

**UNDERSTANDING THE LEGAL LANDSCAPE OF  
DISCRIMINATION AGAINST MUSLIM STUDENTS IN  
PUBLIC ELEMENTARY AND SECONDARY SCHOOLS: A  
GUIDE FOR LAWYERS**

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### INTRODUCTION

Anti-Muslim behavior has been pervasive in the United States since September 11, 2001. The FBI reported that in 2015, 21.9% of religion-based hate crimes were acts of anti-Muslim bias.<sup>1</sup> On February 10, 2015, the tragic shooting of three American-Muslims in Chapel Hill, North Carolina became a brutal reminder of the continued existence of anti-Muslim sentiment. Although this deadly attack occurred in an apartment home, many incidents of discrimination and harassment against Muslims manifest themselves in other spaces as well. For example, in November 2016, a kindergarten teacher in Charlotte, North Carolina allegedly grabbed a five-year old Muslim student by the neck and began choking him. Earlier in the school year, this teacher had harassed the student and encouraged other students to bully him. Multiple times, she called him “bad Muslim boy” in front of several of his classmates. Additionally, she required him to carry a heavy bookbag for entire school days while other students would laugh at him. The student’s mother had asked school officials to transfer him to another class. However, he was moved back to the teacher’s class with no explanation.<sup>2</sup>

This paper examines the scope of discrimination against Muslims in public elementary and secondary schools and analyzes the legal landscape and challenges across the United States. The paper does not discuss every available protection or every obstacle to such protections, but it focuses on several informative and contrasting examples. For instance, the paper will discuss the differences between statutory protections in California and North Carolina. California has four provisions in its educational code and a civil rights law that address religious discrimination in schools whereas North Carolina has only one such statutory provision.<sup>3</sup> The North Carolina provision prohibits religious discrimination only in two contexts: when students engage in private prayer at school and when students include religious content in their assignments. However, these are not the only contexts in which religious discrimination may occur. For example, teachers may single-out students of religious minorities in front of the class, grade them against different standards despite the absence of religious content in their assignments, prescribe harsher punishments than to other students, fail to punish students for discriminatory bullying and harassment, or engage in several other forms of discriminatory treatment.<sup>4</sup>

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1. 2015 *Hate Crime Statistics: Victims*, FBI UNIFORM CRIME REPORTING, 3 (Fall 2016), [https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims\\_final.pdf](https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims_final.pdf).

2. Chris Sommerfeldt, *North Carolina teacher allegedly bullied, assaulted 5-year-old Muslim student because of his religion*, NY DAILY NEWS (Nov. 23, 2016, 11:51 PM), <http://www.nydailynews.com/news/national/n-teacher-allegedly-assaulted-boy-5-muslim-article-1.2885762>.

3. CAL. EDUC. CODE §§ 200, 201, 220, 234.1 (West 2012); CAL. CIV. CODE § 51 (West 2016); N.C. GEN. STAT. ANN. § 115C-407.30 (West 2014).

4. See Nicole K. by & Through Peter K. v. Upper Perkiomen Sch. Dist., 964 F. Supp. 931, 934-36 (E.D.C.Pa. 1997) (granting the school district and teachers’ motion for summary judgment after the teacher called the plaintiff student a “neo Nazi” and “German girl” and other students subsequently

In this paper, North Carolina operates as a working example of a southern state with a sizeable Muslim population of about 26,000 Muslims.<sup>5</sup> Southern states are of particular interest because not only do they have a long history of overt racism, but the legacy of many discriminatory policies continue to exhibit injurious effects. Moreover, severe incidences of anti-Muslim behavior have recently occurred in North Carolina, as mentioned above.

In contrast, California may generally be a safe haven for Muslim students because it is unique in its strong legal protections. However, despite these resources, Muslim students in the state face substantial discrimination and harassment. The most comprehensive study to date about discrimination against Muslims in schools examines California Muslim students. This study reported that in 2014, twenty percent of the 621 respondents experienced discrimination by a school staff member.<sup>6</sup> Twenty-seven percent of the girls who wear a headscarf reported that they had experienced discrimination by their teacher. Among the students who reported incidents of bullying and discrimination, 41% were unsure about or disagreed with the statement that telling an adult helped solve the problem. Among the students who reported the incident to a school staff member, only 34% agreed that they were happy with the school's response.<sup>7</sup> Only 67% of students felt teachers and administrators were responsive to their religious accommodation requests.<sup>8</sup> In a survey of American schoolteachers, 69% of the respondents reported that they are "'not at all familiar' with guidelines on religious expression in schools."<sup>9</sup>

Similarly, in 2016, the Muslim Community Center of Silver Spring, Maryland surveyed 300 Muslim students in third through twelfth grades and found that one third of the respondents had experienced insults or abuse at least once because of their faith. About ten percent of the respondents reported that they had been physically harmed or harassed at least once because of religion. The International Cultural Center in Montgomery Village, Maryland found that ten percent of its survey respondents had been treated unfairly by a teacher or school administrator between the months of January and June 2016.<sup>10</sup>

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bullied her); Chris Sommerfeldt, *North Carolina teacher allegedly bullied, assaulted 5-year-old Muslim student because of his religion*, NY DAILY NEWS (Nov. 23, 2016, 11:51 PM), <http://www.nydailynews.com/news/national/n-teacher-allegedly-assaulted-boy-5-muslim-article-1.2885762>.

5. *U.S. Religion Census 1952 to 2010*, ASSOCIATION OF STATISTICIANS OF AMERICAN RELIGIOUS BODIES (Feb. 2013), <http://www.rcms2010.org/compare.php>.

6. *Mislabeled: The Impact of School Bullying and Discrimination on California Muslim Students*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS CALIFORNIA 1, 14 (Oct. 2015), <https://ca.cair.com/sfba/wp-content/uploads/2015/10/CAIR-CA-2015-Bullying-Report-Web.pdf>.

7. *Id.* at 15.

8. *Id.* at 12.

9. Yaseen Eldik & Monica C. Bell, *The Establishment Clause and Public Education in an Islamophobic Era*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 245, 255 n.28 (2012).

10. Donna St. George, *During a school year of terrorist attacks, Muslim students report bullying*, WASHINGTON POST (June 14, 2016), <https://www.washingtonpost.com/local/education/during-a-school-year-of-terrorist-attacks-muslim-students-report-bullying/2016/06/14/1b066a44-3220-11e6->

This paper seeks to assist Muslim students and their attorneys obtain legal redress for anti-Muslim bias and discrimination in public elementary and secondary schools across the country. The growing American Muslim population is relatively young and therefore the percentage of Muslims in public schools is likely to continue expanding.<sup>11</sup> Coupled with persistent anti-Muslim behavior, the changing population signals an increase in litigation by American Muslim students against their school districts in the near future. Despite the above statistics, American courts have heard a relatively small number of cases regarding discrimination against Muslim students in public elementary and secondary schools. Therefore, this paper will draw from these few cases as well as from cases concerning discrimination against other religious minorities and discrimination against Muslims in the employment context.

