(a) (2023).

<sup>890</sup> *Brown*, 89 N.Y.2d at 179 (explaining that article VI, § 9 of the New York Constitution “continues the Court of Claims and authorizes the Legislature to determine its jurisdiction” and that the Court of Claims Act constitutes New York’s waiver of sovereign immunity relevant to state constitutional claims); *id.* at 183 (“[D]amage claims against the State based upon violations of the State Constitution come within the jurisdiction of the Court of Claims.”).

## New York State Human Rights Law, N.Y. Exec. Law § 296(4) (“NYSHRL”)

### Potential Defendants

- Any education corporation or association which holds itself out to the public to be non-sectarian and tax-exempt.<sup>891</sup>
- Any for-profit entity that operates a college, university, licensed private career school or certified English as a second language school which holds itself out to the public to be non-sectarian and which is not tax-exempt.<sup>892</sup>
- Any public school, including any school district, board of cooperative educational services, or institution of higher education.<sup>893</sup>
- Any individual who aids, abets, incites, compels, or coerce the doing of any of the acts forbidden by the NYSHRL, or who attempts to do so.<sup>894</sup>

### Bases of Discrimination

Race, color, national origin, sex, sexual orientation, gender identity or expression.<sup>895</sup>

### Available Damages

- *Compensatory damages (including emotional distress damages)*: available.<sup>896</sup>
- *Punitive damages*: not available.<sup>897</sup>

### Damages Cap(s)

None. While the NYSHRL imposes caps for punitive damages where available, it does not impose any caps on compensatory damages.<sup>898</sup>

### Statute of Limitations

- One year for schools, school districts, boards of education, boards of cooperative educational services, and/or any officer thereof.<sup>899</sup> While generally the statute of limitations under the NYSHRL is three years,<sup>900</sup> there is a shorter statute of limitations for these defendants.<sup>901</sup>

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<sup>891</sup> N.Y. EXEC. § 292.40.

<sup>892</sup> *Id.*

<sup>893</sup> *Id.*

<sup>894</sup> N.Y. EXEC. § 296(6); *see also Miotto v. Yonkers Pub. Schs.*, 534 F. Supp. 2d 422, 427 (S.D.N.Y. 2008) (“Under the aiding and abetting provision of NYHRL, an individual employee who actually participates in the conduct giving rise to a discrimination claim may be held personally liable.”); *id.* at 429 (denying principal and superintendent’s motion to dismiss in sexual harassment case against public schools on the grounds that plaintiff could plausibly prove principal and superintendent “knew about [harasser’s] prior similar conduct and took no remedial action”).

<sup>895</sup> N.Y. EXEC. § 296(4).

<sup>896</sup> N.Y. EXEC. § 297(9); *see, e.g., Mayo-Coleman v. Am. Sugar Holdings*, No. 14-cv-79, 2018 WL 2684100, at \*3 (S.D.N.Y. June 5, 2018).

<sup>897</sup> N.Y. EXEC. § 297(9); *see also Thoreson v. Penthouse Int’l Ltd.*, 80 N.Y.2d 490 (N.Y. 1992).

<sup>898</sup> N.Y. EXEC. § 297(9); *see also Mayo-Coleman*, 2018 WL 2684100, at \*2 (“There is no cap on compensatory damages for claims arising under the NYSHRL . . . ”).

<sup>899</sup> N.Y. EDUC. § 3813(2-b); *id.* § 3813(1).

<sup>900</sup> *See* N.Y. C.P.L.R. § 214(2); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 147 (N.D.N.Y. 2011).

<sup>901</sup> *Sotomayor v. City of New York*, 862 F. Supp. 2d 226, 248-49 (E.D.N.Y. 2012), *aff’d*, 713 F.3d 163 (2d Cir. 2013) (citing N.Y. EDUC. § 3813(b)); *see also Amorosi v. South Colonie Ind. Cent. Sch. Dist.*, 880 N.E.2d 6, 10 (N.Y. 2007) (“[T]he one-year

- Three years for non-officer individual defendants<sup>902</sup> (i.e., defendants not listed in § N.Y. Educ. Law § 2(13)).<sup>903</sup>

## Administrative Requirements

- Administrative exhaustion not required.<sup>904</sup>
- Notice of claim must be filed within three months for damages actions against schools, school districts, boards of education, boards of cooperative educational services, and/or any officer thereof.<sup>905</sup> This requirement does not apply for non-officer individual defendants (i.e., defendants not listed in N.Y. Educ. Law § 2(13)).<sup>906</sup>

## Fee-Shifting

- The court may in its discretion award reasonable attorneys' fees to any prevailing or substantially prevailing party.<sup>907</sup>
- The court may award a prevailing party, other than the state, attorneys' fees incurred in the action against the state "unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust."<sup>908</sup>

## Other Relevant Information

- Single-sex schools are permissible under the NYSHRL.<sup>909</sup>
- Class actions are not available under the NYSHRL.<sup>910</sup>

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limitation prescribed in Education Law § 3813(2-b) should govern [NYSHRL] discrimination claims against a school district.”).

<sup>902</sup> *Sotomayor*, 862 F. Supp. 2d. at 249 (“Principals and other school administrators are not officers of a board of education; unless these administrators are employed at the special schools specified by the statute, claims against them are not subject to the one year statute of limitations.” (citing *Richards v. Calvet*, No. 99 Civ.12172, 2005 WL 743251, at \*13 (S.D.N.Y. Mar. 31, 2005))).

<sup>903</sup> N.Y. EDUC. § 3813 refers to “school officers.” “The term ‘school officer’ means a clerk, collector, or treasurer of any school district; a trustee; a member of a board of education or other body in control of the schools by whatever name known in a union free school district, central school district, central high school district, or in a city school district; a superintendent of schools; a district superintendent; a supervisor of attendance or attendance officer; or other elective or appointive officer in a school district whose duties generally relate to the administration of affairs connected with the public school system.” N.Y. EDUC. § 2(13).

<sup>904</sup> N.Y. EXEC. §§ 297(9), 298.

<sup>905</sup> N.Y. EDUC. § 3813; *see also Scaggs*, 2007 WL 1456221, at \*20 (collecting cases where “courts have held that, where damages are sought, a claim under the Human Rights Law does not vindicate a public interest” and therefore a notice of claims is required).

<sup>906</sup> *See Pratt*, 803 F. Supp. 2d at 147 (finding that the notice-of-claim requirement did not apply because “none of [the individual-capacity defendants] are ‘officers’ as that term is defined under New York law”).

<sup>907</sup> N.Y. EXEC. § 297(10).

<sup>908</sup> N.Y. C.P.L.R. § 8601(a).

<sup>909</sup> N.Y. EXEC. § 296(4).

<sup>910</sup> *Consol. Edison Co. v. State Human Rts. Appeal Bd.*, 409 N.Y.S.2d 141 (App. Div. 1978), *aff'd*, 49 N.Y.2d 944, (N.Y. 1980). “Class action claims of discrimination under the NYSHRL can nevertheless be brought using the procedural mechanism for establishing a class action set forth in CPLR Article 9. This vehicle is somewhat unpredictable, though, in that the determination of class status rests in the discretion of the trial judge.” 13 N.Y. Prac., Employment Litigation in New York § 3:17 (2023).

## New York Civil Rights Law, N.Y. Civ. Rts. Law §§ 40-c, 40-d (“NYCRL”)

### Potential Defendants

- Public schools, school districts, boards of education, boards of cooperative educational services, or officers thereof in New York state.<sup>911</sup>
- Any person who violates any of the provisions of § 40-c, or who aids or incites the violation thereof.<sup>912</sup>

### Bases of Discrimination

Race, color, national origin, sex, sexual orientation, gender identity or expression.<sup>913</sup>

### Available Damages

Statutory damages between \$100 and \$500.<sup>914</sup>

### Damages Cap(s)

\$500.<sup>915</sup>

### Statute of Limitations

**One or three years.** Typically, the statute of limitations for NYCRL claims is three years.<sup>916</sup> However, in 2013, the Second Circuit affirmed a lower court decision holding that N.Y. Educ. Law § 3813 provides for only a one-year statute of limitations for claims against schools, school districts, boards of education, boards of cooperative educational services, or any officer thereof in a case regarding NYSHRL claims.<sup>917</sup> Since NYCRL claims were not at issue in that case, the court there did not pronounce on the applicability of N.Y. Educ. Law § 3813 to NYCRL claims in terms of the relevant statute of limitations.

### Administrative Requirements

- Administrative exhaustion not required.<sup>918</sup>
- Notice of claims:

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<sup>911</sup> N.Y. CIV. RIGHTS § 40-c (referring to “the state or any agency or subdivision of the state”).

<sup>912</sup> *Id.* § 40-d.

<sup>913</sup> N.Y. CIV. RIGHTS § 40-c(2).

<sup>914</sup> *Id.*

<sup>915</sup> *Id.*

<sup>916</sup> N.Y. C.P.L.R. § 214; *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 148 (N.D.N.Y. 2011) (“Contrary to Defendants’ argument [that Plaintiffs’ claims are claims are barred by the one-year statute of limitations proscribed by § 3813,], claims brought under . . . NYCRL are subject to a three-year statute of limitations.”); *Durham v. SUNY Rockland Comm’y Coll.*, No. 14-cv-607, 2016 WL 128214, at \*6 (S.D.N.Y. Jan. 12, 2016) (“The statute of limitations for claims brought under § 40-c [sic] is three years from the date of injury caused by discrimination.”).

<sup>917</sup> See *Sotomayor v. City of New York*, 862 F. Supp. 2d 226, 248-49 (E.D.N.Y. 2012), *aff’d*, 713 F.3d 163 (2d Cir. 2013).

<sup>918</sup> N.Y. CIV. RIGHTS § 40-d.

- *To defendants:* must be filed within three months of the claim's accrual for damages actions.<sup>919</sup> Note that this requirement does not apply for non-officer individual defendants (i.e., defendants not listed in N.Y. Educ. Law § 2(13)).<sup>920</sup>
- *To Attorney General:* must be filed at or before commencement of the action.<sup>921</sup>

## Fee-Shifting

The court may award a prevailing party, other than the state, attorneys' fees incurred in an action against the state "unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust."<sup>922</sup>

# NORTH CAROLINA

## State Constitutional Equal Protection Claims, N.C. CONST. art. I, § 19<sup>923</sup>

### Potential Defendants

- This provision requires that a "state actor" has violated a constitutional right.<sup>924</sup>
- State actors include: state public schools (elementary to high school), charter schools, the State Board of Education, and public school employees.<sup>925</sup>

### Bases of Discrimination

Race, color, religion, and national origin.<sup>926</sup>

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<sup>919</sup> N.Y. EDUC. § 3813. *But see id.* (no notice of claim required in cases involving sexual abuse of a minor).

<sup>920</sup> *See Pratt*, 803 F. Supp. 2d at 147 (finding that the notice-of-claim requirement did not apply because "none of [the individual-capacity defendants] are 'officers' as that term is defined under New York law").

<sup>921</sup> N.Y. CIV. RIGHTS § 40-d.

<sup>922</sup> N.Y. C.P.L.R. § 8601(a).

<sup>923</sup> "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. CONST. art. I, § 19.

<sup>924</sup> *Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 858 S.E.2d 788, 794 (N.C. 2021); *see Corum v. Univ. of N.C. Through Bd. of Governors*, 413 S.E.2d 276, 290–91 (N.C. 1992) ("This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights . . . . The authorities in North Carolina are consistent with the decisions of the United States Supreme Court . . . to the effect that officials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been violated").

<sup>925</sup> *Craig*, 678 S.E.2d at 352 (claim in part brought against high school principal in her official capacity); *Corum*, 413 S.E.2d at 784 (holding that "officials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been violated").

<sup>926</sup> N.C. CONST. art. I, § 19; *Deminski*, 858 S.E.2d at 414. Cases have interpreted N.C. CONST. art. I, § 19 to potentially entitle individuals "to an education free from abuse or physical harm." *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 731 S.E.2d 245 (N.C. App. 2012). However, *Fothergill v. Jones County Board of Education* determined that a "teacher-student sexual relationship was [not] held to constitute a violation of the student's right to a sound basic education," precluding sexual assault from a teacher as a viable claim to sue against the school board under this equal protection clause. *Fothergill v. Jones Cnty. Bd. of Educ.*, 841 F.Supp.2d 915, 919 (E.D.N.C. 2012).

## Available Damages

- Compensatory damages: (presumptively) available.<sup>927</sup>
- Punitive damages: Unclear.<sup>928</sup>

## Damages Cap(s)

- Compensatory damages: no cap for compensatory damages.<sup>929</sup>
- Punitive damages: capped at three times the amount of compensatory damages or \$250,000, whichever amount is greater.<sup>930</sup>

## State of Limitations

Three years.<sup>931</sup>

## Administrative Requirements

- Administrative exhaustion: not required.<sup>932</sup>
- Notice of claim:
  - A notice of claim against the state typically must be filed within three years after the claim has accrued if the claim involves injury or property damage.<sup>933</sup>

## Fee Shifting

Presumptively not available.<sup>934</sup>

## Jurisdictional Issues

- North Carolina Supreme Court has recognized an implied constitutional right of action:

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<sup>927</sup> *Corum*, 413 S.E.2d at 786 (granting plaintiffs “a direct cause of action under the State Constitution” for violations of constitutional rights, including education, and a means to seek damages directly under the State Constitution, by way of abolishing the bar of sovereign immunity); *See generally* John D. Boutwell, *The Cause of Action for Damages Under North Carolina’s Constitution: Corum v. University of North Carolina*, 70 N.C. L. REV. 1899 (1992).

<sup>928</sup> *Deminski*, 858 S.E.2d at 410 (seeking both compensatory and punitive damages).

<sup>929</sup> *See* McDonald Plosser, *United States: Sky’s The Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule> (explaining that “[t]here is no cap on compensatory damages in North Carolina (except in medical malpractice cases)”).

