



CUDDY & McCARTHY, LLP
Attorneys at Law

2022 Board Member Institute
BOARD MEMBER AND PUBLIC
SCHOOL OFFICIAL LIABILITY UNDER
THE NEW MEXICO CIVIL RIGHTS ACT

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February 5, 2022

HB 4: New Mexico Civil Rights Act Background

- What are civil rights?
 - Collective rights of all citizens to receive fair and equal treatment under the law
 - Majority are contained in the federal Constitution and Civil Rights Act of 1964
 - States can provide additional protections from discrimination, e.g., the New Mexico Constitution
- Examples of civil rights
 - Right to vote
 - Right to speak
 - Right to marry
 - Right to public employment

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- In 2020 the New Mexico Civil Rights Commission was created by and directed to report to the legislature in 2021 on:
 - proposals for laws for the creation of a civil right of action for the deprivation, by a public body or a person acting on behalf of or under the authority of a public body, of any right, privilege or immunity secured by the constitution of New Mexico;
 - the use of qualified immunity as a defense to liability by an officer or employee of a public body in actions brought either under 42 U.S.C. Section 1983 or pursuant to the right of action considered by the commission; and
 - the need for and costs of additional insurance policies for public employees and public bodies, or for persons acting on behalf of or under the authority of public bodies.

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- What is a “civil right of action” for constitutional injuries or deprivation of civil rights?
 - A person’s right to bring a civil complaint for damages against a governmental entity or its employees when acting in their official capacities
- What is qualified immunity?
 - Judicially-created defense used in **federal** civil rights actions brought against state government officials for violating federally created rights.
 - Provides immunity from suit if the officials can show that their conduct did not violate “clearly established” federal statutory or constitutional rights about which a reasonable person would know.
- What additional costs?
 - Of additional insurance policies
 - Caused by anticipated increase in litigation and liability

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- What was a federal civil rights action under 42 U.S.C. § 1983 or other federal laws?
 - Brought in federal court or state court
 - If qualified immunity was raised as a defense, the case did not proceed until a court decided if this immunity should be granted. If granted, the suit was dismissed.
- Why was qualified immunity created by the Supreme Court?
 - Pierson v. Ray, 386 U.S. 547 (1967)
 - Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)
 - Harlow v. Fitzgerald, 457 U.S. 800 (1982)

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- Police Shootings
 - Nationally
 - New Mexico
 - 2015 to 2021
 - Second-highest fatal police shootings in the country
 - Albuquerque Police Department
 - 44 shot/42 died
 - Bernalillo County Sheriff's Office
 - 2017 paid \$3.3M in settlement of cases involving excessive force and fatal police shootings
 - Qualified immunity raised as a defense

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- Colorado
 - Senate Bill 2017 (Enhance Law Enforcement Integrity Act)
 - New civil action for deprivation of rights under Colorado's constitution
 - “qualified immunity is not a defense to liability”
 - First in nation

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- Who can bring a lawsuit against the Board or District employees under the Act?
 - A person who claims to have suffered a deprivation of any rights, privileges or immunities pursuant to the bill of rights of the constitution of New Mexico due to acts or omissions of a public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body may maintain an action to establish liability and recover actual damages and equitable or injunctive relief in any New Mexico district court.
 - Students
 - Parents

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- Who is subject to suit under New Mexico's Act?
 - “A public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body shall not subject or cause to be subjected any resident of New Mexico or person within the state to deprivation of any rights, privileges or immunities secured pursuant to the bill of rights of the constitution of New Mexico.
 - The board of education
 - A school administrator
 - A school employee

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- Against whom can claims be brought?
 - Claims brought pursuant to the New Mexico Civil Rights Act shall be brought exclusively against a public body. Any public body named in an action filed pursuant to the New Mexico Civil Rights Act shall be held liable for conduct of individuals acting on behalf of, under color of or within the course and scope of the authority of the public body.
 - The board of education not an individual board member, superintendent or employee would be a defendant.

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- Where is a suit brought?
 - Any New Mexico (state) district court

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- Who can NOT bring a lawsuit under the Act?
 - Individuals employed by a public body shall be prohibited from using the New Mexico Civil Rights Act to pursue a claim arising from the individual's employment by the public body.
 - Employees
 - Employment claims

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- What remedies are available if liability is established?
 - Actual damages
 - Equitable relief
 - Injunctive relief
 - Attorney fees -- discretionary
 - Other remedies prescribed by law or available pursuant to common law

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- Are there any limits on recovery of damages under the Act?
 - \$2M per occurrence per claimant inclusive of claimant's costs and attorney fees. (Attorneys fees are not mandatory).
 - Interest allowed
 - Two percentage points above the bank prime loan rate published by the board of governors of the federal reserve system on the last business day of the month preceding entry of the judgment
 - Computed daily from date of entry of the judgment until date of payment
 - Recovery limit increased for the cost of living (per the consumer price index) on July 1 of each year beginning in 2022

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- Who pays the judgment?
 - A judgment awarded pursuant to the New Mexico Civil Rights Act against a person acting on behalf of, under color of or within the course and scope of the authority of the public body shall be paid by the public body.
 - The public body shall also pay for all litigation costs for the public body and for any person acting on behalf of, under color of or within the course and scope of the authority of the public body, including attorney fees.

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- What defenses can be raised against a claim under the Act?
 - No public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body shall enjoy the defense of qualified immunity
 - Waives sovereign immunity
 - Preserves judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity
 - Essentially, most public bodies or employees have no greater defenses than they would if sued in their private capacities.

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- Is there a statute of limitation for claims under the Act?
 - A claim must be commenced no later than 3 years from date a claim can be brought
 - Applies solely to acts or omissions that occurred on July 1, 2021 and after

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- Are there any notice requirements under the Act?
 - Must give written notice stating time, place and circumstances of loss or injury within one year or claim is barred
 - Notice is extended to one and a half years for wrongful death

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- Are there other requirements under the Act?
 - Each public body shall maintain a record of all final judgments and settlements paid by the public body for claims made pursuant to the New Mexico Civil Rights Act and attach a copy of the complaint to each record
 - All judgments, settlements and complaints are subject to disclosure pursuant to the Inspection of Public Records Act

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Examples of rights secured by the bill of rights of the NM Constitution that might be most applicable to schools:

- N.M. Const. art. II, § 4. Inalienable rights
 - All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.
- N.M. Const. art. II, § 10. Searches and seizures
 - The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

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Examples of rights secured by the bill of rights of the NM Constitution that might be most applicable to schools:

- N.M. Const. art. II, § 11. Religious freedom
 - Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.

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Examples of rights secured by the bill of rights of the NM Constitution that might be most applicable to schools:

- N.M. Const. art. II, § 17. Freedom of speech and of the press; libel
 - Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted.

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Examples of rights secured by the bill of rights of the NM Constitution that might be most applicable to schools:

- N.M. Const. art. II, § 18. Due process; equal protection; sex discrimination
 - No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.

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- The Act does not affect a person's right to bring claims against a Board, its members, administrators or district employees for suits based on claims brought in federal courts under the federal Constitution or federal laws such as 42 U.S.C. §1983 or other federal laws.
- Nor does it prevent a defense of qualified immunity from being raised in federal cases.

Protecting Against Liability in Federal or State Courts

- Be knowledgeable about the law
- Know, review, and update your policies
- Know your role and responsibilities
- Require training
- Hire carefully
- Evaluate honestly and objectively
- Discipline/Terminate when appropriate

Questions



Contact Information



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