The first section of this paper presents demographic and statistical data about American Muslims. The second section analyzes the intersectional nature of discrimination against Muslim students. The third section provides guidance to plaintiffs' attorneys based on existing case law and the challenges Muslim students face in public schools. The last section outlines several policy recommendations to improve protections for Muslim students.

## I. DEMOGRAPHICS AND STATISTICS ABOUT AMERICAN MUSLIMS

As of 2015, 3.3 million Muslims live in America and make up about 1% of nation's population.<sup>12</sup> Pew expects this proportion to rise to about 2.1% by 2050.<sup>13</sup> In 2015, Muslims comprised 3% of New Jersey's population, 2% of New York, North Dakota, and Virginia's populations, and 1% or less of other states' populations.<sup>14</sup> In 2010, Texas had the largest number of Muslims with about 422,000 Muslims. New York came in second with about 393,000, Illinois was third with about 359,000, and California was fourth with about 273,000. Maryland came in eleventh with about 36,000 and North Carolina was thirteenth with about 26,000.<sup>15</sup>

Some may categorize discrimination against Muslims as "racism." However, race and religion are not synonymous, especially for a global religion such as Islam. Not all Muslims are Arab and not all Arabs are Muslim.<sup>16</sup> There are more Muslims in India and Pakistan, two South Asian countries, than in the Middle East

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8758-d58e76e11b12\_story.html?utm\_term=.c939f03317a3.

11. Besheer Mohamed, *A new estimate of the U.S. Muslim population*, PEW RESEARCH CENTER (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/>.

12. *Id.*

13. *Id.*

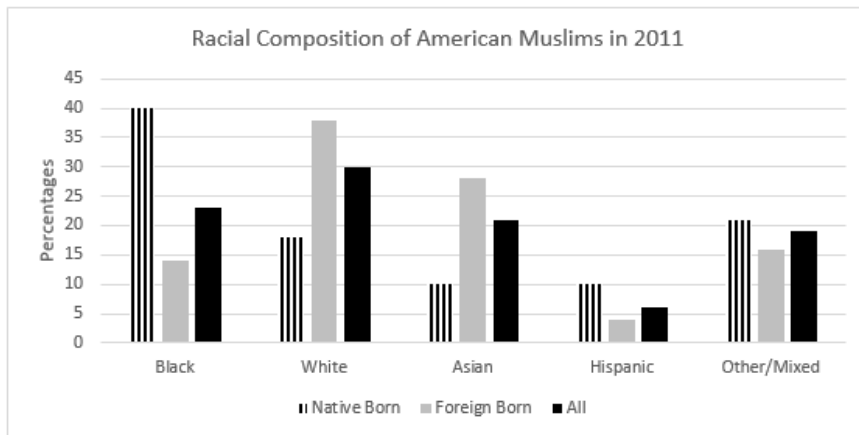
14. *The American Values Atlas*, PUBLIC RELIGION RESEARCH INSTITUTE, <http://ava.publicreligion.org/#religious/2015/States/religion/> (last visited Mar. 22, 2017).

15. *U.S. Religion Census 1952 to 2010*, *supra* note 6.

16. Drew Desilver & David Masci, *World's Muslim Population More Widespread Than You Might Think*, PEW RESEARCH CENTER (Jan. 31, 2017), <http://www.pewresearch.org/fact-tank/2017/01/31/worlds-muslim-population-more-widespread-than-you-might-think/>.

and North Africa region.<sup>17</sup> A significant proportion of Muslims are African-American and have lived in the U.S. for several generations, about one fifth of American Muslim adults became Muslim later in life, and about the same proportion of people who were raised Muslim no longer identify as Muslim.<sup>18</sup> This means that people who do not “look” Muslim may be Muslim and people who do “look” Muslim may not actually be Muslim. These misperceptions are evident from America’s vast overestimation of the American Muslim population. A Pew survey in 2016 found that Americans believe Muslims make up about 17% of the population, however, Muslims constitute no more than 1%.<sup>19</sup> A manifestation of such misperception is the rise in hate crimes against Sikhs and other South Asians whom attackers often perceive as Muslim.<sup>20</sup>

American Muslims are the second most racially diverse religious group in the United States (after Seventh-day Adventists).<sup>21</sup> Pew has estimated that American Muslims are 30% white, 23% black, 21% Asian, 6% Hispanic, and 19% other or mixed. However, these estimates are likely imprecise because the common racial categories do not reflect the rich diversity of the Muslim population. One complication is that both the U.S. census and the Pew survey fail to offer a “Middle



17. *Id.*

18. *Race*, U.S. CENSUS BUREAU, [https://www.census.gov/quickfacts/meta/long\\_RHI225215.htm](https://www.census.gov/quickfacts/meta/long_RHI225215.htm); *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism, Section 1: A Demographic Portrait of Muslim Americans*, PEW RESEARCH CENTER (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/section-1-a-demographic-portrait-of-muslim-americans/> [hereinafter PEW RESEARCH CENTER]; Besheer, *supra* note 11.

19. Pamela Duncan, *Europeans greatly overestimate Muslim population, poll shows*, THE GUARDIAN (Dec. 13, 2016, 5:00 PM), <https://www.theguardian.com/society/datablog/2016/dec/13/europeans-massively-overestimate-muslim-population-poll-shows>.

20. Peter Holley, *Americans are still attacking Sikhs because they think they're Muslims*, CHICAGO TRIBUNE (Dec. 28, 2015, 5:56 PM), <http://www.chicagotribune.com/news/nationworld/ct-americans-attacking-sikhs-they-think-are-muslims-20151228-story.html>.

21. Michael Lipka, *The most and least racially diverse U.S. religious groups*, PEW RESEARCH CENTER (July 27, 2015), <http://www.pewresearch.org/fact-tank/2015/07/27/the-most-and-least-racially-diverse-u-s-religious-groups/>.

Eastern and North African” category.<sup>22</sup> Thus, 60% of foreign-born Americans from the Middle East and North Africa report their race as white, and 22% report their race as other or mixed. These numbers are important to keep in mind when analyzing racial composition data about Muslims.<sup>23</sup>

Note: Data collected from Pew Research Center Data

Although the Pew survey seems to suggest that there are not many American Muslims from Bosnia or Kosovo, two countries in eastern Europe with sizable Muslim populations, it is difficult to know because some respondents from these countries may have marked “white” and some may have marked “other.” This complication furthers the stereotype that Muslims are not white or of European descent, but are only brown or black.