<sup>930</sup> *Id.*; N.C. GEN. STAT. § 1D-25 (2023).

<sup>931</sup> N.C. GEN. STAT. ANN. § 1-52 (2023).

<sup>932</sup> *Davis*, 175 F.Supp.3d at 591 (noting that “if a constitutional violation occurs, individuals may ‘seek to redress’ it, irrespective of whether sovereign immunity would generally apply”).

<sup>933</sup> N.C. GEN. STAT. § 143-299 (2023).

<sup>934</sup> The general rule in North Carolina is that “a successful litigant may not recover attorneys’ fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute.” *Stillwell Enterprises, Inc. v. Interstate Equip. Co.*, 266 S.E.2d 812, 814 (N.C. 1980). The only statute potentially applicable here is N.C. Gen. Stat. § 6-21.4, which governs specific civil actions brought against a public school principal or teacher regarding the use of corporal punishment; however such statute is not applicable here as such actions center on a state constitution violation. N.C. GEN. STAT. §§ 6-21.4 (2023).

- If an individual's state constitutional rights have been abridged and there is an absence of an adequate state remedy, the individual "has a direct claim against the State under the Constitution."<sup>935</sup>
- Actions are to be brought in the Superior Courts.<sup>936</sup>

## State Constitutional Education Protection Claims, N.C. CONST. art. I, § 15

"The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST. art. I, § 15. North Carolina courts have held that, based on this provision, "equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process."<sup>937</sup>

### Potential Defendants

- This provision, similar to § 19, requires that a "state actor" must have violated a constitutional right.<sup>938</sup>
- State actors include: public schools<sup>939</sup>, charter schools,<sup>940</sup> public school employees, and the State Board of Education, including the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor.<sup>941</sup>

### Bases of Discrimination

- The precise bases of discrimination protected by this provision are unclear. At minimum, this provision protects against a school's deliberate indifference "verbal, physical, and sexual

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<sup>935</sup> *Corum v. Univ. of North Carolina Through Bd. of Governors*, 413 S.E.2d 276, 291-292, (N.C. 1992) (concluding that the doctrine of sovereign immunity "cannot stand as a barrier to North Carolina citizens who seek to remedy violations" of the State Constitution, and when "there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail"); *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 678 S.E.2d 351 (N.C. 2009) (establishing right of action for violation of art. I, §§ 15, 19 of state constitution (equal protection of the laws of the land and the right to education)). To note, an "adequate state remedy" means that if the "plaintiff's claim is successful, the remedy would compensate the plaintiff for the damage injury alleged in the direct constitution claim." *Est. of Fennell ex rel. Fennell v. Stephenson*, 528 S.E.2d 911, 915-16 (N.C. App. 2000), *rev'd in part*, 554 S.E.2d 629 (N.C. 2001). Furthermore, an "adequate remedy" is one that "provide[s] the possibility of relief under the circumstances." *Craig*, 363 N.C. at 340. Finally, "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.*

<sup>936</sup> N.C. CONST. art. IV, § 12.

<sup>937</sup> *Sneed v. Greensboro City Bd. of Ed.*, 264 S.E.2d 106, 114 (N.C. 1980).

<sup>938</sup> *Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 858 S.E.2d 788, 792, 413 (N.C. 2021); *see Corum*, 413 S.E.2d at 290 ("This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights . . . . The authorities in North Carolina are consistent with the decisions of the United States Supreme Court . . . . to the effect that officials and employees of the State acting in their official capacity are subject to direct causes of action by plaintiffs whose constitutional rights have been violated").

<sup>939</sup> N.C. CONST. art. IX, § 2, 4 (stating that the uniform system of schools within the state are "free public schools"); *see also* N.C. GEN. STAT. ANN. § 115C-1 (2023) (guaranteeing access to education through "a standard high school course of study," to each student "less than 21 years old").

<sup>940</sup> *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 118-19 (4th Cir. 2022) (ruling that North Carolina charter schools are state actors as they are "public institutions" and "public schools" that are "clothed with the authority of state law").

<sup>941</sup> *Deminski*, 858 S.E.2d at 788 (holding that the State Board of Education could not invoke sovereign immunity).

harassment.”<sup>942</sup> Art. I, § 15 and art. IX, § 12 “require the government to provide an opportunity to learn that is free from continual intimidation and harassment which prevent a student from learning,” i.e. a safe environment for learning.<sup>943</sup>

## Available Damages

- Compensatory damages: available.<sup>944</sup>
- Punitive damages: Unclear.

## Damages Cap(s)

- Compensatory damages: no cap for compensatory damages.
- Punitive damages: capped at three times the dollar amount of compensatory damages or \$250,000, whichever amount is greater.<sup>945</sup>

## State of Limitations

Three years.<sup>946</sup>

## Administrative Requirements

- Administrative exhaustion: not required.<sup>947</sup>
- Notice of claim:
  - a notice of claim against the state typically must be filed within three years after the claim has accrued if claim involves injury or property damage.<sup>948</sup>

## Fee Shifting

Presumptively not available.<sup>949</sup>

## Jurisdictional Issues

- Actions must be brought in the Superior Courts.<sup>950</sup>

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<sup>942</sup> *Id.* at 795 (plaintiff stated a colorable claim that ongoing and severe physical, verbal, and sexual harassment “directly impacted” a student’s educational opportunities and prevented the student from “accessing their constitutional right to a sound basic education,” a constitutionally guaranteed right in North Carolina).

<sup>943</sup> *Deminski*, 858 S.E.2d at 792. The Supreme Court has stated that the state constitutional provisions “work in tandem” to, in effect, “guarantee every child in the state an *opportunity* to receive a sound basic education[.]” *Deminski*, 858 S.E.2d at 792; *Silver v. Halifax Cnty. Bd. of Commissioners*, 821 S.E.2d 755, 756 (N.C. 2018) (emphasis added). A student, in bringing a claim under this deliberate indifference standard, must allege that (1) the discrimination “directly impact[ed] the nature, extent, and quality of educational opportunities made available” to the students and (2) the “government failed to ‘guard and maintain that right’” of a sound basic education. *Deminski*, 858 S.E.2d at 795.

<sup>944</sup> *Corum*, 413 S.E.2d at 289, 786 (granting plaintiffs “a direct cause of action under the State Constitution” for violations of constitutional rights, including education, and a means to seek damages directly under the State Constitution, by way of abolishing the bar of sovereign immunity); *See generally* John D. Boutwell, *The Cause of Action for Damages Under North Carolina’s Constitution: Corum v. University of North Carolina*, 70 N.C. L. Rev. 1899 (1992).

<sup>945</sup> N.C. GEN. STAT. § 1D-25 (2023).

<sup>946</sup> N.C. GEN. STAT. § 1-52 (2023).

<sup>947</sup> *Davis v. Blanchard*, 175 F.Supp.3d 581 (M.D.N.C. 2016) (noting that “if a constitutional violation occurs, individuals may ‘seek to redress’ it, irrespective of whether sovereign immunity would generally apply”).

<sup>948</sup> N.C. GEN. STAT. ANN. § 143-299 (2023).

<sup>949</sup> *See supra* note 934.

<sup>950</sup> N.C. CONST. art. IV, § 12.

# North Dakota

## State Constitutional Equal Protection Claims, N.D. Const. art. I, §§ 21, 22.

“No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.”<sup>951</sup> “All laws of a general nature shall have a uniform operation.”<sup>952</sup>

### Potential Defendants

- State action is required to trigger the protection of Article I, Section 21.<sup>953</sup>

### Available Damages

- Compensatory damages (including emotional distress damages): Available.<sup>954</sup>
- Punitive damages: Likely available.<sup>955</sup>

### Damages Cap(s)

- Compensatory damages: No damage cap, though awards in excess of \$250,000 are subject to review for reasonableness.<sup>956</sup>
- Punitive damages: The amount of punitive damages may not exceed the greater of two times the amount of compensatory damages, or \$250,000.<sup>957</sup>

### Statute of Limitations

Six years.<sup>958</sup>

### Administrative Requirements

- Administrative exhaustion: required.<sup>959</sup>
- Notice of claim: A person bringing a claim against the state or a state employee for an injury shall present to the director of the office of management and budget within one hundred eighty days after the alleged injury is discovered or reasonably should have been discovered a written notice stating the time, place, and circumstances of the injury, the names of any state

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<sup>951</sup> N.D. CONST. art. I, § 21.

<sup>952</sup> N.D. CONST. art. I, § 22.

<sup>953</sup> *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 565 (N.D. 1993)

<sup>954</sup> *Lake v. Neubauer*, 87 N.W.2d 888, 891 (N.D. 1958).

<sup>955</sup> N.D. CENT. CODE § 32-03.2-11.

<sup>956</sup> N.D. CENT. CODE § 32-03.2-08.

<sup>957</sup> N.D. CENT. CODE § 32-03.2-11.

<sup>958</sup> N.D. CENT. CODE § 28-01-16.

<sup>959</sup> *Thompson v. Peterson*, 546 N.W.2d 856, 861 (N.D. 1996) (holding the failure to exhaust administrative remedies precluded a dismissed university professor from raising constitutional claims on appeal).

employees known to be involved, and the amount of compensation or other relief demanded.<sup>960</sup>

### Fee-Shifting

Available for the defendant only.<sup>961</sup>

### Jurisdictional Issues

Civil actions may be brought against the state of North Dakota on account of claims for relief claimed to have arisen out of transactions connected with the operation of the association upon compliance with this section. Such actions must be brought in the county where the association has its principal place of business.<sup>962</sup>

## Ohio

### General Information for Claims Against State Colleges and Universities (e.g., for state common law claims)

#### Available Damages

- *Compensatory damages*: available (see below).
- *Punitive damages*: unavailable for claims against state universities or colleges.<sup>963</sup>

#### Damages Caps

- *Compensatory damages (“actual loss”)*: not capped.<sup>964</sup>
- *Non-“actual loss” damages*: capped at \$250,000.<sup>965</sup>
  - “Actual loss” damages exclude “[a]ny damages awarded for pain and suffering,” “mental anguish,” or “any other intangible loss.”<sup>966</sup>
  - That cap exempts court costs and interest if the action is against a state university or college.<sup>967</sup>

### Fee-Shifting

Attorney’s fees are available if a party prevails in an action against the state of Ohio in the Court of Claims, at a rate of \$60/hour, subject to a maximum of either \$720 (no appeal), \$1,020, or \$1,320 (appeal plus travel time).<sup>968</sup>

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<sup>960</sup> N.D. CENT. CODE § 32-12.2-04.

<sup>961</sup> *Id.* § 32-15-32.

<sup>962</sup> *Id.* § 54-18-12.

<sup>963</sup> OHIO REV. CODE ANN. § 3345.40(B)(1) (2024); *see also id.* § 3345.011, 3345.40 (both defining “state university or college”).

<sup>964</sup> *Id.* § 3345.50(B)(1).

<sup>965</sup> *Id.* § 3345.50(B)(3).

<sup>966</sup> *Id.* § 3345.40 (A)(2)(b)(ii).

<sup>967</sup> *Id.*

<sup>968</sup> *Id.* § 2473.65(A)(1)-(3).

## Jurisdictional Issues

- Claims for money damages against the state of Ohio must be filed in the Court of Claims.<sup>969</sup>
- The Court of Claims also has “exclusive, original jurisdiction of all civil actions” against the Ohio State University Board of Trustees.<sup>970</sup>

## State Constitutional Equal Protection Claims, Ohio Const. art. 1, § 2

### Potential Defendants

The Ohio Department of Education, school districts, public institutions of higher education, boards of education, among potential other government actors.<sup>971</sup>

### Bases of Discrimination

Race, national origin, sex.<sup>972</sup>

### Available Damages

Damages claims cannot be directly sought for violations of the Ohio constitution when “there are other reasonably satisfactory remedies provided by statutory enactment and administrative process.”<sup>973</sup> Several federal district courts in the Sixth Circuit have indicated that § 1983 serves as an adequate remedy (e.g., for municipalities and officers), meaning state equal protection claims are not available

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<sup>969</sup> *Id.* § 2743.02. The Ohio Revised Code defines “state” for the purposes of state liability as “including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state.” *Id.* § 2743.01(A).

<sup>970</sup> *Id.* § 3335.03.

<sup>971</sup> The Ohio Constitution does not define “the state” for purposes of its constitutional protections, but claims have been successfully brought (i.e., assessed on the merits) against the Ohio Department of Education, school districts, public institutions of higher education, boards of education on equal-protection grounds under the state constitution. *E.g., Elec. Classroom of Tomorrow v. Ohio Dep’t of Educ.*, 118 N.E.3d 907 (Ohio Ct. App. 2017); *Shelby Ass’n. of Support Staff, OEA/NEA v. Shelby Sch. Dist. Bd. of Educ.*, No. 06CA86, 2008 WL 787042, at \*1 (Ohio Ct. App. Mar. 21, 2008); *Novak v. Revere Loc. Sch. Dist.*, 583 N.E.2d 1358 (Ohio Ct. App. 1989); *Ohio Univ. Bd. of Trustees v. Smith*, 724 N.E.2d 1155 (Ohio Ct. App. 1999); *Dunham v. Bd. of Ed. of City Sch. Dist. of City of Cincinnati*, 98 N.E.2d 594 (Ohio Com. Pl. 1950); *Hensley v. Toledo Area Reg’l Transit Auth.*, 700 N.E.2d 641 (Ohio Ct. App. 1997) (including board of education as a defendant in equal protection claim, which court addressed on the merits); *Jacobs v. Benedict*, 316 N.E.2d 898 (Ohio Ct. App. 1973) (holding that Ohio Rev. Code Ann. § 3313.20 does not grant boards of education the power to make rules which discriminate on the basis of sex). The Ohio Revised Code defines “state” for the purposes of state liability as “including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state.” OHIO REV. CODE ANN. § 2743.01(A) (2024).

