

## HB0391S01 compared with HB0391

~~text~~ shows text that was in HB0391 but was deleted in HB0391S01.

Inserted text shows text that was not in HB0391 but was inserted into HB0391S01.

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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: \_\_\_\_\_

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#### 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, ~~except in~~

## HB0391S01 compared with HB0391

~~specified~~ 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:

None

### Utah Code Sections Affected:

AMENDS:

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

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

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

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

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

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

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

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

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

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

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

## HB0391S01 compared with HB0391

operation, and management of:

- (i) an emergency shelter;
- (ii) housing;
- (iii) a staging place; or
- (iv) a medical facility; and

(d) adopt methods or measures, in accordance with Section 26-1-30, for health care providers, public health entities, and health care insurers to coordinate among themselves to verify the identity of the individuals they serve.

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

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

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

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

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

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

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

(b) except as provided in Subsections 63G-7-301(~~(2)(k)~~3) and (~~(j)~~4), assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;

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

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

## HB0391S01 compared with HB0391

- (e) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (f) a misrepresentation by an employee whether or not the misrepresentation is negligent or intentional;
- (g) a riot, unlawful assembly, public demonstration, mob violence, or civil disturbance;
- (h) the collection or assessment of taxes;
- (i) an activity of the Utah National Guard;
- (j) the incarceration of a person in a state prison, county or city jail, or other place of legal confinement;
- (k) a natural condition on publicly owned or controlled land;
- (l) a condition existing in connection with an abandoned mine or mining operation;
- (m) an activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire, and State Lands;
- (n) the operation or existence of a pedestrian or equestrian trail that is along a ditch, canal, stream, or river, regardless of ownership or operation of the ditch, canal, stream, or river, if:
  - (i) the trail is designated under a general plan adopted by a municipality under Section 10-9a-401 or by a county under Section 17-27a-401;
  - (ii) the trail right-of-way or the right-of-way where the trail is located is open to public use as evidenced by a written agreement between:
    - (A) the owner or operator of the trail right-of-way or of the right-of-way where the trail is located; and
    - (B) the municipality or county where the trail is located; and
  - (iii) the written agreement:
    - (A) contains a plan for operation and maintenance of the trail; and
    - (B) provides that an owner or operator of the trail right-of-way or of the right-of-way where the trail is located has, at a minimum, the same level of immunity from suit as the governmental entity in connection with or resulting from the use of the trail;
- (o) research or implementation of cloud management or seeding for the clearing of fog;
- (p) the management of flood waters, earthquakes, or natural disasters;
- (q) the construction, repair, or operation of flood or storm systems;

## HB0391S01 compared with HB0391

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

(s) the activity of:

(i) providing emergency medical assistance;

(ii) fighting fire;

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

(iv) an emergency evacuation;

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

(vi) intervening during a dam emergency;

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

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

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

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

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

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

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

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

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

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

(b) as to any action brought to foreclose mortgages or other liens on real or personal

## HB0391S01 compared with HB0391

property, to determine any adverse claim on real or personal property, or to obtain an adjudication about any mortgage or other lien that the governmental entity may have or claim on real or personal property;

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

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

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

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

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

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

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

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

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

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

[\(3\) ~~Notwithstanding Subsection 63G-7-104\(4\), immunity from suit is waived as to a claim for an injury resulting from a sexual battery, as provided in Section 76-9-702.1, or the sexual abuse of a child, as provided in Section 76-5-405.1, considering the term "child" in that~~](#)

## HB0391S01 compared with HB0391

~~section to include an individual under the age 18, committed against a student of a public elementary or secondary school by an employee of the school, unless:~~

~~— (a) at the time of the sexual battery or sexual abuse, the school was subject to a policy:~~

~~— (i) adopted by the school district;~~ (a) As used in this Subsection (3):

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

~~(iii)A) that~~ regulates behavior of ~~an~~ a school employee toward a student;