The consequences of society’s failure to recognize the complex relationship between race and religion for Muslims fall disproportionately on the most marginalized Muslims. In other words, Muslims who face discrimination because of their combined religious and racial, gender, or sexual identity face the brunt of the problem. A teacher may discriminate against an African-American Muslim student but not against other African-American students or other Muslim students.<sup>24</sup> However, the affected student may have difficulty proving a combined racial and religious discrimination claim because the teacher can easily hide behind a pretextual reason for treating this student differently. The teacher can point to his fair treatment of other African-American students and of other Muslim students to argue that he did not discriminate against the student in question.

Additionally, the all-encompassing “white” category may come undone for “white” Muslim girls who wear headscarves.<sup>25</sup> The existence of the “white” category suggests that courts treat differently two American-born Muslim girls with stereotypically Muslim names who wear headscarves. Suppose both girls are in the same class and their teacher discriminates against them simultaneously with the same unfair treatment. Suppose further that one set of parents are South Asian and the other set of parents are white and had converted to Islam in adulthood. Both girls are facing the same discriminatory treatment, but the white student will not have a racial discrimination claim. Although she can rely on laws barring religious discrimination, her classmate has access to the racial discrimination claim in addition to her religious discrimination claim.

As evident from President Trump’s Executive Orders banning nonresidents from several majority-Muslim nations, discrimination based on national origin is

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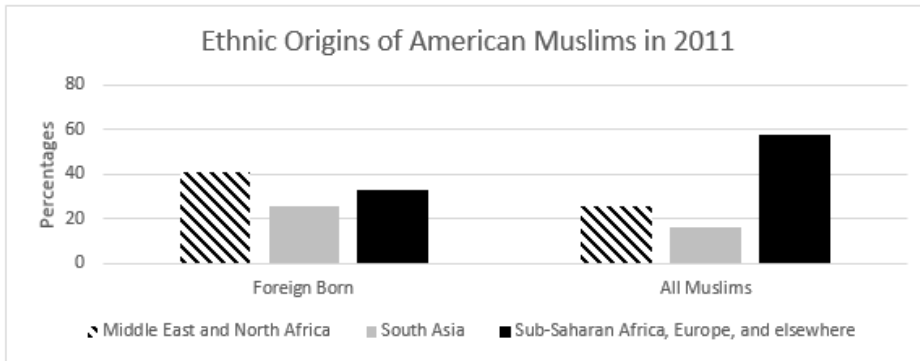
22. *Race*, U.S. CENSUS BUREAU, *supra* note 18; PEW RESEARCH CENTER *supra* note 18.

23. PEW RESEARCH CENTER *supra* note 18.

24. See Akinyi Ochieng, *Black Muslims Face Double Jeopardy, Anxiety in the Heartland*, NPR CODE SWITCH (Feb. 25, 2017, 6:01 AM), <http://www.npr.org/sections/codeswitch/2017/02/25/516468604/black-muslims-face-double-jeopardy-anxiety-in-the-heartland> (describing the unique nature of discrimination against black Muslims).

25. See Kim Joseph, *A Convert to Islam Finds Discrimination on Both Sides of the Veil*, THE HUFFINGTON POST: THE BLOG (Oct. 18, 2010, 9:08 PM), [http://www.huffingtonpost.com/kim-joseph/islam-convert-discrimination\\_b\\_765983.html](http://www.huffingtonpost.com/kim-joseph/islam-convert-discrimination_b_765983.html) (narrating the experiences of a white Muslim woman who used to wear a headscarf).

often a pretext for religious discrimination.<sup>26</sup> Although many instances of anti-Muslim sentiment have included statements such as, “go back home,” America is home for most American Muslims.<sup>27</sup> About 81% of American Muslims are citizens of the United States. Among them, 37% are citizens by birth and among the 63% of American Muslims born abroad, 70% are naturalized citizens. Thus, most American Muslims are American by choice. Moreover, the American Muslim adults who were born abroad came from over seventy-seven different countries.<sup>28</sup>



Note: Data collected from Pew Research Center Data.<sup>29</sup>

## II. INTERSECTIONAL DISCRIMINATION CLAIMS

Race, religion, ethnicity, national origin, and gender are each integral to an individual’s identity, because they shape culture and upbringing.<sup>30</sup> Manifestations of discrimination against American Muslims depend on the intersections of these identity factors. Intersectionality theory recognizes the unique situations and forms of discrimination against individuals who fall within multiple subordinated groups.<sup>31</sup> For example, intersectionality theory acknowledges that discrimination against women of color may be different from discrimination against men of color or white women.<sup>32</sup> Similarly, it recognizes that Muslim women experience discrimination differently from Muslim men, Muslims of color experience discrimination differently from white Muslims, and so on. Discrimination against

26. Exec. Order No. 13,769 82 Fed. Reg. 8977 (Jan 27, 2017); Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

27. Sara Maslin Nir, *Finding Hate Crimes on the Rise, Leaders Condemn Vicious Acts*, NEW YORK TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/nyregion/hate-crimes-are-on-the-rise-in-new-york-city.html>.

28. PEW RESEARCH CENTER *supra* note 18.

29. *Id.*

30. See Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 127 (1997) (discussing the importance of race and religion to one’s identity).

31. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991).

32. *Id.*

Muslim women also varies depending on whether they manifest their religious identity through their choice of dress.

Consider the intersections of race and religion. Even if one can easily differentiate between racial and religious identities for a certain group of people, one may not be able to readily distinguish racial discrimination from religious discrimination.<sup>33</sup> These forms of discrimination are similar, because they are each targeted against individuals and groups who look and act differently from the majority.<sup>34</sup> When a person who belongs to both religious and racial minority groups, discrimination against her may be a result of either piece of her identity or both. For instance, some religions are often associated with particular ethnicities or races due to historic pairings and events.<sup>35</sup> Despite the similarities and intertwining nature of racial and religious discrimination, courts have treated racial and religious discrimination differently.<sup>36</sup> Though one can argue that religion is changeable, unlike race, and therefore deserving of unique treatment, religious beliefs are often taught and absorbed at an early age and thereby shape identities in unchangeable ways as well.<sup>37</sup>

One major difference in how the Supreme Court assesses racial and religious discrimination is that it often gives greater weight to discriminatory effects in religious jurisprudence than it does in race jurisprudence.<sup>38</sup> In race jurisprudence, the Court focuses more on “formal notions of equality.”<sup>39</sup> In other words, the Court has held that evidence of discriminatory effects on the basis of race is insufficient to prevail on an equal protection claim.<sup>40</sup> This presents a challenge to African-American Muslim students who experience discrimination in school and seek equal protection claims for discrimination on the basis of both race and religion.