<sup>972</sup> Ohio courts have typically construed the state constitution as coextensive with the federal constitution, including the state’s equal protection clause, although the federal constitution does not necessarily serve as an outer boundary on the state constitution’s protections. *See Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 717 N.E.2d 286, 291 (Ohio 1999) (“[T]he federal and Ohio Equal Protection Clauses are to be construed and analyzed identically.”); *State v. Robinette*, 685 N.E.2d 762, 766 (Ohio 1997) (similar). *But see Simmons–Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999) (explaining that Ohio courts will not “irreversibly tie ourselves” to an interpretation of the language of the Ohio Constitution just because it is consistent with language of the federal Constitution); *State v. Mole*, 74 N.E.3d 368, 375 (Ohio 2016) (collecting cases where Ohio courts accorded more expansive definitions to its state constitutional provisions than their federal equivalents on issues of free exercise, warrantless arrests, criminal defense, and government appropriation of private property); *id.* at 376 (“We once again reaffirm that this court, the ultimate arbiter of the meaning of the Ohio Constitution, can and will interpret our Constitution to afford greater rights to our citizens when we believe that such an interpretation is both prudent and not inconsistent with the intent of the framers.”).

<sup>973</sup> *Provenc v. Stark Cty. Bd. of Mental Retardation & Developmental Disabilities*, 594 N.E.2d 959, 965-66 (Ohio 1992).

against those actors.<sup>974</sup> While § 1983 cannot be enforced against state institutions, the state of Ohio has waived its immunity from liability, with various exceptions, and consented to be sued (and have its liability determined) in the Court of Claims.<sup>975</sup> This may be an adequate remedy.<sup>976</sup> Political subdivisions, such as school districts, are entitled to various, but narrow, immunities.<sup>977</sup>

## Damages Cap(s)

N/A.

## Statute of Limitations

Two years.<sup>978</sup>

## Administrative Requirements

- Administrative exhaustion not required.<sup>979</sup>
- Notice of claim not required.<sup>980</sup>

## Fee-Shifting

If a party prevails in an action against the state of Ohio in the Court of Claims, attorney's fees are available at a rate of \$60/hour, subject to a maximum of either \$720 (no appeal), \$1,020, or \$1,320 (appeal plus travel time).<sup>981</sup> If a party prevails against a political subdivision in a court of common pleas, attorney's fees are available at a rate of \$75/hour (or a higher hourly fee approved by the

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<sup>974</sup> See *Fowler v. City of Canton*, No. 5:08CV2350, 2009 WL 2950818, at \*2-3 (N.D. Ohio Sept. 10, 2009) (explaining that “42 U.S.C. § 1983 is one such remedy” under the *Provens* standard, such that “[t]herefore, unless § 1983 is proven to be an inadequate remedy, Plaintiffs’ Ohio constitutional claims must be dismissed”); *Williams v. Nice*, 58 F.Supp.3d 833, 839-40 (N.D. Ohio 2014), *aff’d sub nom. Williams v. Morgan*, 652 F. App’x 365 (6th Cir. 2016) (“[U]nless § 1983 is proven to be an inadequate remedy, Plaintiffs’ Ohio constitutional claims must be dismissed.”); *Ware v. Sanderson*, No. 1:12-CV-01920, 2013 WL 587583, at \*3 (N.D. Ohio Feb. 13, 2013) (“The Ohio Constitution does not provide . . . a civil damages remedy.”).

<sup>975</sup> OHIO REV. CODE ANN. § 2473.02(A)(1) (2024); *see also id.* § 2734.03 (“[T]he court of claims . . . has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code and exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims.”).

<sup>976</sup> See, e.g., *Akbar-El v. Ohio Univ.*, No. 94CA2049, 1995 WL 249829, at \*7 (Ohio Ct. App. Apr. 26, 1995) (rejecting “appellant’s state law claims,” including claim of equal-protection violation under Ohio constitution, against state university as brought initially in a Court of Common Please on grounds that “any state law claims against Ohio University [a]re . . . barred because the State of Ohio has waived its governmental immunity only if sued in the Court of Claims,” citing Ohio Rev. Code Ann. § 2743.02(A)(1)); *cf. Newton v. Ohio Univ. Sch. of Osteopathic Med.*, 633 N.E.2d 593, 712 (Ohio Ct. App. 1993) (rejecting plaintiff-appellant’s contention that proceeding in Court of Claims was “an inadequate remedy at law” for tort plaintiffs bringing claim against state university).

<sup>977</sup> OHIO REV. CODE ANN. § 2744.03 (2024).

<sup>978</sup> *Id.* § 2743.16(A) (“[C]ivil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties.”); *id.* § 2744.04 (same for all claims brought against political subdivisions); *id.* § 2743.01(A) (defining the “state” as “including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state”); *id.* § 2473.01(B) (defining “political subdivisions” as “municipal corporations, townships, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches”).

<sup>979</sup> Administrative exhaustion for discrimination claims is only required for discrimination claims under the Ohio Revised Civil Rights Statute. *Id.* § 4112.052.

<sup>980</sup> Notice of claim is only required in actions for wrongful death. *Id.* § 2125.02.

<sup>981</sup> *Id.* § 2473.65(A)(1)-(3).

court),<sup>982</sup> subject to a cap of \$250,000 that is inclusive of the other non-“actual loss” damages incurred by a party (e.g., pain and suffering).<sup>983</sup>

## Jurisdictional Issues

The Court of Claims has “exclusive, original jurisdiction of all civil actions” against the Ohio State University Board of Trustees.<sup>984</sup>

## Notes

- Ohio’s revised Civil Rights Statute, which provides a private cause of action (subject to administrative exhaustion),<sup>985</sup> prohibits disability discrimination in educational institutions.<sup>986</sup>

Ohio has some other laws prohibiting race and sex discrimination against students, but only in very limited scenarios and without an indication that a private cause of action is available.<sup>987</sup>

## Oklahoma

### Oklahoma Statutes Annotated 25 § 1401-1402 (Discrimination in Public Accommodations)

#### Potential Defendants

- Any “person” who denies an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a “place of public accommodation.”<sup>988</sup>
  - A “place of public accommodation” includes any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds.<sup>989</sup>
  - Although we did not locate any Oklahoma case specifically holding that schools are public accommodations, they appear to fit the statutory definition. The Oklahoma Court of Appeals has held that a preschool was a “public accommodation under a similar Tulsa city ordinance because it advertised the school to the general public.”<sup>990</sup>
  - The statute provides that persons aggrieved by discriminatory practices may file a complaint with the attorney general’s office within 180 days of the discriminatory

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<sup>982</sup> *Id.* § 2335.39

<sup>983</sup> *Id.* § 2744.05.

<sup>984</sup> *Id.* § 3335.03.

<sup>985</sup> *Id.* § 4112.05.

<sup>986</sup> *Id.* § 4112.022.

<sup>987</sup> *E.g.*, *id.* § 3326.10 (prohibiting discrimination on the basis of, *inter alia*, race, color, and sex in admission to particular STEM schools); *id.* § 3314.06 (same for admission to community schools); *id.* § 3313.976 (requiring all registered alternative schools not to discriminate on the basis of, *inter alia*, race and ethnic background); *id.* § 3327.01 (providing that the Ohio Board of Education will not provide transportation of pupils if the selection of pupils discriminates on the basis of, *inter alia*, race, color, or national origin).

<sup>988</sup> Okla. Stat. Ann. 25 § 1402.

<sup>989</sup> Okla. Stat. Ann. 25 § 1401.

<sup>990</sup> *Valentine v. City of Tulsa*, 518 P.2d 316, 319-20 (Okla. App. Ct. 1973).

practice.<sup>991</sup> The attorney general may file a civil action on behalf of an aggrieved person, in which the aggrieved person may intervene.<sup>992</sup>

#### Bases of Discrimination

Race, color, religion, sex, national origin, age, or disability.<sup>993</sup>

#### Available Damages

Compensatory damages for the aggrieved person and civil penalties of \$50,000 for a first violation and \$100,000 for a subsequent violation.<sup>994</sup>

#### Damages Cap(s)

See above for caps on civil penalties.

#### Statute of Limitations

180 days for complaints to the attorney general's office. The statute does not set an explicit statute of limitations for civil actions by the attorney general.

#### Administrative Requirements

Aggrieved parties must file a complaint with the attorney general's office within 180 days.<sup>995</sup>

#### Fee Shifting

Unknown

#### Jurisdictional Issues

N/A

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<sup>991</sup> Okla. Stat. Ann. 25 § 1502.

<sup>992</sup> Okla. Stat. Ann. 25 §§ 1502.15, 1506.

<sup>993</sup> Okla. Stat. Ann. 25 § 1402.

<sup>994</sup> Okla. Stat. Ann. 25 § 1506.

<sup>995</sup> Okla. Stat. Ann. 25 § 1502.

# Oregon

## Prohibited Discrimination in Schools, Oregon Revised Statutes § 659.850

Oregon's discrimination law provides that a person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity.<sup>996</sup> It also requires all public and charter schools/districts in Oregon are required to have discrimination policies.<sup>997</sup>

### Potential Defendants

- Public elementary schools, secondary schools or community college education programs financed in part or in whole by moneys appropriated from the government<sup>998</sup>, including public charter schools.<sup>999</sup>
- Presumably, both the school district personnel and representatives of community organizations can be held liable.<sup>1000</sup>

### Bases of Discrimination

Race<sup>1001</sup>, color, national origin, sex, sexual orientation, and gender identity.<sup>1002</sup>

### Available Damages

Compensatory damages: available. “\$200 or actual damages, whichever is greater.”<sup>1003</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

One year of the filing of a grievance with the school district, which must be filed within 180 days of the alleged discrimination.<sup>1004</sup>

### Administrative Requirements

- Administrative exhaustion:
  - Complainant must first file a complaint with the applicable school/district.<sup>1005</sup>

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<sup>996</sup> OR. ADMIN. R. § 581-021-0045 (2024) establishes procedures for compliance with OR. REV. STAT. § 659.850 (2024).

<sup>997</sup> OR. ADMIN. R. § 581-022-2370(1) (2024).

<sup>998</sup> OR. REV. STAT. § 659.850(2) (2024).

<sup>999</sup> *Id.* § 338.125(2) (2024).

<sup>1000</sup> *Powell v. Bunn*, 142 P.3d 1054, 1058 (Or. 2006) (holding that the statute requires that the school district may not permit anyone to discriminate against a person in any public school program, service, or activity).

<sup>1001</sup> The CROWN Act was signed into law on June 11, 2021. It prohibits discrimination based on hairstyles associated with a person's race. H.R. 2935, 81<sup>st</sup> Gen. Assemb., Reg. Sess. (Or. 2021).

<sup>1002</sup> OR. REV. STAT. § 659.850(1) (2024).

<sup>1003</sup> OR. REV. STAT. § 659.850(1) (2024).

<sup>1004</sup> OR. REV. STAT. § 659.850(2), (3) (2024).

<sup>1005</sup> *Id.*

## Fee-Shifting

The statute does not provide for recovery for attorney fees.

# Pennsylvania

## Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Stat. and Cons. Stat. § 953–63

Although this statute is most commonly used for employment, it has been used in the education context at least once before.<sup>1006</sup>

### Potential Defendants

- Superintendents and employees<sup>1007</sup> of any “public accommodation, resort or amusement” including “kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions under the supervision of this Commonwealth.”<sup>1008</sup>

### Bases of Discrimination

Race, color, familial status, ancestry, age, sex, handicap or disability, and national origin.<sup>1009</sup>

### Available Damages

- *Compensatory damages (including emotional distress)*: available.<sup>1010</sup>
- *Punitive damages*: not available.<sup>1011</sup>

### Damages Cap(s)

None.<sup>1012</sup> However, actions against the state are capped at \$250,000 per plaintiff and \$1,000,000 in the aggregate<sup>1013</sup> and actions against local agencies are capped at \$500,000 in the aggregate<sup>1014</sup> for the same cause of action.

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<sup>1006</sup> The court also found that the immunity statute did not apply to the PHRA. *Wible v. Sch. Dist. of Phila.*, No. 15043169, 2018 WL 6814818, at \*1, \*15–16 (Pa. Ct. Com. Pl. Phila. Cnty. Dec. 17, 2018).

<sup>1007</sup> 43 PA. STAT. AND CONS. STAT. § 955(i)(1) (2024).

<sup>1008</sup> 43 PA. STAT. AND CONS. STAT. § 954(l) (2024).

<sup>1009</sup> 43 PA. STAT. AND CONS. STAT. § 962 (2024). The Pennsylvania Human Relations Commission (“Commission”) has put out guidance that sex under the PHRA, sex may refer to sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity and/or gender expression. Pa. Hum. Rels. Comm’n Guidance on Discrimination on the Basis of Sex Under the Pa. Hum. Relations Act, PHRC, <https://www.phrc.pa.gov/AboutUs/Documents/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf> (last visited Jan. 26, 2024).

<sup>1010</sup> *Taylor v. Cent. Pa. Drug & Alcohol Servs. Corp.*, 890 F.Supp. 360, 373 (M.D. Pa. 1995); *Pa. Hum. Rels. Comm’n v. Zamantakis*, 387 A.2d 70, 73 (Pa. 1978) (holding that PHRA allows damages for “humiliation and mental anguish”).

<sup>1011</sup> *Hoy v. Angelone*, 720 A.2d 745, 751 (Pa. 1998).

<sup>1012</sup> *Gucker v. U.S. Steel Corp.*, 212 F.Supp.3d 549, 559 (W.D. Pa. 2016).

<sup>1013</sup> 42 PA. STAT. AND CONS. STAT. § 8528(b) (2024).

<sup>1014</sup> 42 PA. STAT. AND CONS. STAT. § 8553(b) (2024).

