

Representative Ken Ivory proposes the following substitute bill:

MODIFICATIONS TO GOVERNMENTAL IMMUNITY

PROVISIONS

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ken Ivory

Senate Sponsor: Deidre M. Henderson

LONG TITLE

General Description:

This bill modifies provisions relating to governmental immunity.

Highlighted Provisions:

This bill:

▶ waives governmental immunity for an injury claim resulting from a sexual battery or sexual abuse of a child against a student by a school employee unless the school was subject to a specified policy and had taken reasonable steps to implement and enforce the policy;

▶ waives governmental immunity for an injury claim resulting from a sexual battery of a student by an employee of an institution of higher education, under certain circumstances; and

▶ authorizes a court to award a prevailing plaintiff the plaintiff's reasonable attorney fees and costs in an action to recover for a claim for which immunity is waived under this bill.

Money Appropriated in this Bill:

None

Other Special Clauses:



26 None

27 **Utah Code Sections Affected:**

28 AMENDS:

29 **63G-7-201**, as last amended by Laws of Utah 2016, Chapter 181

30 **63G-7-301**, as amended by Statewide Initiative -- Proposition 4, Nov. 6, 2018

31 **63G-7-603**, as last amended by Laws of Utah 2017, Chapter 152



33 *Be it enacted by the Legislature of the state of Utah:*

34 Section 1. Section **63G-7-201** is amended to read:

35 **63G-7-201. Immunity of governmental entities and employees from suit.**

36 (1) Except as otherwise provided in this chapter, each governmental entity and each
37 employee of a governmental entity are immune from suit for any injury that results from the
38 exercise of a governmental function.

39 (2) Notwithstanding the waiver of immunity provisions of Section **63G-7-301**, a
40 governmental entity, its officers, and its employees are immune from suit for any injury or
41 damage resulting from the implementation of or the failure to implement measures to:

42 (a) control the causes of epidemic and communicable diseases and other conditions
43 significantly affecting the public health or necessary to protect the public health as set out in
44 Title 26A, Chapter 1, Local Health Departments;

45 (b) investigate and control suspected bioterrorism and disease as set out in Title 26,
46 Chapter 23b, Detection of Public Health Emergencies Act;

47 (c) respond to a national, state, or local emergency, a public health emergency as
48 defined in Section **26-23b-102**, or a declaration by the President of the United States or other
49 federal official requesting public health related activities, including the use, provision,
50 operation, and management of:

51 (i) an emergency shelter;

52 (ii) housing;

53 (iii) a staging place; or

54 (iv) a medical facility; and

55 (d) adopt methods or measures, in accordance with Section **26-1-30**, for health care
56 providers, public health entities, and health care insurers to coordinate among themselves to

57 verify the identity of the individuals they serve.

58 (3) A governmental entity, its officers, and its employees are immune from suit, and
59 immunity is not waived, for any injury if the injury arises out of or in connection with, or
60 results from:

61 (a) a latent dangerous or latent defective condition of:

62 (i) any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, or
63 viaduct; or

64 (ii) another structure located on any of the items listed in Subsection (3)(a)(i); or

65 (b) a latent dangerous or latent defective condition of any public building, structure,
66 dam, reservoir, or other public improvement.

67 (4) A governmental entity, its officers, and its employees are immune from suit, and
68 immunity is not waived, for any injury proximately caused by a negligent act or omission of an
69 employee committed within the scope of employment, if the injury arises out of or in
70 connection with, or results from:

71 (a) the exercise or performance, or the failure to exercise or perform, a discretionary
72 function, whether or not the discretion is abused;

73 (b) except as provided in Subsections 63G-7-301(3) and (4), assault, battery, false
74 imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel,
75 slander, deceit, interference with contract rights, infliction of mental anguish, or violation of
76 civil rights;

77 (c) the issuance, denial, suspension, or revocation of, or the failure or refusal to issue,
78 deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar
79 authorization;

80 (d) a failure to make an inspection or making an inadequate or negligent inspection;

81 (e) the institution or prosecution of any judicial or administrative proceeding, even if
82 malicious or without probable cause;

83 (f) a misrepresentation by an employee whether or not the misrepresentation is
84 negligent or intentional;

85 (g) a riot, unlawful assembly, public demonstration, mob violence, or civil disturbance;

86 (h) the collection or assessment of taxes;

87 (i) an activity of the Utah National Guard;

88 (j) the incarceration of a person in a state prison, county or city jail, or other place of
89 legal confinement;

90 (k) a natural condition on publicly owned or controlled land;

91 (l) a condition existing in connection with an abandoned mine or mining operation;