Our courts have had a history of denying and diminishing combined discrimination claims.<sup>41</sup> A 1997 study by the Women’s Legal Defense Fund found that courts had evaluated age and sex employment discrimination claims together in only ten percent of cases alleging both forms of discrimination from 1975 to 1995.<sup>42</sup> However, even if a court recognizes a black woman’s combined race and sex discrimination claims against her employer, the court is likely to fall short by essentializing the status of “black woman.”<sup>43</sup> In other words, the court may accept

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33. Yang, *supra* note 30, at 121 n.9.

34. *Id.* at 135.

35. *Id.*

36. *Id.* at 142.

37. *Id.* at 132-33.

38. *Id.* at 157.

39. Yang, *supra* note 30, at 157.

40. *Id.* at 158.

41. See Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1461 (finding that courts often treat claims of discrimination based on multiple protected classes as standing alone instead of recognizing the interaction of such claims).

42. Carol Kleinman, *Age, Sex Bias Rulings Going Against Women*, SUN SENTINEL (Mar. 17, 1997), [http://articles.sun-sentinel.com/1997-03-17/business/9703140153\\_1\\_age-discrimination-age-discrimination-suits-older-women](http://articles.sun-sentinel.com/1997-03-17/business/9703140153_1_age-discrimination-age-discrimination-suits-older-women).

43. Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701,



a defendant's argument that it treats other black women fairly and therefore cannot be liable for discriminating against the plaintiff. This reasoning fails to recognize intra-group differences and the possibility that the plaintiff does not meet the employer's or school's social expectations of black women. In the public school context, courts may rule in favor of a school that had discriminated against one student who wears a headscarf if the school shows it treats fairly other Muslim students who do not wear a headscarf. A similar situation may arise if a school discriminates against only the Muslim students whose parents are from the Middle East, but not against other Muslim students with different ancestry.

### III. GUIDANCE FOR PLAINTIFFS

The following guidance is based on federal and state constitutional and statutory protections. Courts have heard a fair number of religious discrimination cases concerning students in public schools, but few have been about Muslim students. The case law below concerning other religious minority students helps show how courts may analyze Muslim students' discrimination claims. Despite the dearth of religious discrimination cases concerning Muslims in public schools, courts have heard plenty of discrimination cases concerning Muslims in employment. Such cases discussed below analyze issues that are also likely to arise in religious discrimination against Muslim students, including misperception and offensive remarks.

#### A. Administrative Procedures

The first step parents should take is to document or keep a log of every discriminatory incident their children experience at school. The ability to point to several specific instances is a strong persuasive tool. Parents can take this information to the school administration, write a complaint to the local district to seek redress, or seek to admit the documents into evidence in court.

Before litigating, injured parties should comply with state or local procedural requirements. In *Erekson v. Billings High Sch. Dist. No. 2*, the plaintiff claimed he had been discriminated against based on his religion when his varsity football coach did not give him any playing time during his senior year and he was removed from the basketball team.<sup>44</sup> The court granted summary judgment for the school district because the plaintiff failed to report the incident to the Montana Human Rights Board within a certain period.<sup>45</sup> Thus, injured parties in states with formal complaint procedures should pursue such means of redress before filing suit.

For example, injured parties in California must first engage with the school district's "Uniform Complaint Procedures." California requires each school district to establish such complaint procedures and to publish them in their

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717 (2001).

44. *Erekson v. Billings High Sch. Dist. No. 2*, No. 05-722, 2006 WL 2961745, at \*2 (Mont. Oct. 17, 2006).

45. *Id.* at \*7.

student handbooks.<sup>46</sup> A student, parent, or other interested party must file this complaint with the school district within six months of the alleged discrimination. The district must then investigate and send a report to the complainant within sixty days. The complainant may provide evidence to the district during the investigation process. If the district does not complete the investigation and report within sixty days, the complainant may contact the California Department of Education (CDE) to file an appeal. If the district sends the report within the sixty days and the complainant disagrees with the outcome, she can file an appeal to the State Superintendent of Public Instruction within fifteen days of the district's decision. CDE may deny the appeal, require the district to investigate further, issue a decision, or undertake its own investigation before issuing a decision. CDE may also require the school district to follow remedial orders or corrective actions.<sup>47</sup>

California also requires parties alleging torts by state entities to engage with administrative processes before filing suit against them.<sup>48</sup> If complainants seek to sue a state, county, or local government agency or employee for monetary damages under state law tort claims, such as negligent and intentional infliction of emotional distress, they are subject to the Government Tort Claims Act (GTCA). This Act requires anyone who seeks to sue a public agency for monetary damages to write a claim letter to the agency within six months of the incident in question. The agency may grant or deny the claim within forty-five days. If the agency gives a written denial, the plaintiff may file suit within six months of that notice. If the agency does not take any action, the plaintiff may file suit within two years from the incident in question.<sup>49</sup> The purpose of the GTCA is to give the state entity enough notice to investigate and settle the alleged claims, if settlement is appropriate.<sup>50</sup> The claim letter to the school district must be clear enough for the district to reasonably make an "adequate investigation."<sup>51</sup>

In contrast, some states such as North Carolina do not have a streamlined complaint or administrative process for discrimination claims against government entities. In May 2016, several North Carolina legislators proposed an anti-discrimination bill that would have required boards of education to adopt a non-discrimination policy and that would have established a human relations board to administer these new provisions. However, the bill did not become law.<sup>52</sup>

Students and parents in any state may file a complaint with the U.S. Department of Education Office of Civil Rights or with the Civil Rights Division

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46. CAL. CODE REGS. tit. 5, § 4600 (2016), *et seq.*

47. CAL. CODE REGS. tit. 5, § 4670 (2016).

48. *State Sovereign Immunity and Tort Liability in all 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. (Mar. 10, 2017), <https://www.mwl-law.com/wp-content/uploads/2013/03/STATE-GOVERNMENTAL-LIABILITY-IN-ALL-50-STATES-CHART-GLW-00211981.pdf>.

49. CAL. GOV'T CODE § 810-996.6; Cynthia C. Jamison, *The Cost of Defiance: Plaintiff's Entitlement to Damages Under the California Civil Rights Initiative*, 33 SW. U. L. REV. 521, 546-47.