## Statute of Limitations

180 days to file the initial complaint with the Pennsylvania Human Rights Commission.<sup>1015</sup> An action must be filed within two years of notice of the Commission closing the complaint.<sup>1016</sup>

## Administrative Requirements

- Administrative exhaustion: required.<sup>1017</sup>
  - As described above, a plaintiff has 180 days to file an initial complaint with the Pennsylvania Human Rights Commission.<sup>1018</sup> If, within one year of filing a complaint with the Commission, the Commission dismisses the complaint or has not entered into a conciliation agreement, the Commission must notify the complainant.<sup>1019</sup> After receiving that notice, a complainant may bring an action.<sup>1020</sup>
- Notice of claims: not required.

## Fee-Shifting

The court may award attorney fees, including to the defendant if the claim was brought in bad faith.<sup>1021</sup>

## Jurisdictional Issues

An action must be filed in courts of common pleas.<sup>1022</sup>

## Notes

- Pennsylvania's state constitution contains equal protection provisions for both sex<sup>1023</sup> and race,<sup>1024</sup> but no private right of action for damages is available thereunder.<sup>1025</sup>

## Rhode Island

Our research did not identify a Rhode Island statute that provides a private cause of action for education in discrimination. Rhode Island prohibits race, sex, sexual orientation, sexual identity, disability, and religious discrimination in public places, 11 R.I. Gen. Laws §§ 24-1–24-8, and

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<sup>1015</sup> 43 PA. STAT. AND CONS. STAT. § 959(h) (2024). However, this period “may be tolled during a child’s period of minority.” Nicole B. v. Sch. Dist. of Phila., 237 A.3d 986, 1000 (Pa. 2020).

<sup>1016</sup> 43 PA. STAT. AND CONS. STAT. § 962(c)(2) (2024). If after one year, the Commission has dismissed the claim or “has not entered into a conciliation agreement to which the complainant is a party,” the Commission must notify the Complainant. This starts the two-year clock. § 962(c)(1) (2024).

<sup>1017</sup> Clay v. Advanced Comput. Applications, Inc., 559 A.2d 917, 920 (Pa. 1989) (“[T]he statutory scheme would be frustrated if aggrieved employees were permitted to circumvent the [Commission] by simply filing [discrimination] claims in court.”). However, a party may sue for common law torts if the underlying acts would independently support the common law tort claim. Schweitzer v. Rockwell Int’l, 586 A.2d 383, 388–89 (Pa. Super. Ct. 1990) (allowing independent action for intentional infliction of emotional distress and assault).

<sup>1018</sup> See n.22, *supra*.

<sup>1019</sup> 43 PA. STAT. AND CONS. STAT. § 962(c)(1) (2024).

<sup>1020</sup> *Id.*

<sup>1021</sup> § 962(c.2)–(c.3).

<sup>1022</sup> § 962(c)(1).

<sup>1023</sup> PA. CONST, art. I, § 28.

<sup>1024</sup> PA. CONST, art. I, § 29.

<sup>1025</sup> *Jones v. City of Phila.*, 890 A.2d 1188, 1208 (Pa. Commw. Ct. 2006) (“[N]either Pennsylvania statutory authority, nor appellate case law has authorized the award of monetary damages for a violation of the Pennsylvania Constitution.”).

specifically prohibits discrimination based on sex in public schools, 16 R.I. Gen. Laws §§ 16-38-1.1, but those statutes do not appear to provide an express private cause of action.

## South Carolina

Our research has not identified any viable anti-discrimination causes of action under South Carolina law.<sup>1026</sup> The information below, however, may be useful in bringing common law claims on behalf of students or others.

### General Information for state common law claims

#### Available Damages

- *Compensatory damages*: available,<sup>1027</sup> likely including emotional distress.<sup>1028</sup>
- *Punitive damages*: available for personal injury claims,<sup>1029</sup> except actions against the state.<sup>1030</sup>

#### Damages Caps

- *Compensatory damages (including emotional distress damages)*: Uncapped for personal injury claims,<sup>1031</sup> except for actions brought against the state (including schools, colleges and universities)<sup>1032</sup> for a single occurrence<sup>1033</sup> may not exceed \$300,000 per person or a total of \$600,000.<sup>1034</sup>
- *Punitive damages*: For government entities, generally held to greater of three times compensatory damages or \$500,000 for personal injury claims.<sup>1035</sup>

#### Statute of Limitations

The general statute of limitations for personal injury actions in South Carolina is three years.<sup>1036</sup> However, the statute of limitations for actions against the state is two years.<sup>1037</sup>

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<sup>1026</sup> The Safe School Climate Act, S.C. CODE ANN. §§ 59-63-110 to 59-63-150, is intended to prevent bullying, it “does not create or alter tort liability.” S.C. CODE ANN. § 59-63-150(A) (2024); *See also Doe v. Spartanburg Cnty. Sch. Dist. Three*, No. 7:15-02764-HMH, 2015 WL 13763039, at \*2 (D. S.C. Aug. 19, 2015) (explaining that the South Carolina Safe School Climate Act does not create a cause of action).

<sup>1027</sup> *See* § 15-32-220(3) (2024) (defining economic damages).

<sup>1028</sup> *See Riley v. Ford Motor Co.*, 777 S.E.2d 824, 194–95 (S.C. 2015) (confirming that the trial court’s granting of *nisi additur* was proper, even though the original award contained noneconomic damages, including “emotional turmoil”).

<sup>1029</sup> S.C. CODE ANN. § 15-32-530 (2024); *See also Mitchell, Jr. v. Fortis Ins. Co.*, 686 S.E.2d 176, 184–86 (S.C. 2009) (stating the test for South Carolina courts when reviewing post-judgment award of punitive damages).

<sup>1030</sup> S.C. CODE ANN. § 15-78-120(b) (2024).

<sup>1031</sup> While medical malpractice claims are capped for noneconomic damages, they are not capped for economic claims. *See* S.C. CODE ANN. § 15-32-220 (2024); *See also* How Economic Damages Are Calculated in South Carolina, DAMAGEGUIDE, <https://www.damageguide.com/writings/jurisdictions/south-carolina/#:~:text=There%20are%20no%20limits%20on,caps%20to%20non%2Deconomic%20damages> (last visited Oct. 29, 2024).

<sup>1032</sup> S.C. CODE ANN. § 15-78-30(a) (2024).

<sup>1033</sup> An occurrence is “an unfolding sequence of events which proximately flow from a single act of negligence.” S.C. CODE ANN. § 15-78-30(g) (2024); *See also Boiter v. S.C. Dep’t of Transp.*, 712 S.E.2d 401, 133–34 (S.C. 2011) (determining that two separate negligence acts by two distinct entities comprised two occurrences).

<sup>1034</sup> S.C. CODE ANN. § 15-78-120(a)–(b) (2024). There are also damage caps for licensed physicians and dentists employed by a government entity. § 15-78-120(c)–(d) (2024).

<sup>1035</sup> There are a few exceptions to this damage cap, the most relevant being if the “defendant had an intent to harm,” in which case there is no cap on punitive damages. S.C. CODE ANN. § 15-32-530 (2024).

<sup>1036</sup> S.C. CODE ANN. § 15-3-530(4)–(5) (2024).

<sup>1037</sup> However, it can be extended to three years by filing a statutorily defined claim. S.C. CODE ANN. § 15-78-110 (2024).

## Administrative Requirements

- Administrative Exhaustion: Not required.<sup>1038</sup>
- Notice of Claims:
  - If a verified claim<sup>1039</sup> is filed, the claimant may not institute an action until after the earliest of: 180 days after filing of the claim; the state's disallowance of the claim; or the state's rejection of a settlement offer.<sup>1040</sup>

## Fee-Shifting

Fee-Shifting is generally not available for personal injury actions.<sup>1041</sup> It is also not available for actions against the state.<sup>1042</sup>

## Jurisdictional Issues

- For actions against the state, jurisdiction is the circuit court and can be filed in the “county where the act or omission occurred.”<sup>1043</sup>

## Notes

- State actors enjoy official immunity or qualified immunity for claims based on discretionary acts.<sup>1044</sup>
- For actions against government entities, “only the agency or political subdivision for which the employee was acting shall be named as the party defendant,” and not the individual employee.<sup>1045</sup>
- For actions against the state, “the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”<sup>1046</sup>

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<sup>1038</sup> See *Searcy v. S.C. Dep't of Educ.*, Transp. Div., 402 S.E.2d 486, 487 (S.C. Ct. App. 1991), citing S.C. CODE ANN. §§ 15-78-80(a), 15-78-90(b) (2024) (stating that the Tort Claim Act allows a person to file a claim with the “appropriate state agency, the appropriate political subdivision, or, in some cases, the Attorney General” or the person “[can] institute an action against the appropriate agency or political subdivision’ irrespective of ‘[whether or not [a] claim is filed . . . .’”).

<sup>1039</sup> A verified claim is one supported by an oath. *Id* at 488. The claim must also include the “circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names all person involved if known, and the amount of the loss sustained. The claim must be filed with the appropriate person by certified mail or service of process and must be received “within one year after the loss was or should have been discovered. S.C. CODE ANN. § 15-78-80(a)–(c) (2024).

<sup>1040</sup> S.C. CODE ANN. § 15-78-90(b) (2024).

<sup>1041</sup> See generally Peter R. Roest, *Recovery of Attorneys' Fees as Costs or Damages in South Carolina*, 38 S.C. L. REV. 823 (1987) (discussing the South Carolina statutes that allow for recovery of attorneys' fees).

<sup>1042</sup> *Knoke v. S.C. Dep't of Parks, Recreation, and Tourism*, 478 S.E.2d 256, 260 (S.C. 1996).

<sup>1043</sup> S.C. CODE ANN. § 15-78-120(c) (2024).

<sup>1044</sup> S.C. CODE ANN. § 15-78-60(5) (2024).

<sup>1045</sup> S.C. CODE ANN. § 15-78-70(c) (2024); See also *Joubert v. S. C. Dep't of Soc. Servs.*, 534 S.E.2d 1, 6–8 (S.C. Ct. App. 2000).

<sup>1046</sup> S.C. CODE ANN. § 15-78-100(b) (2024).

# South Dakota

## Human Relations Act – Educational institutions' unfair or discriminatory practices, SDCL § 20-13-22

The statutes prohibit educational institutions from discriminatory practices because of race, color, creed, religion, sex, ancestry, disability, or national origin, including:

- (1) To discriminate in any manner in its full use or in its benefits, or in its services against any individual because of race, color, creed, religion, sex, ancestry, disability, or national origin.
- (2) To include, expel, limit, or otherwise discriminate against any individual seeking admission as a student, or an individual enrolled as a student because of race, color, creed, religion, sex, ancestry, disability, or national origin.
- (3) To make or use a written or oral inquiry, or form of application for admission that elicits or attempts to elicit information, or to make or keep a record, concerning the race, color, creed, religion, ancestry, disability, or national origin of an applicant for admission except as may be permitted by regulations of the commission of human rights.

### Potential Defendants

- “Educational institutions,” including any public or private institution of education such as an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system, and any business, nursing, professional, secretarial, technical, or vocational school, and includes any agent of such institutions.<sup>1047</sup>

### Bases of Discrimination

Race, color, sex, ancestry, and national origin.<sup>1048</sup>

### Available Damages

- Compensatory damages (including emotional distress damages): available.<sup>1049</sup>
- Punitive damages: available.<sup>1050</sup>

### Damages Cap(s)

No cap for compensatory damages, likely including emotional distress damages.<sup>1051</sup>

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<sup>1047</sup> S.D. CODIFIED LAWS § 20-13-22.

<sup>1048</sup> *Id.*

<sup>1049</sup> *Id.* at § 20-13-35.1. (“In a civil action, if the court or jury finds that an unfair or discriminatory practice has occurred, it may award the charging party compensatory damages.”).

<sup>1050</sup> *Id.* (“Punitive damages may be awarded under § 21-3-2 for a violation of §§ 20-13-20 to 20-13-21.2, inclusive, 20-13-23.4, 20-13-23.7, or 20-13-26.”).

<sup>1051</sup> See McDonald Plosser, *United States: Sky's The Limit? A 50-State Survey Of Damages Caps And The Collateral Source Rule*, Mondaq (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule> (“There is no general cap on compensatory or punitive damages in South Dakota.”)).

## Statute of Limitations

- Any charge filed under SDCL Ch. 20-13 must “be filed within one hundred and eighty days after the alleged discriminatory or unfair practice occurred.”<sup>1052</sup>
- Any civil action shall be filed within one year of electing to file an individual lawsuit.<sup>1053</sup>

## Administrative Requirements

- Administrative exhaustion: required.<sup>1054</sup>
- Notice of claim:
  - Written notice of the time, place, and cause of the injury must be given to the public entity within 180 days after the injury.<sup>1055</sup>

## Fee-Shifting

Presumably unavailable.<sup>1056</sup>

## Jurisdictional Issues

- Any person claiming to be aggrieved by a discriminatory or unfair practice may file with the Division of Human Rights a verified, written charge which shall state the name and address of the person or agency alleged to have committed the discriminatory or unfair practice.<sup>1057</sup>
- After filing the charges with the agency, the parties have a right to transfer the matter to circuit court.<sup>1058</sup>
- No later than twenty days after the issuance of notice requiring the respondent to answer the charge, the charging party or the respondent may elect to have the claims asserted in the charge decided in a civil action, in lieu of a hearing, under the provisions of this section. Any civil action shall be filed within one year of such election. Upon receipt of notice of election, the Division of Human Rights or the Commission of Human Rights has no further jurisdiction over the parties concerning the charge filed. The Division of Human Rights or the Commission of Human Rights shall notify the parties in writing of the election and of the one year limitation period in which to file a civil action.<sup>1059</sup>

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<sup>1052</sup> S.D. CODIFIED LAWS § 20-13-31.

<sup>1053</sup> *Id.* At § 20-13-35.1.