92 (m) an activity authorized by the School and Institutional Trust Lands Administration
93 or the Division of Forestry, Fire, and State Lands;

94 (n) the operation or existence of a pedestrian or equestrian trail that is along a ditch,
95 canal, stream, or river, regardless of ownership or operation of the ditch, canal, stream, or river,
96 if:

97 (i) the trail is designated under a general plan adopted by a municipality under Section
98 10-9a-401 or by a county under Section 17-27a-401;

99 (ii) the trail right-of-way or the right-of-way where the trail is located is open to public
100 use as evidenced by a written agreement between:

101 (A) the owner or operator of the trail right-of-way or of the right-of-way where the trail
102 is located; and

103 (B) the municipality or county where the trail is located; and

104 (iii) the written agreement:

105 (A) contains a plan for operation and maintenance of the trail; and

106 (B) provides that an owner or operator of the trail right-of-way or of the right-of-way
107 where the trail is located has, at a minimum, the same level of immunity from suit as the
108 governmental entity in connection with or resulting from the use of the trail;

109 (o) research or implementation of cloud management or seeding for the clearing of fog;

110 (p) the management of flood waters, earthquakes, or natural disasters;

111 (q) the construction, repair, or operation of flood or storm systems;

112 (r) the operation of an emergency vehicle, while being driven in accordance with the
113 requirements of Section 41-6a-212;

114 (s) the activity of:

115 (i) providing emergency medical assistance;

116 (ii) fighting fire;

117 (iii) regulating, mitigating, or handling hazardous materials or hazardous wastes;

118 (iv) an emergency evacuation;

119 (v) transporting or removing an injured person to a place where emergency medical
120 assistance can be rendered or where the person can be transported by a licensed ambulance
121 service; or

122 (vi) intervening during a dam emergency;

123 (t) the exercise or performance, or the failure to exercise or perform, any function
124 pursuant to Title 73, Chapter 10, Board of Water Resources - Division of Water Resources;

125 (u) an unauthorized access to government records, data, or electronic information
126 systems by any person or entity; or

127 (v) an activity of wildlife, as defined in Section 23-13-2, that arises during the use of a
128 public or private road.

129 Section 2. Section 63G-7-301 is amended to read:

130 **63G-7-301. Waivers of immunity.**

131 (1) (a) Immunity from suit of each governmental entity is waived as to any contractual
132 obligation.

133 (b) Actions arising out of contractual rights or obligations are not subject to the
134 requirements of Sections 63G-7-401, 63G-7-402, 63G-7-403, or 63G-7-601.

135 (c) The Division of Water Resources is not liable for failure to deliver water from a
136 reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development
137 Act, if the failure to deliver the contractual amount of water is due to drought, other natural
138 condition, or safety condition that causes a deficiency in the amount of available water.

139 (2) Immunity from suit of each governmental entity is waived:

140 (a) as to any action brought to recover, obtain possession of, or quiet title to real or
141 personal property;

142 (b) as to any action brought to foreclose mortgages or other liens on real or personal
143 property, to determine any adverse claim on real or personal property, or to obtain an
144 adjudication about any mortgage or other lien that the governmental entity may have or claim
145 on real or personal property;

146 (c) as to any action based on the negligent destruction, damage, or loss of goods,
147 merchandise, or other property while it is in the possession of any governmental entity or
148 employee, if the property was seized for the purpose of forfeiture under any provision of state
149 law;

150 (d) subject to Subsection 63G-7-302(1), as to any action brought under the authority of
151 Utah Constitution, Article I, Section 22, for the recovery of compensation from the
152 governmental entity when the governmental entity has taken or damaged private property for
153 public uses without just compensation;

154 (e) subject to Subsection 63G-7-302(2), as to any action brought to recover attorney
155 fees under Sections 63G-2-405 and 63G-2-802;

156 (f) for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees
157 Act;

158 (g) as to any action brought to obtain relief from a land use regulation that imposes a
159 substantial burden on the free exercise of religion under Title 63L, Chapter 5, Utah Religious
160 Land Use Act;

161 (h) except as provided in Subsection 63G-7-201(3), as to any injury caused by:

162 (i) a defective, unsafe, or dangerous condition of any highway, road, street, alley,
163 crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

164 (ii) any defective or dangerous condition of a public building, structure, dam, reservoir,
165 or other public improvement;

166 (i) subject to Subsections 63G-7-101(4) and 63G-7-201(4), as to any injury
167 proximately caused by a negligent act or omission of an employee committed within the scope
168 of employment; and

169 (j) as to any action or suit brought under Section 20A-19-301 and as to any
170 compensation or expenses awarded under Section 20A-19-301(5).