~~— (iii) that includes a prohibition against:~~

~~— (A) any sexual conduct between an employee and a student; and~~

~~— (B) the employee and student sharing any sexually explicit or lewd communication, image, or photograph; and~~

~~— (iv) that is reasonably calculated to protect students from a sexual battery or sexual abuse; and~~

~~— (b) before the sexual battery or sexual abuse occurred, the school had taken reasonable steps to implement and enforce the policy;~~

~~— (4) Notwithstanding Subsection 63G-7-104(4), immunity from suit is waived as to a claim for an injury resulting from a sexual battery, as provided in Section 76-9-702.1, committed against a student of an institution included within the state system of higher education under Section 53B-1-102 by an employee of the institution, unless:~~

~~— (a) the institution proves that the employee's behavior that otherwise would constitute a sexual battery was:~~

~~— (i) with a student who was at least 18 years old at the time of the behavior; and~~

~~— (ii) with the student's consent; or~~

~~— (b) (i) at the time of the sexual battery, the institution was subject to a policy:~~

~~— (A) adopted by the institution or the State Board of Regents;~~

~~— (B) that regulates behavior of an employee toward a student;~~

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

~~(D)C) that~~ is reasonably calculated to protect students from a sexual battery; ~~;~~ and  
; or sexual abuse.

## HB0391S01 compared with HB0391

(ii) "Local education agency" means:

(A) a school district;

(B) a charter school; or

(C) the Utah Schools for the Deaf and the Blind.

(iii) "Local education governing board" means:

(A) for a school district, the local school board;

(B) for a charter school, the charter school governing board; or

(C) for the Utah Schools for the Deaf and the Blind, the state board.

(iv) "Public school" means a public elementary or secondary school.

(v) "Sexual abuse" means the offense described in Subsection 76-5-404.1(2).

(vi) "Sexual battery" means the offense described in Section 76-9-702.1, considering the term "child" in that section to include an individual under age 18.

(b) Notwithstanding Subsection 63G-7-101(4), immunity from suit is waived as to a claim against a local education agency for an injury resulting from a sexual battery or sexual abuse committed against a student of a public school by a paid employee of the public school who is criminally charged in connection with the sexual battery or sexual abuse, unless:

(i) at the time of the sexual battery or sexual abuse, the public school was subject to an appropriate behavior policy; and

(ii) before the sexual battery or sexual abuse occurred, the ~~institution~~ public school had taken reasonable steps to implement and enforce the ~~policy~~ appropriate behavior policy.

(4) (a) As used in this Subsection (4):

(i) "Higher education institution" means an institution included within the state system of higher education under Section 53B-1-102.

(ii) "Policy governing behavior" means a policy adopted by a higher education institution or the State Board of Regents that:

(A) regulates behavior of a special trust employee toward a subordinate student;

(B) includes a prohibition against any sexual conduct between a special trust employee and a subordinate student;

(C) includes a prohibition against a special trust employee and subordinate student sharing any sexually explicit or lewd communication, image, or photograph; and



## HB0391S01 compared with HB0391

(D) is reasonably calculated to protect subordinate students from a sexual battery committed by a special trust employee.

(iii) "Sexual battery" means the offense described in Section 76-9-702.1.

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

(v) "Subordinate student" means a student:

(A) of a higher education institution; and

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

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

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

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

(B) with the student's consent; or

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

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

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

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

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

(b) If a governmental entity would be required to pay the judgment under Section 63G-7-902 or 63G-7-903, the governmental entity shall pay any judgment or portion of any judgment entered against its employee in the employee's personal capacity even if the judgment

## HB0391S01 compared with HB0391

is for or includes exemplary or punitive damages.

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

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

(3) In an action to recover for an injury described in Subsection 63G-7-301(~~(2)~~(~~4~~)<sup>3</sup>) or (~~(4)~~<sup>4</sup>), the court may award a prevailing plaintiff the plaintiff's reasonable attorney fees and costs.