<sup>1054</sup> S.D. CODIFIED LAWS § 20-13-29 (“Any person claiming to be aggrieved by a discriminatory or unfair practice may file with the Division of Human Rights a verified, written charge which shall state the name and address of the person or agency alleged to have committed the discriminatory or unfair practice.”); *id.* § 20-13-35.1 (“No later than twenty days after the issuance of notice requiring the respondent to answer the charge, the charging party or the respondent may elect to have the claims asserted in the charge decided in a civil action, in lieu of a hearing, under the provisions of this section. Any civil action shall be filed within one year of such election. Upon receipt of notice of election, the Division of Human Rights or the Commission of Human Rights has no further jurisdiction over the parties concerning the charge filed. The Division of Human Rights or the Commission of Human Rights shall notify the parties in writing of the election and of the one year limitation period in which to file a civil action.”).

<sup>1055</sup> S.D. CODIFIED LAWS § 3-21-2 (“No action for the recovery of damages for personal injury, property damage, error, or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice of the time, place, and cause of the injury is given to the public entity as provided by this chapter within one hundred eighty days after the injury.”).

<sup>1056</sup> *Id.* § 20-13-35.1. (“Attorneys' fees and costs may be awarded to the prevailing party for housing matters.”).

<sup>1057</sup> S.D. CODIFIED LAWS § 20-13-29.

<sup>1058</sup> *Id.* at § 20-13-35.1.

<sup>1059</sup> *Id.* at § 20-13-35.1.

# TENNESSEE

## State Constitutional Equal Protection Claims, TENN. CONST. art. I, § 8

### Potential Defendants

- State action is required to invoke the protections of the provision.<sup>1060</sup> Actions by private parties are only attributable to the state if the state compels the action.<sup>1061</sup>

### Bases of Discrimination

Race, alienage, national origin, gender.<sup>1062</sup>

### Available Damages

**N/A.** Tennessee does not recognize a private cause of action for recovery of damages for violations of the Tennessee Constitution.<sup>1063</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

One year, for any cause of action sounding in tort or for violations of civil rights.<sup>1064</sup>

### Administrative Requirements

- Administrative exhaustion: required only for suits for money damages, which are not available here.<sup>1065</sup>
- Notice of claim:
  - Claims against state defendants must be initially noticed to the Division of Claims of Risk Management of the Tennessee Board of Claims.<sup>1066</sup>
  - Claims against local governmental entities (including school districts) must first be noticed to the local governmental entity itself.<sup>1067</sup> Statute does not appear to set a time limit for such notice, but the websites for certain municipalities suggest that notice should be given no more than 30 days following the incident giving rise to the claim.<sup>1068</sup>

### Fee-Shifting

Not available.<sup>1069</sup>

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<sup>1060</sup> *CitiMortgage, Inc. v. Drake*, 410 S.W.3d 797, 806 (Tenn. Ct. App. 2013).

<sup>1061</sup> *CitiMortgage, Inc. v. Drake*, 410 S.W.3d 797, 804 (Tenn. Ct. App. 2013).

<sup>1062</sup> *State v. Whitehead*, 43 S.W.3d 921, 925 (Tenn. Crim. App. 2000).

<sup>1063</sup> *Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1996).

<sup>1064</sup> Tenn. Code § 28-3-104 (2024); *Turner v. State*, 184 S.W.3d 701, 706 (Tenn. Ct. App. 2005).

<sup>1065</sup> Tenn. Code § 9-8-307(a) (2024); Tenn. Code § 29-20-304 (2024).

<sup>1066</sup> Tenn. Code § 9-8-402 (2024).

<sup>1067</sup> Tenn. Code § 29-20-304 (2024).

<sup>1068</sup> *Risk Management*, CITY OF GALLATIN, <https://www.gallatin.tn.gov/246/Risk-Management> (last visited Jan. 24, 2024).

<sup>1069</sup> *Reid v. State*, 9 S.W.3d 788, 795 (Tenn. Ct. App. 1999).

## Jurisdictional Issues

N/A.

## Tennessee Human Rights Act, TENN. CODE § 4-21

### Potential Defendants

- “[A]ny state agency receiving federal funds making it subject to Title VI of the Civil Rights Act of 1964 . . .”<sup>1070</sup>
- “Places of public accommodation” including “any place, store or other establishment” that “is supported directly or indirectly by government funds.”<sup>1071</sup>

### Bases of Discrimination

- *State agencies subject to Title VI of the Civil Rights Act:* race, color or national origin.<sup>1072</sup>
- *Places of public accommodation:* race, color, sex, or national origin.<sup>1073</sup>

### Available Damages

- *Compensatory damages (including emotional distress damages):* Available (including emotional distress damages).<sup>1074</sup>
- *Punitive damages:* Not available (apart from instances of malicious harassment or housing discrimination).<sup>1075</sup>

### Damages Cap(s)

The following damage caps apply to suits against government entities:

- Suits for monetary damages against the state based on the acts of state employees<sup>1076</sup> are limited to \$300,000 per claimant and \$1,000,000 per occurrence.<sup>1077</sup> Punitive damages are not available from the state.<sup>1078</sup>
- Suits for monetary damages against local government entities (which includes school districts) are limited to the greater of (1) minimum insurance coverage limits required by local government by statute<sup>1079</sup> (which ranges up to \$700,000 depending on the cause of action) and (2) any higher coverage limits which a local government has secured through its insurance carrier.<sup>1080</sup>

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<sup>1070</sup> Tenn. Code § 4-21-904 (2024).

<sup>1071</sup> Tenn. Code § 4-21-102(15) (2024) (defining “public accommodation”); 4-21-501(2024) (prohibiting discrimination in places of public accommodation).

<sup>1072</sup> Tenn. Code § 4-21-904 (2024).

<sup>1073</sup> Tenn. Code § 4-21-501 (2024).

<sup>1074</sup> Tenn. Code § 4-21-306 (2024); *Crumley v. Greyhound Lines, Inc.*, No. 11-2153, 2011 WL 1897185, at \*2 (W.D. Tenn. May 18, 2011).

<sup>1075</sup> *Carver v. Citizen Utilities Co.*, 954 S.W.2d 34, 36 (Tenn. 1997) (“[P]unitive damages under the THRA are available only in cases involving discriminatory housing practices and malicious harassment . . .”).

<sup>1076</sup> Tenn. Code §8-42-101(3)(A) (2024).

<sup>1077</sup> Tenn. Code § 9-8-307(e) (2024).

<sup>1078</sup> Tenn. Code § 9-8-307(d) (2024).

<sup>1079</sup> Tenn. Code § 29-20-403 (2024).

<sup>1080</sup> Tenn. Code § 29-20-311 (2024).

## Statute of Limitations

180 days.<sup>1081</sup>

## Administrative Requirements

- Administrative exhaustion is required.
  - Plaintiffs must file a complaint with the Tennessee Human Rights Commission within 180 days from the date of the alleged discriminatory practices, and comply with the other procedures set forth in Title 4, Chapter 21, Part 3 of the Tennessee Code.<sup>1082</sup>
- Notice of claim:
  - Claims against state defendants must be initially noticed to the Division of Claims of Risk Management of the Tennessee Board of Claims.<sup>1083</sup>
  - Claims against local governmental entities (including school districts) must first be noticed to the local governmental entity itself.<sup>1084</sup> Statute does not appear to set a time limit for such notice, but the websites for certain municipalities suggest that notice should be given no more than 30 days following the incident giving rise to the claim.

## Fee-Shifting

Available under the Tennessee Human Rights Act,<sup>1085</sup> but likely unavailable against defendants that are governmental entities.<sup>1086</sup>

## Jurisdictional Issues

Suits for monetary damages against the state based on the acts of state employees may be brought exclusively before the Tennessee Claims Commission.<sup>1087</sup>

Suits for monetary damages against a local governmental entity (which includes school districts)<sup>1088</sup> may be brought exclusively in Tennessee Circuit Court (assuming administrative and notice requirements have been exhausted).<sup>1089</sup>

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<sup>1081</sup> Tenn. Code §4-21-302(c) (2024).

<sup>1082</sup> Tenn. Code §4-21-302(c) (2024).

<sup>1083</sup> Tenn. Code § 9-8-402 (2024).

<sup>1084</sup> Tenn. Code § 29-20-304 (2024).

<sup>1085</sup> Tenn. Code §4-21-306(a)(7) (2024).

<sup>1086</sup> *Reid v. State*, 9 S.W.3d 788, 795 (Tenn. Ct. App. 1999).

<sup>1087</sup> Tenn. Code § 9-8-307(a) (2024). The Act also applies to “places of public accommodation,” but no case appears to have extended this definition to a governmental entity.

<sup>1088</sup> Tenn. Code § 29-20-102(3)(A) (2024).

<sup>1089</sup> Tenn. Code § 29-20-307 (2024); *Arbuckle v. City of Chattanooga*, 696 F. Supp. 2d 907, 928 (E.D. Tenn. 2010).

# Texas

## State Constitutional Equal Protection Claims, Tex. Const. art. I, § 3

### Potential Defendants

State actors including the Texas Education Agency, school districts, public institutions of higher education, boards of education, among potential other government actors.<sup>1090</sup>

### Bases of Discrimination

Sex, race, color, creed, and national origin.<sup>1091</sup>

### Available Damages

No damages available. A party may only seek injunctive relief for violations of rights listed under the Texas Bill of Rights.<sup>1092</sup>

### Damages Cap(s)

N/A.

### Statute of Limitations

No specific statute of limitation expressly applies to constitutional claims.<sup>1093</sup> Courts determine the appropriate statute of limitations based on the nature of the claim.<sup>1094</sup> If, after characterizing the plaintiff's action, there is no corresponding statute of limitation expressly listed within the Texas code, then the residual four-year statute of limitations applies.<sup>1095</sup>

### Administrative Requirements

If the suit does not implicate state school laws or an employment contract, there is no administrative exhaustion requirement.<sup>1096</sup> But if the constitutional claim relates to a "complaint about the board's handling of an employment contract or application of school law," such that the claim necessarily results from a violation of school laws or an employment contract, then section 7.057(a) of the Texas Education Code requires the Commissioner of Education to hear the issue first.<sup>1097</sup>

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<sup>1090</sup> The Texas constitution does not define "the state" for purposes of its constitutional protections, but claims have been successfully brought (i.e., assessed on the merits) against the Texas Education Agency, school districts, public institutions of higher education, and boards of education on equal-protection grounds under the state constitution. *E.g., Alphonso Crutch Life Support Ctr. v. Williams*, No. 03-13-00789, 2015 WL 7950713, at \*1 (Tex. App. Nov. 30, 2015) (Texas Education Agency); *Sw. Broad. Co. v. Oil Ctr. Broad. Co.*, 210 S.W.2d 230 (Tex. Civ. App. 1947) (per curiam) (school district); *Eiland v. Wolf*, 764 S.W.2d 827 (Tex. App. 1989) (higher education); *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507 (Tex. App. 1993) (board of education).

<sup>1091</sup> TEX. CONST. art. 1, § 3a.

<sup>1092</sup> *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 687 (Tex. App. 1998); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-149 (Tex. 1995).

<sup>1093</sup> See TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.001-037, 16.051-072.

<sup>1094</sup> *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 686 (Tex. App. 1998).

<sup>1095</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (2023); *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 686 (Tex. App. 1998). (applying a four year statute of limitations)

<sup>1096</sup> *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 552-53 (Tex. 2016).

<sup>1097</sup> TEX. EDUC. CODE ANN. § 7.057(a) (2023).

## Fee-Shifting

N/A.

## Jurisdictional Issues

Section 7.057 of the Texas Education Code grants the Commissioner of Education exclusive jurisdiction over claims involving (1) the school laws of the state; or (2) actions or decisions of any school district board of trustees that violate the laws of the state.<sup>1098</sup> A person aggrieved by an action of the state Education Agency may file suit in Travis County district court.<sup>1099</sup>

## **Tex. Educ. Code Ann. § 1.002**

This law requires state-funded educational institutions to “provide equal opportunities to all individuals within its jurisdiction.” Tex. Educ. Code Ann. § 1.002. It does not include a private right to sue but allows students to file grievance appeals with the state Commission of Education.

## Potential Defendants

Educational institutions funded in whole or part by state tax funds, except for those schools specifically excluded by the state educational code.<sup>1100</sup>

## Bases of Discrimination

The law does not specific bases for discrimination.

## Available Damages

The Texas Commissioner of Education does not have authority to award monetary damages or attorney fees.<sup>1101</sup>

## Damages Cap(s)

N/A.

## Statute of Limitations

The law does not provide for any specific statute of limitations. A complaint merely must be filed “within a reasonable time.”<sup>1102</sup>

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<sup>1098</sup> TEX. EDUC. CODE ANN. § 7.057 (2023).

<sup>1099</sup> TEX. EDUC. CODE ANN. § 1.001(a) (2023). Tex. Educ. Code Ann. § 1.001(b) provides exceptions for programs under the jurisdiction of certain agencies, such as the Texas Juvenile Justice Department and the Texas Department of Criminal Justice.

<sup>1100</sup> TEX. EDUC. CODE ANN. § 1.001(a) (2023).

<sup>1101</sup> *Parent, ex rel. Student v. Tomball Indep. Sch. Dist.*, Docket No. 038-R10-08-2017, 2018 WL 2721869, at \*3-4 (Comm'r Educ. 2018); *Pepperday v. Clear Creek Indep. Sch. Dist.*, Docket No. 484-R1-895, 1997 WL 35410991, at \*4 (Comm'r Educ. 1997).

<sup>1102</sup> *Westheimer Indep. Sch. Dist.*, 567 S.W.2d 780, 789 (Tex. 1978) (holding that where four years had passed, the appeal was not timely).