50. *D.K. v. Solano Cty. Office of Educ.*, 667 F. Supp. 2d 1184, 1195 (E.D. Cal. 2009).

51. *Id.*

52. Act of May 10, 2016, 2016 N.C. Sess. Laws 1078.

at the federal Department of Justice.<sup>53</sup> To file a claim to the Department of Justice under Title IV of the Civil Rights Act of 1964, parents must write, sign, and send a complaint to the Attorney General explaining how the school or school district is depriving their children of equal protection under the law or has denied admission to the student based on race, color, religion, or national origin. The Attorney General has discretion to undertake a civil action against the school board.<sup>54</sup> The Attorney General has delegated this authority to the Civil Rights Division of the Department of Justice.

### B. Standing in Court

After exhausting the above administrative remedies, the student can retain an attorney to file suit in state or federal court. For students who are minors and are unrepresented, courts should appoint guardians ad litem to advocate for the students' best interests.<sup>55</sup> Injured students should be plaintiffs because courts may find that only students, not parents, have standing.<sup>56</sup> In *Kreitenberg v. Los Alamitos Unified Sch. Dist.*, the parents of a Jewish student brought a religious discrimination case against the school district alleging the baseball coach removed the student from the junior varsity baseball team and otherwise treated him differently from other team members because of his Jewish faith.<sup>57</sup> The student's parents argued they had standing because of the "injuries they sustained by their association with their children . . . as taxpayers and their vested rights to educate their children in a public non-discriminatory secondary school . . . [and] due to their duty and legal obligation to nurture, support, and provide for the welfare of their children."<sup>58</sup> However, the California District Court held that only the affected children have standing for the civil rights, state constitutional, and education code violation claims in a school discrimination case.<sup>59</sup>

In some circumstances and claims, courts may find that parents do have standing. *California Parents for the Equalization of Educ. Materials v. Noonan* held that the plaintiff parents had standing for one of its claims but not the others.<sup>60</sup> The case arose because on March 8, 2009, the California State Board of Education (SBE) adopted a textbook that portrayed Hinduism in a discriminatory and denigrating manner.<sup>61</sup> The next day, a group of Hindu and Indian parents with children in

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53. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, Discrimination Complaint Form (2016), <https://wdcrocolp01.ed.gov/CFAPPS/OCR/contactus.cfm>.

54. 42 U.S.C. § 2000c-6(a) (2012).

55. FED. R. CIV. P. 17(c)(2); CAL. CIV. PROC. CODE § 372 (2016); N.C. GEN. STAT. § 1A-1, Rule 17(b) (2016).

56. See *Kreitenberg v. Los Alamitos Unified Sch. Dist.*, No. G043933, 2012 WL 1374694 (Cal. Ct. App. Apr. 20, 2012).

57. *Id.* at \*3.

58. *Id.* at \*9.

59. *Id.* at \*25.

60. *Cal. Parents for the Equalization of Educ. Materials v. Noonan*, 600 F.Supp.2d 1088, 1102 (E.D. Cal. 2009).

61. *Id.* at 1102.

California public schools formed California Parents for the Equalization of Education Materials (CAPEEM) to promote “an accurate portrayal of the Hindu religion in the public education system of the State of California.”<sup>62</sup> CAPEEM filed suit against SBE for indoctrinating students in Christianity and Judaism.<sup>63</sup> However, the California Eastern District Court found that CAPEEM did not have standing for their Equal Protection, Establishment, and Free Speech and Association Clause claims because preventing indoctrination in other religions is not essential to the group’s purpose.<sup>64</sup> CAPEEM only had standing for the claim of discrimination against one of its members during the textbook adoption process.<sup>65</sup>

### C. Government Immunity

One issue that plaintiffs may encounter is government immunity. For instance, § 820.2 of the California Government Code states that public employees are not liable for actions or omissions that they make within their discretionary authority, even if they abuse this discretion. California courts consider “discretion” to focus on the actor and action’s context.<sup>66</sup> Section 818 allows plaintiffs to seek actual and statutory damages from state entities but prohibits them from seeking punitive damages. They can claim punitive damages if they name a specific government employee as a defendant.<sup>67</sup>

### D. Potential Claims

To succeed in litigation, plaintiffs should present evidence of religious discrimination beyond merely broad assertions. The plaintiff in *Mata v. S. San Antonio Indep. Sch. Distr.* is a member of the Jehovah’s Witness faith and she brought a religious discrimination claim against the school district after the school filed charges against her father, a co-plaintiff, for violating compulsory school attendance laws.<sup>68</sup> The Fifth Circuit found in favor of the school district and dismissed the plaintiffs’ appeal because they had failed to show evidence for their claims beyond their broad assertions.<sup>69</sup> Sometimes plaintiffs have evidence of direct discriminatory statements, but when they do not, attorneys should urge courts to nonetheless analyze plaintiffs’ arguments with just as much fervor. It is often difficult to find smoking gun evidence of discrimination, because it may not exist in writing and school employees are not likely to admit intentional

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62. *Id.* at 1103.

63. *Id.* at 1095.

64. *Id.* at 1108.

65. *Id.* at 1109.

66. Jamison, *supra* note 49, at 547.

67. *Id.* at 548.

68. *Mata v. S. San Antonio Indep. Sch. Dist.*, No. 93-8182, 1993 U.S. App. LEXIS 38998 at \*1 (5th Cir. Oct. 15, 1993).

69. *Id.* at \*8.

discrimination.<sup>70</sup>

One way to protect the rights of Muslim students in public schools is to encourage courts to recognize the varied and intersectional nature of discrimination against Muslim students. Courts should not shy away from combined discrimination claims and instead appreciate that the interactions of multiple factors drive such discrimination. For example, if a defendant argues that it did not engage in religious discrimination because it treats other Muslims fairly, plaintiffs' attorneys should clarify for the court that religious discrimination can manifest in different forms depending on other factors of the injured party's identity. Additionally, plaintiffs' attorneys should urge courts to analyze the "totality of the circumstances" as they do in many other civil matters. Courts should recognize these challenges and seriously consider how several instances together can suggest there is discrimination even if there is no direct evidence.

Injured students can file claims under the Civil Rights Act and constitutional clauses such as the Freedom of Religion Clause, Establishment Clause, Equal Protection Clause, and Due Process Clause. Students may also file state constitutional claims and other claims pursuant to state statutes. There are many other potential claims available to student plaintiffs; however, this paper will cover only the following common claims.