171 (3) (a) As used in this Subsection (3):

172 (i) "Appropriate behavior policy" means a policy adopted by a local education
173 governing board or the State Board of Education that:

174 (A) regulates behavior of a school employee toward a student;

175 (B) includes a prohibition against any sexual conduct between an employee and a
176 student and against the employee and student sharing any sexually explicit or lewd
177 communication, image, or photograph; and

178 (C) is reasonably calculated to protect students from a sexual battery or sexual abuse.

179 (ii) "Local education agency" means:

180 (A) a school district;

- 181 (B) a charter school; or
- 182 (C) the Utah Schools for the Deaf and the Blind.
- 183 (iii) "Local education governing board" means:
- 184 (A) for a school district, the local school board;
- 185 (B) for a charter school, the charter school governing board; or
- 186 (C) for the Utah Schools for the Deaf and the Blind, the state board.
- 187 (iv) "Public school" means a public elementary or secondary school.
- 188 (v) "Sexual abuse" means the offense described in Subsection [76-5-404.1\(2\)](#).
- 189 (vi) "Sexual battery" means the offense described in Section [76-9-702.1](#), considering
- 190 the term "child" in that section to include an individual under age 18.
- 191 (b) Notwithstanding Subsection [63G-7-101\(4\)](#), immunity from suit is waived as to a
- 192 claim against a local education agency for an injury resulting from a sexual battery or sexual
- 193 abuse committed against a student of a public school by a paid employee of the public school
- 194 who is criminally charged in connection with the sexual battery or sexual abuse, unless:
- 195 (i) at the time of the sexual battery or sexual abuse, the public school was subject to an
- 196 appropriate behavior policy; and
- 197 (ii) before the sexual battery or sexual abuse occurred, the public school had taken
- 198 reasonable steps to implement and enforce the appropriate behavior policy.
- 199 (4) (a) As used in this Subsection (4):
- 200 (i) "Higher education institution" means an institution included within the state system
- 201 of higher education under Section [53B-1-102](#).
- 202 (ii) "Policy governing behavior" means a policy adopted by a higher education
- 203 institution or the State Board of Regents that:
- 204 (A) regulates behavior of a special trust employee toward a subordinate student;
- 205 (B) includes a prohibition against any sexual conduct between a special trust employee
- 206 and a subordinate student;
- 207 (C) includes a prohibition against a special trust employee and subordinate student
- 208 sharing any sexually explicit or lewd communication, image, or photograph; and
- 209 (D) is reasonably calculated to protect subordinate students from a sexual battery
- 210 committed by a special trust employee.
- 211 (iii) "Sexual battery" means the offense described in Section [76-9-702.1](#).

212 (iv) "Special trust employee" means an employee of a higher education institution who
213 is in a position of special trust, as defined in Section 76-5-404.1, with a higher education
214 student.

215 (v) "Subordinate student" means a student:

216 (A) of a higher education institution; and

217 (B) whose educational opportunities could be adversely impacted by a special trust
218 employee.

219 (b) Notwithstanding Subsection 63G-7-101(4), immunity from suit is waived as to a
220 claim for an injury resulting from a sexual battery committed against a subordinate student by a
221 special trust employee, unless:

222 (i) the institution proves that the special trust employee's behavior that otherwise would
223 constitute a sexual battery was:

224 (A) with a subordinate student who was at least 18 years old at the time of the
225 behavior; and

226 (B) with the student's consent; or

227 (ii) (A) at the time of the sexual battery, the higher education institution was subject to
228 a policy governing behavior; and

229 (B) before the sexual battery occurred, the higher education institution had taken
230 reasonable steps to implement and enforce the policy governing behavior.

231 Section 3. Section **63G-7-603** is amended to read:

232 **63G-7-603. Exemplary or punitive damages prohibited -- Governmental entity**
233 **not subject to execution, attachment, or garnishment -- Exception -- Attorney fees and**
234 **costs in certain cases.**

235 (1) (a) A judgment may not be rendered against a governmental entity for exemplary or
236 punitive damages.

237 (b) If a governmental entity would be required to pay the judgment under Section
238 **63G-7-902** or **63G-7-903**, the governmental entity shall pay any judgment or portion of any
239 judgment entered against its employee in the employee's personal capacity even if the judgment
240 is for or includes exemplary or punitive damages.

241 (2) (a) Except as provided in Subsection (2)(b), execution, attachment, or garnishment
242 may not issue against a governmental entity.

243 (b) A judgment creditor may garnish a state income tax refund owing to the judgment
244 debtor.

245 (3) In an action to recover for an injury described in Subsection [63G-7-301](#)(3) or (4),
246 the court may award a prevailing plaintiff the plaintiff's reasonable attorney fees and costs.