## Administrative Requirements

An individual seeking redress under this law must first file a grievance with their local school board.<sup>1103</sup> If the petitioner wishes to appeal the outcome of that grievance, they can file an appeal with the Commissioner of Education, who has exclusive jurisdiction over claims arising under the school laws of the state (including Tex. Educ. Code Ann. § 1.002) and actions or decisions of any school district board of trustees that violate the laws of the state.<sup>1104</sup>

## Fee-Shifting

N/A.<sup>1105</sup>

## Jurisdictional Issues

The Commissioner of Education has exclusive jurisdiction.<sup>1106</sup>

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<sup>1103</sup> *Parent, ex rel. Student v. Tomball Indep. Sch. Dist.*, No. 038-R10-08-2017, 2018 WL 2721869, at \*2 (Comm'r Educ. 2018).

<sup>1104</sup> TEX. EDUC. CODE ANN. § 7.057 (2023); *Larsen v. Santa Fe Indep. Sch. Dist.*, 296 S.W.3d 118, 128 (Tex. App. 2009) (holding that § 1.002 is a school law of the state).

<sup>1105</sup> *Parent, ex rel. Student v. Tomball Indep. Sch. Dist.*, No. 038-R10-08-2017, 2018 WL 2721869, at \*4 (Comm'r Educ. 2018).

<sup>1106</sup> TEX. EDUC. CODE ANN. § 7.057 (2023).

# U.S. Virgin Islands

## Virgin Islands Civil Rights Act – Race Discrimination in Education Title 10, Chapter 1, § 3(h).

“No individual in the Virgin Islands may be excluded from participation in or be denied the benefits of any program or activity of a college, university, or other postsecondary institution, or a public system of higher education; or an elementary or secondary education system or vocational or career technology education, or other school system; or be subjected to discrimination under any program or activity of any school or educational institution, based on race.”<sup>1107</sup>

### Potential Defendants

- Any school or educational institution.<sup>1108</sup>

### Bases of Discrimination

- Race.<sup>1109</sup>

### Available Damages

- *Compensatory damages*: available.<sup>1110</sup>
- *Punitive damages*: available.<sup>1111</sup>

### Damages Cap(s)

- Punitive damages up to \$5,000<sup>1112</sup>

### Statute of Limitations

- N/A.

### Administrative Requirements

- Administrative exhaustion not required.<sup>1113</sup>
- Notice of Claims: N/A
- Statute of limitations: Unclear.
- Fee-shifting: Unclear.

### Fee Shifting

- N/A

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<sup>1107</sup> H.R. 34-0147, 34<sup>th</sup> Leg., Reg. Sess. (V.I. 2022)

<sup>1108</sup> V.I. CODE tit. 10, § 3(h) (2024).

<sup>1109</sup> V.I. CODE tit. 10, § 3(h) (2024).

<sup>1110</sup> V.I. CODE tit. 10, § 7 (“[shall be] liable in actual damages;”).

<sup>1111</sup> V.I. CODE tit. 10, § 7

<sup>1112</sup> V.I. CODE tit. 10 § 7 (2024) (“[shall be] liable in actual damages, and in addition, thereto, to punitive damages not to exceed \$5,000 to be recovered in a civil action by the person aggrieved thereby or by any resident of the United States Virgin Islands to whom the person aggrieved may assign his cause of action.”).

<sup>1113</sup> V.I. CODE tit. 10 § 7(2024) (“Neither penalty nor action listed above, in subdivisions (1) and (2) of this section, shall be a bar to the other, and recovery or action in one shall not preclude action or recovery in the other or in any other lawful remedy otherwise possessed by an aggrieved person.”)

## Notes

- “The Creating a Respectful and Open World for Natural Hair Act of 2022” or “The Virgin Islands Crown Act of 2022” was signed into law fairly recently (on April 11, 2022) and amends Title 10 of the Virgin Islands Code as described above.<sup>1114</sup>

## Jurisdictional Issues

N/A

## **Unlawful Discriminatory Practices Claims, US Virgin Islands Code, Title 10, Chapter 5, § 64.**

“It shall be unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be nonsectarian and exempt from taxation pursuant to the provisions of Title 33 of the Code, to deny the use of its facilities to any person otherwise qualified, by reason of his race, age, color, religion, national origin, sex, disability and/or political affiliation.”<sup>1115</sup>

## Potential Defendants

- Education corporation or association which holds itself out to the public to be nonsectarian and exempt from taxation.<sup>1116</sup>

## Bases of Discrimination

- Race, age, color, religion, national origin, sex, disability and/or political affiliation.<sup>1117</sup>

## Available Damages

- *Attorney's fees and costs:* available.<sup>1118</sup>
- *Compensatory damages:* available.<sup>1119</sup>
- *Punitive damages:* available.<sup>1120</sup>

## Damages Cap(s)

- N/A

## Statute of Limitations

- N/A

## Administrative Requirements

- Administrative exhaustion not required.<sup>1121</sup>

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<sup>1114</sup> H.R. 34-0147 *supra* note 1.

<sup>1115</sup> V.I. CODE tit. 10 § 64(7) (2024).

<sup>1116</sup> *Id.*

<sup>1117</sup> V.I. CODE tit. 10 § 64(7) (2024).

<sup>1118</sup> V.I. CODE tit. 10 § 64(15) (2024). (“In addition to other remedies, any person who has been discriminated against as defined in this section may bring an action for compensatory and punitive damages in any court of competent jurisdiction. The court in such action shall award to the plaintiff reasonable attorney's fees and costs of the action, in addition to any judgment in favor of the plaintiff.”).

<sup>1119</sup> V.I. CODE tit. 10 § 64(15).

<sup>1120</sup> *Id.*

<sup>1121</sup> *Id.*

- Notice of Claims: N/A
- Statute of limitations: Unclear.
- Fee-shifting: Unclear.

#### Fee Shifting

- N/A

#### Jurisdictional Issues

- N/A

## Utah

### State Constitutional Equal Protection Claims, Utah Const. Art I, § 24, Art. 4, § 1

The Uniform Operation of the Laws Clause provides that “all laws of a general nature shall have uniform operation.”<sup>1122</sup> It is the Utah Constitution’s “counterpart to the federal Equal Protection Clause.”<sup>1123</sup> It is “at least as exacting and, in some circumstances, more rigorous than” the federal provision.<sup>1124</sup> The Equal Political Rights Clause provides that “[b]oth male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.”<sup>1125</sup>

#### Potential Defendants

Public schools and universities.

#### Bases of Discrimination

At least sex and race trigger heightened scrutiny.<sup>1126</sup>

#### Available Damages

- *Compensatory damages*: available.<sup>1127</sup>
- *Punitive damages*: not available.<sup>1128</sup>

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<sup>1122</sup> UTAH CONST. art. I, § 24.

<sup>1123</sup> *In re Adoption of J.S.*, 2014 UT 51, ¶ 67, 358 P.3d 1009, 1026 (2014).

<sup>1124</sup> *Gallivan v. Walker*, 2002 UT 89, ¶ 33, 54 P.3d 1069, 1084 (2002).

<sup>1125</sup> UTAH CONST. art. IV, § 1.

<sup>1126</sup> *Adoption of J.S.*, 358 P.3d at 1026-27

<sup>1127</sup> See *Spackman ex rel. Spackman v. Bd. Of Educ. Of Box Elder Cnty. Sch. Dist.*, 16 P.3d 533 (Utah 2000) (“In the absence of applicable constitutional or statutory authority, Utah courts employ the common law. Under the common law, ‘individuals had access to remedies of money damages for violations of their individual rights, and these rights, enumerated in fundamental documents, were the forerunners of many of the provisions adopted in federal and state bills of rights.’ Hence, a Utah court’s ability to award damages for violation of a self-executing constitutional provision rests on the common law.”). See requirements set forth in *Spackman*.

<sup>1128</sup> UTAH CODE ANN. § 63G-7-603.

## Damages Cap(s)<sup>1129</sup>

Damages for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, are generally limited to \$583,900 for one person in any one occurrence.<sup>1130</sup> Generally, there is a \$3,000,000 limit to the aggregate amount of individual awards that may be awarded in relation to a single occurrence.<sup>1131</sup>

## Statute of Limitations

Claims against the State of Utah (including public colleges and universities) must be brought within one year after the claim arises.<sup>1132</sup> The statute of limitations does not begin to run until a claimant knew, or with the exercise of reasonable diligence, should have known (i) that the claimant had a claim against the governmental entity or the governmental entity's employee, and (ii) the identity of the governmental entity or the name of the employee.<sup>1133</sup>

## Administrative Requirements

- Administrative exhaustion: N/A
- Notice of claim: Plaintiffs making claims against the State of Utah (including public colleges and universities) must file a written notice of claim with the entity with the superintendent or business administrator of the board (when the claim is against a school district or board of education) or the attorney general (when the claim is against the state) setting forth“(i) a brief statement of the facts; (ii) the nature of the claim asserted; (iii) the damages incurred by the claimant so far as the damages are known; and (iv) if the claim is being pursued against a governmental employee individually as provided in Subsection 63G-7-202(3)(c), the name of the employee.”<sup>1134</sup>

## Fee-Shifting

Generally available, but not available for administrative proceedings.<sup>1135</sup>

## Jurisdictional Issues

The district courts have exclusive, original jurisdiction over any action brought against the State of Utah (including public colleges and universities).<sup>1136</sup>

## Utah Civil Rights Act (UCRA), Utah Code Ann. § 13-7-3

### Potential Defendants

- Places of public accommodation or enterprises regulated by the state<sup>1137</sup>

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<sup>1129</sup> The limitations of judgments established in Subsection (1) of Section 63G-7-604 shall be adjusted according to the methodology set forth in Section 63G-7-605.

<sup>1130</sup> UTAH CODE ANN. § 63G-7-604(1)(a).

<sup>1131</sup> UTAH CODE ANN. § 63G-7-604(1)(d).

<sup>1132</sup> UTAH CODE ANN. § 63G-7-402; *see also Amundsen v. Univ. of Utah*, 448 P.3d 1224 (Utah 2019).

<sup>1133</sup> UTAH CODE ANN. § 63G-7-401.

<sup>1134</sup> UTAH CODE ANN. § 63G-7-401(3); *see also Stephenson v. Ellison*, 405 P.3d 733 (Utah Ct. App 2017).

<sup>1135</sup> UTAH CODE ANN. § 63G-2-802.

<sup>1136</sup> UTAH CODE ANN. § 63G-7-501(1).

<sup>1137</sup> UTAH CODE ANN. § 13-7-1.

## Bases of Discrimination

Race, color, sex, pregnancy, religion, ancestry, or national origin<sup>1138</sup>

## Available Damages

- *Compensatory damages*: available.<sup>1139</sup>
- *Punitive damages*: not available.<sup>1140</sup>

## Damages Cap(s)<sup>1141</sup>

Damages for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, are generally limited to \$583,900 for one person in any one occurrence.<sup>1142</sup> Generally, there is a \$3,000,000 limit to the aggregate amount of individual awards that may be awarded in relation to a single occurrence.<sup>1143</sup>

## Statute of Limitations

Claims against the State of Utah (including public colleges and universities) must be brought within one year after the claim arises.<sup>1144</sup> The statute of limitations does not begin to run until a claimant knew, or with the exercise of reasonable diligence, should have known (i) that the claimant had a claim against the governmental entity or the governmental entity's employee, and (ii) the identity of the governmental entity or the name of the employee.<sup>1145</sup>

## Administrative Requirements

- Administrative exhaustion: not required.<sup>1146</sup>
- Notice of claim: Plaintiffs making claims against the State of Utah (including public colleges and universities) must file a written notice of claim with the entity with the superintendent or business administrator of the board (when the claim is against a school district or board of education) or the attorney general (when the claim is against the state) setting forth“(i) a brief statement of the facts; (ii) the nature of the claim asserted; (iii) the damages incurred by the claimant so far as the damages are known; and (iv) if the claim is being pursued against a governmental employee individually as provided in Subsection 63G-7-202(3)(c), the name of the employee.”<sup>1147</sup>

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<sup>1138</sup> UTAH CODE ANN. § 13-7-1.

<sup>1139</sup> UTAH CODE ANN. § 13-7-4(3) (“Any person who is denied the rights provided for in Section 13-7-3 shall have a civil action for damages and any other remedy available in law or equity against any person who denies him the rights provided for in Section 13-7-3 or who aids, incites or conspires to bring about such denial.”).

<sup>1140</sup> UTAH CODE ANN. § 63G-7-603.

<sup>1141</sup> The limitations of judgments established in Subsection (1) of Section 63G-7-604 shall be adjusted according to the methodology set forth in Section 63G-7-605.

<sup>1142</sup> UTAH CODE ANN. § 63G-7-604(1)(a).

<sup>1143</sup> UTAH CODE ANN. § 63G-7-604(1)(d).

<sup>1144</sup> UTAH CODE ANN. § 63G-7-402; *see also Amundsen v. Univ. of Utah*, 448 P.3d 1224 (Utah 2019).

<sup>1145</sup> UTAH CODE ANN. § 63G-7-401.

<sup>1146</sup> UTAH CODE ANN. § 13-7-4(3) (“Any person who is denied the rights provided for in Section 13-7-3 shall have a civil action for damages and any other remedy available in law or equity against any person who denies him the rights provided for in Section 13-7-3 or who aids, incites or conspires to bring about such denial.”). *See also* Utah Code Ann. § 13-7-1 (“The remedies provided herein are not exclusive but are in addition to any other remedies available at law or equity.”).

<sup>1147</sup> UTAH CODE ANN. § 63G-7-401(3); *see also Stephenson v. Elison*, 405 P.3d 733 (Utah Ct. App 2017).

## Fee-Shifting

Generally available, but not available for administrative proceedings.<sup>1148</sup>

## Jurisdictional Issues

The district courts have exclusive, original jurisdiction over any action brought against the State of Utah (including public colleges and universities).