#### **E. Section 1983**

Section 1983 of the U.S. code prohibits persons from, under color of law or custom, causing U.S. citizens or persons in the U.S. to be deprived "of any rights, privileges, or immunities secured by the Constitution and laws."<sup>71</sup> This provision is the mechanism through which parties and courts enforce federal constitutional and statutory rights, except when the claim concerns a right for which the legislature has adopted a specific remedial scheme.<sup>72</sup> The claim must address an official law or policy, as required by the "under color of law" clause of § 1983.<sup>73</sup> The paragraphs below will provide examples of § 1983 claims under various constitutional and statutory theories. Such claims are viable against state or local law violations only if they violate federal law as well.<sup>74</sup>

#### **F. Title IV of the Civil Rights Act**

Title IV prohibits religious discrimination in schools, which includes but is not limited to harassment, freedom of religious expression, and religious dress accommodations. The Civil Rights Division of the U.S. Department of Justice has handled harassment cases involving Muslim students, because the U.S. Department of Education does not have jurisdiction over religious discrimination

70. See Julie K. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1360 (2008) (noting that smoking gun evidence of discrimination is rare).

71. 42 U.S.C. § 1983 (2012).

72. *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981).

73. *Casey v. Newport Sch. Comm.*, 13 F. Supp. 2d 242, 245 (D.C.R.I. 1998).

74. *Cabrera v. Bayamon*, 562 F.2d 91, 102 (1st Cir. 1977).

claims.<sup>75</sup> Harassment cases in public schools can arise when teachers or other school employees harass students or when schools are deliberately indifferent to harassment by other students. For example, in March 2005, a fourth-grade Muslim student in the Cape Henlopen, Delaware School District filed a complaint with the Civil Rights Division because the student's teacher had harassed her about her religion in front of the class. She had ridiculed the student for her mother's headscarf. Other students repeatedly harassed her after this and the school failed to appropriately remedy the situation. The Civil Rights Division reached a settlement with the school district which required programs to teach religious tolerance to both teachers and students, and special training and monitoring for the student's teacher.<sup>76</sup>

Religious expression cases for Muslim students often involve private prayer during school. In May 2007, the Division reached a settlement with a high school in Texas that denied students the right to pray during their lunch periods. The settlement required the school to allow students to meet in a designated space near the cafeteria.<sup>77</sup>

The Division has handled religious dress cases for Muslim students who wear headscarves as well. In *Hearn and United States v. Muskogee Pub. Sch. Dist.*, the school prohibited a Muslim girl from wearing a headscarf. The Division intervened and argued that the school did not enforce its uniform policy consistently. The parties reached a settlement in May 2004.<sup>78</sup>

Misperception of religious identity may also occur in public schools. In the employment context, courts have found that an employer's perception or even misperception could lead to potential liability under Title VII of the Civil Rights Act of 1964. Thus, if an employer does not hire a person because it believes that the person is Muslim, the employer has discriminated against the person even if she is not actually Muslim.<sup>79</sup> As mentioned above, one may confuse Muslims and Sikhs or generalize all Arabs as Muslim. If a teacher or school discriminated against a plaintiff who is not Muslim but who they think is Muslim, then the defendant should also be liable under Title IV.

### G. Title VI of the Civil Rights Act

Title VI prohibits discrimination on the grounds of race, color, and national origin in public schools. Although discrimination against Muslims may not always coincide with race, color, or national origin discrimination, many courts have

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75. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, Dear Colleague Letter on Title VI and Title IX Religious Discrimination in Schools and Colleges (2004), <http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

76. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., Religious Discrimination in Education (2015), <https://www.justice.gov/crt/combating-religious-discrimination-and-protecting-religious-freedom-20>.

77. *Id.*

78. *Id.*

79. *E.E.O.C. v. Bojangles*, 284 F.Supp.2d 320, 328 (M.D.N.C. 2003).

equated anti-Semitism discrimination to race and national origin discrimination.<sup>80</sup>

The Office for Civil Rights (OCR) of the U.S. Department of Justice confirms that although Title VI does not cover religion, it will cover Muslims if the discriminatory act is based on their shared ancestry or ethnicity, but not for their religious practices.<sup>81</sup> OCR states, “Title VI further prohibits discrimination against an individual where it is based on actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.”<sup>82</sup> Thus, Muslim students who have ancestry from countries often associated with war, terrorism, oppression, and violence or with Islam in general may have sufficient bases to argue national origin discrimination claims.

Muslim students who can argue race, color, or national origin discrimination may rely on a hostile educational environment theory for their Title VI claims. The U.S. Department of Education explains that a school district violates Title VI if “(1) [a] racially hostile environment existed; (2) the recipient had actual or constructive notice of the racially hostile environment; and (3) the recipient failed to respond adequately to redress the racially hostile environment.”<sup>83</sup>

*Nicole K. by & Through Peter K. v. Upper Perkiomen Sch. Dist.* held that a plaintiff whose father was German did not have a § 1983 claim under a hostile educational environment theory when her teacher called her a “neo Nazi” and “the German girl” and said “Germans make good farmers.”<sup>84</sup> The Pennsylvania Eastern District Court deduced that although calling someone a Nazi is cruel, the term is not aimed at a person’s national origin within the meaning of § 1983.<sup>85</sup> Section 1983 defines discrimination based on national origin as comments or actions made because of the country in which the plaintiff was born or the country of her ancestors.<sup>86</sup> The court held that Nazis are followers of a violent political ideology that now exist in many countries besides Germany.<sup>87</sup>

Moreover, to prevail on a § 1983 claim based on a hostile educational environment allegation, the harassment must be “pervasive and regular.”<sup>88</sup> Two comments are insufficient to show such an environment.<sup>89</sup> Although the plaintiff reports that her classmates called her a Nazi for months after the teacher’s

80. *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 354-55 (S.D.N.Y. 2014).

81. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., Letter to U.S. Dep’t of Educ., Office for Civil Rights: Title VI and Coverage of Religiously Identifiable Groups (2010), [https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810\\_AAG\\_Perez\\_Letter\\_to\\_Ed\\_OCR\\_Title%20VI\\_and\\_Religiously\\_Identifiable\\_Groups.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf).

82. *Id.*

83. Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448-01 (Mar. 10, 1994).

84. *Nicole K. ex rel. Peter K. v. Upper Perkiomen Sch. Dist.*, 964 F. Supp. 931, 934-36 (E.D.C.Pa. 1997).

85. *Id.* at 935.

86. *Id.*

87. *Id.*

88. *Id.* at 936.