## Vermont

### **Vermont Fair Housing and Public Accommodations Act Title 9, Chap. 139 § 4500-4508**

#### Potential Defendants

- This law applies to “owners of places of public accommodation,” defined to mean any person with a legal or beneficial interest in “any school, restaurant, store, establishment, or other facility at which services, facilities, goods, privileges, advantages, benefits, or accommodations are offered to the general public”. Agents and employees of such owners and operators are also included.<sup>1149</sup>
- Defendants to lawsuits brought under the law include a university, university, board of trustees, and university administrators.<sup>1150</sup>

#### Bases of Discrimination

Race, sex, sexual orientation, gender identity, age, marital status, religious creed, color, national origin, or disability of a person.<sup>1151</sup>

#### Available Damages

- *Compensatory damages:* available.<sup>1152</sup>
- *Punitive damages:* available.<sup>1153</sup>

#### Damages Cap(s)

Criminal penalty damage limit of \$10,000 per violation.<sup>1154</sup>

#### Statute of Limitations

Six years.<sup>1155</sup>

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<sup>1148</sup> UTAH CODE ANN. § 63G-2-802.

<sup>1149</sup> V.T. STAT. ANN. tit. 9, § 4501(1),(4) (2023).

<sup>1150</sup> See Ware v. Univ. of Vermont and State Agric. Coll., No. 2:22-cv-212, 2024 WL 989804, at \* 1 (D. Vt. 2024).

<sup>1151</sup> V.T. STAT. ANN. tit. 9, § 4502(a), 4503(a) (2023).

<sup>1152</sup> V.T. STAT. ANN. tit. 9, §4506(a) (2023).

<sup>1153</sup> V.T. STAT. ANN. tit. 9, §4506(a) (2023).

<sup>1154</sup> V.T. STAT. ANN. tit. 9, §4507 (2023).

<sup>1155</sup> V.T. STAT. ANN. tit. 12, §525 (2023).

## Administrative Requirements

- Administrative exhaustion not required.<sup>1156</sup>

## Fee Shifting

The court may award costs and reasonable attorney's fees to an aggrieved person who prevails in an action brought under V.T. STAT. ANN. tit. 9, § 4506(a).<sup>1157</sup>

## Jurisdictional Issues

Aggrieved persons may file a charge of discrimination with the Vermont Human Rights Commission or may bring an action in the Superior Court of the county in which the violation is alleged to have occurred.<sup>1158</sup>

# VIRGINIA

Research has not identified any cases where an individual brings an anti-discrimination cause of action under Virginia law or any provision of the State Constitution of Virginia. The information below, however, may be useful in bringing common law claims on behalf of students or others. The notes section below also offers a summary of recent developments in terms of public policy and events happening in or pertaining to the Commonwealth.<sup>1159</sup>

## Virginia Constitution Equal Protection Claims, VA. CONST. art. I, § 11.

“[N]o person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.” VA. CONST. art. I, § 11.

Although there is no Section 1983 analogue in Virginia allowing an individual to sue under a state civil rights statute,<sup>1160</sup> the Virginia Court of Appeals recently held that the first paragraph of § 11 is self-executing and thus conveys a private right of action and waives the state's sovereign immunity.<sup>1161</sup>

## Potential Defendants

- Public schools and other state actors.

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<sup>1156</sup> See V.T. STAT. ANN. tit. 9, §4506(d) (2023) (“The initiation or completion of an investigation by the Human Rights Commission shall not be a condition precedent to the filing of any lawsuit for violation of this chapter.”).

<sup>1157</sup> V.T. STAT. ANN. tit. 9, §4506(b) (2023).

<sup>1158</sup> V.T. STAT. ANN. tit. 9, §4506(a) (2023).

<sup>1159</sup> The State Constitution directing the General Assembly to “provide a system of free public elementary and secondary schools” and to “ensure” each educational program of “high quality is established and continually maintained” is not self-executing and instead “leaves to the judgement of the General Assembly the manner and means of its execution.” *Cnty. Sch. Bd. of Prince Edward Cnty. v. Griffin*, 204 Va. 650, 660 (Va. 1963); VA. CONST. art. VIII, § 1.

<sup>1160</sup> *Kitchen v. City of Newport News*, 275 Va. 378, 392, 395–96 (Va. 2008).

<sup>1161</sup> *Ibanez v. Albemarle Cnty. Sch. Bd.*, 897 S.E.2d 300, 311–12 (Va. App. Ct. 2024).

## Bases of Discrimination

Race, sex, sexual orientation, gender identity, age, marital status, religious creed, color, national origin, or disability of a person.<sup>1162</sup>

## Available Damages

The Virginia Court of Appeals has reserved the question of whether damages are available.<sup>1163</sup>

## Damages Cap(s)

N/A

## Statute of Limitations

Unclear. Likely two years, or two years from the filing of a notice of claim, which must be submitted within one year after the cause of action accrues.<sup>1164</sup>

## Administrative Requirements

Plaintiffs may need to submit a notice of claim pursuant to VA. CODE ANN. § 8.01-195.7.

## Fee Shifting

Unknown.

## Jurisdictional Issues

N/A

# General Information for Virginia State Common Law Claims

## Available damages

- Compensatory damages (including emotional distress damages): available.<sup>1165</sup>

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<sup>1162</sup> V.T. STAT. ANN. tit. 9, § 4502(a), 4503(a) (2023).

<sup>1163</sup> *Ibanez*, 897 S.E.2d at 311–12 (Va. App. Ct. 2024) (noting that the court did need to decide whether such provision “support[s] claims for money damages,” and choosing to reserve this “difficult question for a future case”).

<sup>1164</sup> VA. CODE ANN. § 8.01-243; VA. CODE ANN. § 8.01-195.7

<sup>1165</sup> VA. CODE ANN. § 8.01-52. For emotional distress damages, the Supreme Court of Virginia has established that a plaintiff “can recover damages for emotional distress when the defendant’s negligence causes both emotional disturbance and physical injury.” *Doe ex rel. Doe v. Baker*, 299 Va. 628, 857 S.E.2d 573, 588 (2021) (case predicated on a church member suing a retired pastor for sexually molesting her as a minor and sought, among other damages, emotional distress damages). *A.H. v. Church of God in Christ, Inc.* offers more guidance on emotional distress damages in general, as it explains that a “negligence cause of action for emotional distress does not exist in the abstract” but a plaintiff may “recover emotional-distress damages” only when they can show that the “defendants were negligent—which necessarily requires a showing of a breach of an underlying tort duty of care.” *A.H. ex rel. C.H. & E.H. v. Church of God in Christ, Inc.*, 831 S.E.2d 460, 475, 477 (Va. 2019) (holding that the plaintiff, who was sexually abused by a church employee, sufficiently stated a claim for negligence based on a “special-relationship duty of the church defendants” to protect the plaintiff, a minor, “while she was in their custody”). “[C]ommon law recognizes a duty to protect when a special relationship exists” where a “vulnerable individual” is in a “custodial relationship and his or her custodian,” and such relationship “imposes a duty of reasonable care upon the custodian to protect the vulnerable individual in [their] custody.” *Id.* at 471. While these two cases involve a special relationship between the church and a minor, a school potentially could assume a similar duty to protect minor students. Thus, compensatory damages, including emotional distress damages, are available—or presumptively available—to plaintiffs, particularly when alleging sexual abuse or discrimination.

- Punitive damages: available.<sup>1166</sup>

## Damages Caps

- Compensatory damages: uncapped for general personal injury claims.<sup>1167</sup>
- Punitive damages: capped at \$350,000.<sup>1168</sup>

## Statute of Limitations

The statute of limitations for personal injury actions in Virginia is two (2) years.<sup>1169</sup>

## Administrative Requirements

- Notice of claim: must be filed within one year after such cause of action has accrued.<sup>1170</sup>

## Fee-shifting

Not available.<sup>1171</sup>

## Jurisdictional Issues

- If the claim is against the Commonwealth, the claim must be filed with the Director of the Division of Risk Management or the Attorney General.<sup>1172</sup>
- Sovereign immunity issues for state actors/employees and Commonwealth agencies:
  - School boards and government employees, including teachers, principals, and other school employees, enjoy common-law discretionary immunity for negligence claims; this civil immunity from civil damages encompasses any acts or omissions regarding students within the employee's scope of employment.<sup>1173</sup>

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<sup>1166</sup> VA. CODE ANN. § 8.01-38.1.

<sup>1167</sup> See McDonald Plosser, *United States: Sky's The Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/skys-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule> (noting that “[t]here is no general cap on compensatory damages in Virginia, though a statutory scheme exists to cap on such damages in medical malpractice actions); VA. CODE ANN. §§ 8.01-52.

<sup>1168</sup> VA. CODE ANN. § 8.01-38.1 (stating that for actions accruing after July 1, 1988, an award of punitive damages cannot exceed the cap of \$350,000). However, a jury cannot be advised of this cap, so the judge then must reduce any punitive damages award that exceeds this cap. *Id.* Additionally, punitive damages may not be awarded at all if the party liable is deceased. VA. CODE ANN. § 8.01-25.

<sup>1169</sup> VA. CODE ANN. §§ 8.01-243 (2024).

<sup>1170</sup> VA. CODE ANN. § 8.01-195.6 (2024).

<sup>1171</sup> *Prospect Dev. Co., Inc. v. Bersbader*, 258 Va. 75, 92 (1999) (“The general rule in this Commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party.”). There are a number of recognized exceptions in Virginia to this otherwise blanket rule, but personal injury actions are not among them. *See id.* at 92–93. *See, e.g., Kemp v. Miller*, 166 Va. 661 (1936). However, interest may be awarded on either a judgment or a decree for compensatory damages. VA. CODE ANN. § 8.01-382 (2024).

<sup>1172</sup> VA. CODE ANN. § 8.01-195.6 (2024).

<sup>1173</sup> VA. CODE ANN. § 8.01-220.1:2 (eliminating liability of civil damages for school employees and school volunteers who promptly and in good faith report “alleged acts of bullying or crimes against others to the appropriate school official”); *Mais v. Albemarle Cnty. Sch. Bd.*, 657 F.Supp.3d 813, 823 (W.D.Va., 2023) (“Unless there is an express constitutional or statutory waiver of sovereign immunity, the Commonwealth and its agencies are immune from liability.”).

- The one exception expressly noted is for acts or omissions that were the result of “gross negligence or willful misconduct.”<sup>1174</sup>
- There is a four (4) part test to determine whether an individual working for an immune state entity is him or herself entitled to such protection of immunity.<sup>1175</sup>
- State boards of education are an immune state entity or agency of the Commonwealth.<sup>1176</sup>

## Notes

The Virginia Human Right Act (VHRA) lacks a private cause of action.<sup>1177</sup>

## Washington

### Washington Law Against Discrimination (“WLAD”) (WASH. REV. CODE. § 49.60)

#### Potential Defendants

- Education institutions, schools of special instruction, nursery schools, day care centers, and children’s camps.<sup>1178</sup>

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<sup>1174</sup> VA. CODE ANN. § 8.01-220.1:2 (“Any teacher employed by a local school board in the Commonwealth shall not be liable for any civil damages for any acts or omissions resulting from the supervision, care or discipline of students when such acts or omissions are within such teacher's scope of employment and are taken in good faith in the course of supervision, care or discipline of students, unless such acts or omissions were the result of gross negligence or willful misconduct.”); *Burns v. Gagnon*, 283 Va. 657 (2012) (explaining that if an individual is working for an immune governmental entity, that individual is “entitled to the protection of sovereign immunity under the common law,” but such individual is not altogether immunized from suit, as the “degree of negligence which must be shown to impose liability is elevated from simple to gross negligence”) (citing *Colly v. Boyden*, 241 Va. 125, 128 (1991)).

<sup>1175</sup> *Burns v. Gagnon*, 283 Va. 657, 676 (2012) (listing the four factors as: “(1) the nature of the function the employee performs; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion”).

<sup>1176</sup> See *Mais v. Albemarle Cnty. Sch. Bd.*, 657 F. Supp. 3d 813, 823 (W.D. Va. 2023) (stating that the Commonwealth is “immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action” and holding that this immunity extends to local school boards “when acting in their governmental capacities”) (citing *All. to Save the Mattaponi v. Commw., Dept. of Env'l Quality ex rel. State Water Control Bd.*, 270 Va. 423, 454 (2005)).

<sup>1177</sup> *Mais v. Albemarle Cnty. Sch. Bd.*, 657 F. Supp. 3d 813, 826–27 (W.D. Va. 2023) (stating that the Virginia Human Rights Act does not contain “an explicit waiver of sovereign immunity for Commonwealth agencies” and also does not create a “private cause of action against county school boards”); VA. CODE ANN. § 2.2-3900 (2024) (The policy of the Commonwealth is to “[s]afeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, sexual orientation, gender identity, military status, or disability in places of public accommodation, including *educational institutions* and in real estate transactions”) (emphasis added). This policy, while containing promising language, does not convey a private right of action for students.

<sup>1178</sup> WLAD prohibits discriminatory practices in “places of public resort, accommodation, assemblage or amusement” which includes “educational institution[s], or schools of special instruction, or nursery schools, or day care centers or children’s camps.” WASH. REV. CODE. § 49.60.040(2) (2024).

## Bases of Discrimination

Race, color, national origin, citizenship or immigration status, families with children, sex, marital status, and sexual orientation.<sup>1179</sup>

## Available Damages

- *Compensatory Damages*: actual damages (including for emotional distress) are available.<sup>1180</sup>
- *Punitive damages*: not available.<sup>1181</sup>

## Damages Cap

Damages for humiliation and mental suffering shall not exceed \$20,000.<sup>1182</sup>

## Statute of Limitations

Three years.<sup>1183</sup>

## Administrative Requirements

- Administrative Exhaustion: Not required.<sup>1184</sup>
- Notice of Claims: required.<sup>1185</sup>

## Fee-Shifting

Available for the defendant only.<sup>1186</sup>

## **Discrimination Prohibited (WASH. REV. CODE. § 28A.642.010)**

### Potential Defendants

- Washington State and its agencies and employees.<sup>1187</sup>

### Basis of Discrimination

- Sex, race, color, religion, creed, national origin, sexual orientation, gender identity, gender expression, disability, the use of a trained dog guide or service animal, age, and honorably discharged veteran or military status.<sup>1188</sup>

## Available Damages

- Compensatory damages: (including emotional distress): Treble damages authorized.<sup>1189</sup>

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<sup>1179</sup> WASH. REV. CODE. § 49.60.010 (2024).