89. *Upper Perkiomen Sch. Dist.*, 964 F. Supp. at 936.

statement, a school district is not liable under § 1983 for its students' actions.<sup>90</sup>

If a Muslim student whose teacher calls him a "terrorist" wishes to bring a § 1983 claim, he may have difficulty prevailing on a national origin discrimination argument because terrorists exist in many countries. Despite the common knowledge that Nazis are associated with Germany, the Pennsylvania Eastern District Court failed to recognize that calling a student with German ancestry a Nazi is particularly offensive. Similarly, a court may fail to recognize that calling a student who is Muslim or who has Middle Eastern ancestry a terrorist is particularly offensive.

In an employment discrimination case, the Court of Appeals in the Third District of California found that the plaintiff failed to show a hostile working environment under Title VII of the Civil Rights Act, because he only heard three offensive remarks over the course of one and a half years and only two of those remarks could arguably have been directed at him.<sup>91</sup> His employer allowed him to attend Friday afternoon prayer services despite his supervisor's displeasure.<sup>92</sup> However, in the school setting, the injured parties are children and are therefore more vulnerable to harm from offensive remarks. Plaintiffs alleging religious discrimination cases in public schools should therefore argue for a higher threshold to determine which combinations of offensive remarks constitute religious discrimination.

#### H. Title IX of the Civil Rights Act

Title IX prohibits discrimination and harassment on the basis of sex. Muslim girls who are discriminated or harassed in relation to their headscarf can bring Title IX claims. In the fall of 2003, the classmates of Jana Elhifny, a public high school student in Washoe County, Nevada, referred to her with profanity and other offensive terms. They threatened to assault and kill her several times as well. Her teachers and school administrators were aware of these abuses but failed to appropriately address the offensive treatment. Instead, they suggested to Jana to refrain from wearing her headscarf at school.<sup>93</sup> She brought several claims against the school administrators, including Title IX claims for both discrimination and harassment based on her sex which deprived her of access to equal educational opportunities and created a hostile educational environment.<sup>94</sup> Jana and the school reached a settlement agreement for \$350,000.<sup>95</sup>

Title IX of Education Amendments of 1972 prohibits § 1983 claims against school officials or employees.<sup>96</sup> Some courts have held that Title IX claims subsume

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90. *Id.*

91. *Elhertani v. Level One Commc'ns, Inc.*, No. C039471, 2002 WL 31555329, at \*7 (Cal. Ct. App. Nov. 19, 2002).

92. *Id.* at \*2.

93. *Complaint at 6, Barns v. Gifford*, No. 3:04-cv-00583-LRH-PAL (D.C. Nev. Oct. 19, 2004).

94. *Id.* at 62, 65.

95. *Verdict and Settlement Summary, Elhifny v. Gifford*, 2009 WL 982239 (D.Nev. 2009).

96. *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 441 F.3d 1287, 1302 (11th Cir. 2006).



§ 1983 claims brought under Title IX theories because of Title IX's enforcement mechanism.<sup>97</sup> However, other courts have held that the enforcement mechanisms in Title IX are not comprehensive enough to preclude § 1983 claims.<sup>98</sup>

### I. Establishment Clause

Plaintiffs can bring establishment claims if the public school in question has failed to separate itself from religion. This is likely to arise if a school promotes Christianity and effectively requires non-Christian students to partake in Christian practices.

To succeed on an establishment claim, plaintiffs must pass the Lemon test, which has three elements. The practice in question must (1) lack a secular purpose, (2) have a primary effect which advances or inhibits religion, or (3) foster "excessive government entanglement with religion."<sup>99</sup> A Delaware District Court held that a plaintiff's establishment claim against a textbook about the September 11 attacks did not withstand summary judgment because the textbook served an educational purpose and did not inhibit religion.<sup>100</sup> The only reference to religion in the book was where it describes the terrorists' stated purpose and contrasts it from the peaceful beliefs of most Muslims.<sup>101</sup>

However, courts find that school-organized prayer does pass the Lemon test and therefore violates the Establishment Clause.<sup>102</sup> In *Sands v. Morongo Unified Sch. Dist.*, the California Supreme Court found that the school district had violated the Establishment Clause by incorporating prayer into a high school graduation ceremony.<sup>103</sup> This incident of school prayer passed the Lemon test because the purpose of prayer can never be secular and a school district who allows prayer gives the message that it strongly endorses such prayer.<sup>104</sup>

### J. Free Exercise Clause

Alongside establishment claims, plaintiffs can bring free exercise claims. However, to bring a free exercise claim, the plaintiff must point to an official policy or custom that burdens the student's right to practice her religion.<sup>105</sup> Unlike

97. *Lakoski v. James*, 66 F.3d 751, 758 (5th Cir. 1995).

98. *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997).

99. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

100. *Doe v. Cape Henlopen Sch. Dist.*, 759 F. Supp. 2d 522, 529-30 (D.C. Del. 2011).

101. *Id.*

102. *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding that prayers at the beginning of the school day violate the Establishment Clause); *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 832-33 (11th Cir. 1989) (holding that school-organized prayer before football games violates the Establishment Clause); *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 879, 881-82 (Cal. Sup. Ct. 1991) (holding that including prayers at graduation ceremonies violates the Establishment Clause).

103. *Id.* at 879, 881, 882.

104. *Id.* at 873-74.

105. See *Walden v. Moffett*, No. CV-04-6680 AWI/DLB, 2006 WL 2520291, at \*6, \*13-16 (E.D. Cal. Aug. 28, 2006) (dismissing freedom of religion and due process claims because plaintiffs failed to allege an official policy or custom).

establishment claims, free exercise claims require a showing of coercion or compulsion by the state entity in question.<sup>106</sup> The Supreme Court explains that indirect coercive pressure satisfies this requirement.<sup>107</sup> The Court additionally clarifies that even though the Free Exercise Clause protects religious liberty, this liberty does not allow followers of a majority religion to use this clause to burden other religious groups.<sup>108</sup>

Additionally, courts may require the plaintiff to show she has a sincerely held religious belief and that the state action conflicts with and burdens this belief.<sup>109</sup> The Eastern District of Texas court explains that the factfinder may decide whether the belief was sincerely held but may not consider whether the belief is consistent with religious doctrine or is otherwise reasonable.<sup>110</sup> For example, when the Big Sandy Independent School District dress code prohibited male students from wearing long hair, Native American plaintiffs who followed a religious practice of wearing long hair brought a free exercise claim. The court stated that to qualify as a religious practice or belief under the free exercise clause, it is sufficient for the practice to be “deeply rooted in religious belief” and it need not be a fundamental tenet.<sup>111</sup> Similarly, the Supreme Court has found that the First Amendment protects religious beliefs even if they are not “acceptable, logical, consistent, or comprehensible to others.”<sup>112</sup> This interpretation is beneficial for Muslim students because there are many religious beliefs and practices that are disputed or are encouraged but not required in the Islamic faith. Therefore, if a school prevents a Muslim student from undertaking a religious practice or belief that other Muslims at the school do not pursue, she should still have a free exercise claim.