<sup>1180</sup> WASH. REV. CODE. § 49.60.030 (2024).

<sup>1181</sup> See generally *Grays Harbor Cnty. v. Bay City Lumber Co.*, 47 Wash.2d 879 (1955).

<sup>1182</sup> WASH. REV. CODE. § 49.60.250(5) (2024).

<sup>1183</sup> WASH. REV. CODE. § 4.16.080(2) (2024).

<sup>1184</sup> *Arthur v. Whitman Cnty.*, 24 F.Supp.3d 1024 (E.D. Wash. 2014).

<sup>1185</sup> WASH. REV. CODE. § 4.96.020 (2024).

<sup>1186</sup> WASH. REV. CODE. § 49.60.030(2) (2024).

<sup>1187</sup> WASH. REV. CODE. § 4.92.090 (2024).

<sup>1188</sup> WASH. REV. CODE. § 28A.642.010 (2024).

<sup>1189</sup> WASH. REV. CODE. § 19.86.090 (2024).

- Punitive damages: not available.<sup>1190</sup>

## Damages Cap

N/A.

## Statute of Limitations

- Three years.<sup>1191</sup>

## Administrative Requirements

- Administrative Exhaustion: Not required.
- Notice of Claim: Verified Notice of Claim form must be filed with Washington Office of Risk Management prior to the expiration of the Statute of Limitations for the claim.<sup>1192</sup> The notice must describe time, place, conduct and circumstances of injury, names of all witnesses and relevant persons, amount of damages, and address of claimant. Suit cannot be filed until 60 days after standard tort claim form filed.<sup>1193</sup>

## Notes

- In Washington State, school districts may be held liable for injuries sustained as a result of negligent supervision or failure to supervise activities of its students.<sup>1194</sup>
- The Washington State Constitution states that “[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”<sup>1195</sup> We could not determine whether there is a private right of action to enforce this provision.
- Washington *does* have an Equal Rights Amendment.<sup>1196</sup>

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<sup>1190</sup> Exemplary or punitive damages are generally not recoverable under Washington law unless expressly authorized by statute. *See Grays Harbor Cnty. v. Bay City Lumber Co.*, 47 Wash.2d 879 (1955); *Anderson v. Dalton*, 40 Wash.2d 894, 898 (1952).

<sup>1191</sup> WASH. REV. CODE. § 4.16.080(2) (2024).

<sup>1192</sup> WASH. REV. CODE. § 4.92.100 (2024).

<sup>1193</sup> WASH. REV. CODE. § 4.92.110 (2024).

<sup>1194</sup> *See e.g., McLeod v. Grant Cy. School Dist. No. 128*, 42 Wash.2d 316; *Rice v. School Dist. No. 302 Pierce Cnty.*, 140 Wash. 189 (1926).

<sup>1195</sup> WASH. CONST. art. IX § 1.

<sup>1196</sup> *See State-Level Equal Rights Amendments*, BRENNAN CTR. FOR JUSTICE (Dec. 6, 2022) <https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments>.

# West Virginia

## State Constitutional Equal Protection Claims, W. Va. Const. art. III, § 10

Although the state constitution does not contain the phrase “equal protection,” the Supreme Court of Appeals of West Virginia (the “Court”) has held that the state’s due process clause found in Article III, Section 10 of the West Virginia Constitution includes an equal protection component.<sup>1197</sup>

It is unclear whether there is a cause of action to enforce this provision. Although West Virginia has recognized rights of action for damages under other provisions of the state constitution,<sup>1198</sup> although we did not locate a case specifically addressing the equal protection clause. In addition, a West Virginia statute provides a right to damages for a violation of “any statute.”<sup>1199</sup>

### Potential Defendants

- The provision requires “state action,” as distinguished from “a purely private activity.”<sup>1200</sup> Organizations may be “so intertwined with the state that their acts constitute state action.”<sup>1201</sup>
- Public university, state university board of trustees, university rugby club, coach and faculty advisor of university rugby club,<sup>1202</sup> school activities commission.<sup>1203</sup>

### Bases of Discrimination<sup>1204</sup>

Race, gender, sex, national origin, gender identity<sup>1205</sup>

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<sup>1197</sup> *Israel by Israel v. W. Virginia Secondary Sch. Activities Comm’n*, 388 S.E.2d 480, 481 (W. Va. 1989).

<sup>1198</sup> See, e.g., *Hutchison v. City of Huntington*, 479 S.E.2d 649, 654, 660-61 (W. Va. 1996) (holding that cause of action existed to vindicate § 10’s due process clause but finding city immune under West Virginia Code, 29-12A-5(a)); *but see Fields v. Mellinger*, 851 S.E.2d 789, 799 (W. Va. 2020) (declining to create cause of action for damages to enforce Article III § 6 where alternative remedies were available).

<sup>1199</sup> W. VA. CODE § 55-7-9 (2024).

<sup>1200</sup> *See id.*

<sup>1201</sup> *See id.* at n.4.

<sup>1202</sup> *Kyriazis v. Univ. of W. Virginia*, 450 S.E.2d 649 (W. Va. 1994) (where the Rugby Club was a recognized club which received financial support from the University, plaintiff was a student of the University and member of the Rugby Club at the time of his injury, that the University provided facilities for meetings and practices of the club, that one of the defendants was the faculty advisor for the club and that the source for all student activities comes from an activity fee charged to each student).

<sup>1203</sup> *See Israel by Israel*, 450 S.E.2d at 482; *see also State ex rel. W. Virginia Secondary Sch. Activities Comm’n v. Cuomo*, 880 S.E.2d 46 (W. Va. 2022).

<sup>1204</sup> *Robertson v. Goldman*, 179 W. Va. 453, 3698 S.E.2d 888, 889 (1988) (“the scope and application of [equal protection] is coextensive or broader than that of the fourteenth amendment to the United States Constitution”); *see also Cuomo*, 247 W. Va. 324, 880 S.E.2d 46 at n.5(2022) (“[The Court] [has] historically drawn on federal case law interpreting federal equal protection principles in interpreting West Virginia’s equal protection principles”).

<sup>1205</sup> Note that there is a case on appeal re: gender identity under the Fourteenth Amendment of the U.S. Constitution. *See B.P.J. v. W. Virginia State Bd. Of Educ.*, 550 F.Supp.3d 347 (S.D.W. Va. 2021). “The Supreme Court denied West Virginia’s request to lift the Fourth Circuit’s injunction and allow the state to immediately enforce H.B. 3293 to ban B.P.J. from participating on the girls’ track team while her appeal continues... The [Supreme] Court did not issue an opinion explaining its decision in B.P.J.’s favor.” Oleg Nudelman, *Supreme Court refuses, for now, to enforce West Virginia ban on transgender students’ participation in school sports*, THOMPSON & HORTON LLP (Apr. 10, 2023), <https://www.thompsonhorton.com/blog/supreme-court-refuses-for-now-to-enforce-west-virginia-ban-on-transgender-students-participation-in-school-sports>.

## Available Damages

- *Compensatory Damages*: Unclear (see above).
- *Punitive Damages*: Unclear.

## Damages Cap(s)

A West Virginia statute provides that punitive damages may not exceed the greater of four times the amount of compensatory damages or \$500,000.<sup>1206</sup>

## Statute of Limitations

Two years.<sup>1207</sup>

## Administrative Requirements

- Administrative exhaustion: N/A.
- Notice of claim: Typically, a notice of claim for claims against the state must be given to the clerk in writing and in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any.<sup>1208</sup> The claimant shall not otherwise be held of any formal requirement of notice.<sup>1209</sup>

## Fee-Shifting

The general rule prohibits the award of attorney fees in the absence of statutory authorization; however, there is a well established exception allowing an award to the prevailing litigant of his or her reasonable attorney's fees as "costs," without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.<sup>1210</sup>

## Jurisdictional Issues

Any civil action in which the governing board of any state institution of higher education, any state institution of higher education, or any department or office of any of those entities, or any officer, employee, agent, intern or resident of any of those entities, acting within the scope of his or her employment, is made a defendant, shall be brought in the circuit court of any county wherein the cause of action arose, unless otherwise agreed by the parties.<sup>1211</sup>

## The West Virginia Human Rights Act (the "HRA"), W. Va. Code §§ 5-11-1, *et seq.*

### Potential Defendants

- Places of public accommodation<sup>1212</sup>

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<sup>1206</sup> W. VA. CODE § 55-7-29 (2024).

<sup>1207</sup> W. VA. CODE § 55-2-12 (2024).

<sup>1208</sup> W. VA. CODE § 14-2-16 (2024).

<sup>1209</sup> *Id.*

<sup>1210</sup> *Nelson v. W. Virginia Pub. Emps. Ins. Bd.*, 300 S.E.2d 86, 92 (W. Va. 1982).

<sup>1211</sup> W. VA. CODE § 14-2-2a(a) (2024). May apply only to West Virginia University or Marshall University per *State ex rel. Fairmont State Univ. Bd. Of Governors v. Wilson*, 806 S.E.2d 794 (W. Va. 2017).

<sup>1212</sup> W. VA. CODE § 16b-17-19(6) (2024); W. VA. CODE § 16b-17-3(j) (2024) ("The term 'place of public accommodations' means any establishment or person, as defined herein, including the state, or any political or civil

## Bases of Discrimination

Race, religion, color, national origin, ancestry, sex, age, blindness or disability<sup>1213</sup>

## Available Damages

- *Compensatory damages*: available.<sup>1214</sup>
- *Punitive damages*: available.<sup>1215</sup>

## Damages Cap(s)

Punitive damages may not exceed the greater of four times the amount of compensatory damages or \$500,000.<sup>1216</sup>

## Statute of Limitations

365 days after the alleged act of discrimination.<sup>1217</sup>

## Administrative Requirements

- Administrative exhaustion: not required.
- Notice of claim: Make, sign and file with the commission a verified complaint within 365 days after the alleged act of discrimination.<sup>1218</sup>

## Fee-Shifting

Available.<sup>1219</sup>

## Jurisdictional Issues

The procedure provided under the HRA, when invoked, is exclusive and the final determination therein will exclude any other action, civil or criminal, based on the same grievance.<sup>1220</sup> However, a complainant may institute an action against a respondent in the county wherein the respondent resides or transacts business at any time within 90 days after the complainant is given notice of a right to sue or, if the statute of limitations on the claim has not expired at the end of such 90-day period, then at any time during which such statute of limitations has not expired.<sup>1221</sup>

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subdivision thereof, which offers its services, goods, facilities, or accommodations to the general public, but shall not include any accommodations which are in their nature private.”)

<sup>1213</sup> W. VA. CODE § 16b-17-19(6) (2024).

<sup>1214</sup> W. VA. CODE § 16b-17-13(c); *see Bishop Coal Co. v. Salyers*, 380 S.E.2d 238 (W. Va. 1989) (noting that money damages granted by the commission under the HRA are limited to back pay and limited incidental damages; however, the circuit court may grant more substantial money damages); *Haynes v. Rhone-Poulenc, Inc.*, 521 S.E.2d 331 (W. Va. 1999) (“For complainants who file HRA cases in circuit court, their claims sound in tort and traditional tort damages are available”).

<sup>1215</sup> *Haynes*, 521 S.E.2d at 331 (“Punitive damages are an available form of remedial relief . . . under the [HRA]”).

<sup>1216</sup> W. VA. CODE § 55-7-29.

<sup>1217</sup> W. VA. CODE § 16b-17-10.

<sup>1218</sup> *Id.*

<sup>1219</sup> W. VA. CODE § 16b-17-13(c); *see also Bishop Coal Co.*, 380 S.E.2d at 238.

<sup>1220</sup> W. VA. CODE § 16b-17-13(a).

<sup>1221</sup> W. VA. CODE § 16b-17-13(b).

## Wisconsin

We did not locate any statutory damages remedy for education discrimination under Wisconsin law.

## Wyoming

### State Constitutional Equal Protection Claims, Wyo. Const. Art. 1, § 2

Potential Defendants

State actors.

Bases of Discrimination

Race and religion are considered suspect classes.<sup>1222</sup> Gender-based classifications warrant intermediate scrutiny.<sup>1223</sup>

Available Damages

- *Compensatory damages*: (including emotional distress damages): available.<sup>1224</sup>
- *Punitive damages*: Unclear.

Damages Cap(s)

- Typically \$250,000 per person; \$500,000 per occurrence.<sup>1225</sup>
- If the state has liability insurance, these limits are extended to match limits of policy.<sup>1226</sup>

Statute of Limitations

Suit must be filed within one (1) year of the filing of a written Notice of Claim.<sup>1227</sup>

Administrative Requirements

- Administrative exhaustion: N/A
- Notice of claim: Written Notice of Claim must be presented within two (2) years.<sup>1228</sup>

Fee-Shifting

Available.<sup>1229</sup>

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<sup>1222</sup> See *Gezzi v. State*, 800 P.2d 485 (Wyo. 1990).

<sup>1223</sup> *A v. X, Y, and Z*, 641 P.2d 1222, 1224 (Wyo. 1982).

<sup>1224</sup> WYO. STAT. ANN. § 1-39-113(b)(iii) (2024) (claim must state amount of compensation or other relief demanded).

<sup>1225</sup> WYO. STAT. ANN. § 1-39-118.

<sup>1226</sup> *Id.*

<sup>1227</sup> WYO. STAT. ANN. § 1-39-114.

<sup>1228</sup> *Id.*

<sup>1229</sup> W.R.C.P. § 54; WYO. STAT. ANN. § 1-14-126 (2013) (“In civil actions for which an award of attorney’s fees is authorized, the court in its discretion may award reasonable attorney’s fees to the prevailing party without requiring expert testimony.”)