### K. Equal Protection Clause of the Fourteenth Amendment

Equal protection claims require plaintiffs to show that defendants intentionally discriminated against them based on their religion or other protected classification. In other words, plaintiffs must show the defendant treated them adversely compared to similarly situated individuals based on their religion.<sup>113</sup> A teacher, administrator, or school board’s deliberate indifference to student-on-student harassment based on religion may constitute intentional discrimination.<sup>114</sup> In *G.D.S. v. Northport-East Northport Union Free School Dist.*, a Jewish student’s classmates made several offensive comments about Jewish people both in person

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106. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963).

107. *Id.*

108. *Id.* at 226.

109. *See Ala. & Coushatta Tribes v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1328 (E.D. Tex. 1993).

110. *Id.*

111. *Id.* at 1326, 1329.

112. *Thomas v. Review Bd. of Indiana Emp’ Sec. Division*, 450 U.S. 707, 714 (1981).

113. *G.D.S. v. Northport-E. Northport Union Free Sch. Dist.*, 915 F. Supp. 2d 268, 277 (E.D.N.Y. 2012).

114. *Id.*

and on social media.<sup>115</sup> Among other slurs, they said, “Jews are disgusting,” “Hitler was a good person,” and “What’s the difference between a Jew and a pizza? A pizza doesn’t scream when it goes into the oven.”<sup>116</sup> His classmates would drop coins on the floor and tell him, “Pick it up, Jew.”<sup>117</sup> One student posted a picture of Anne Frank on Facebook and wrote in the caption, “Just gonna stand there and watch me burn,” and “That’s alright because I like the way it hurts.”<sup>118</sup>

Here, the defendant sought to dismiss plaintiff’s § 1983 claim under the equal protection theory but the court denied defendant’s motion because the plaintiff was able to show that (1) other students harassed the student because of his religion; (2) the defendant had actual knowledge of the religion-based harassment; and (3) that in light of the circumstances, the defendant’s response was unreasonable enough to give rise to a reasonable inference that the defendant intended for the harassment to occur.<sup>119</sup> In his complaint, the plaintiff described how this severe harassment deprived him of access to the educational opportunities at his school.<sup>120</sup> The school had notice of the harassment, because the plaintiff wrote an essay about the anti-Semitism at his school, which his English teacher read, and his parents also spoke with the school principal and the school district’s superintendent about the pervasive incidents.<sup>121</sup> Yet, the school administration failed to take any action despite the severe and offensive nature of other students’ anti-Semitic slurs.<sup>122</sup> The plaintiff’s complaint argues that this omission was unreasonable under the circumstances.<sup>123</sup> Therefore, the plaintiff sufficiently met each element of his equal protection claim.<sup>124</sup>

#### L. Due Process Clause of the Fourteenth Amendment

The liberty guarantee of the Due Process Clause requires states to not only avoid discriminatory treatment but to shape state action with religious differences in mind. This affirmative duty has been used to protect both religious and racial or ethnic identity.<sup>125</sup> Additionally, the Supreme Court has interpreted liberty to include the right to “to direct the education and upbringing of one’s children.”<sup>126</sup>

Procedural due process claims require plaintiffs to show that the school deprived them of a “life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment” without first providing adequate

115. *Id.* at 271–72.

116. *Id.* at 271.

117. *Id.*

118. *Id.* at 272.

119. *G.D.S.*, 915 F. Supp. at 277.

120. *Id.* at 278.

121. *Id.*

122. *Id.* at 279.

123. *Id.*

124. *Id.*

125. Yang, *supra* note 30, at 148.

126. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

procedural rights.<sup>127</sup> For example, in *Hill v. Blount Cty. Bd. of Educ.*, two plaintiffs brought suit against the school board after experiencing race-based bullying and harassment from classmates.<sup>128</sup> The two Asian plaintiffs stated that their classmates called them “chink,” told them “go home to your country,” attempted to speak in “Asian” accents, and physically harassed them.<sup>129</sup> A teacher reported one of the plaintiffs for disrespect and defiance, and the principal subsequently suspended him for one day.<sup>130</sup> The court found that the plaintiff did not have a procedural due process claim for the suspension, because the principal gave him notice of his suspension and allowed him to explain his story.<sup>131</sup>

Substantive due process claims require plaintiffs to show that the school’s actions “were so egregious as to shock the conscience” and “that they deprived [them] of a protected interest in life, liberty, or property.”<sup>132</sup> To “shock the conscience,” an act must be “truly outrageous, uncivilized, and intolerable.”<sup>133</sup> Violations of the law do not necessarily give rise to substantive due process claims unless the results are significantly disproportionate to the need presented, inspired by malice, or are inhumane abuses of power.<sup>134</sup> Non-action, such as failing to punish other students from bullying the injured student, is not sufficiently egregious to give rise to a claim either.<sup>135</sup> State entities that have custody of or special relationships with the injured party in which they have a duty of care are exempt from this non-action rule. Courts have held that schools do not fit this exception.<sup>136</sup> However, plaintiffs may have a claim if they can show the school knowingly and affirmatively created for plaintiffs a risk of danger from a third party.<sup>137</sup> Thus, substantive due process claims under the Fourteenth Amendment are most likely successful if plaintiffs can show that the school engaged in an affirmative act that created a significant danger to the plaintiff students. A successful § 1983 claim under a Fourteenth Amendment Due Process theory requires the plaintiff to allege an abuse of government power.<sup>138</sup>

### M. State Law Claims

Plaintiffs may join state law claims in federal court. These claims may be based on constitutional or statutory protections. Some state constitutions do not explicitly prohibit discrimination on the basis of religion. For example, the California constitution prohibits discrimination and preferential treatment on the

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127. *Hill v. Blount County Bd. of Educ.*, 203 F.Supp.3d 871, 879–80 (E.D. Tenn. 2016).

128. *Id.* at 877-78.

129. *Id.*

130. *Id.* at 878.

131. *Id.* at 880.

132. *Pollard v. Georgetown Sch. Dis.*, 132 F.Supp.3d 208, 227 (D. Mass. 2015).

133. *Id.*

134. *Id.*

135. *Hill*, *supra* note 127, at 878.

136. *Id.* at 879.

137. *Id.*

138. *Love v. King*, 784 F.2d 708, 712 (5th Cir. 1986).

bases of race, sex, color, ethnicity, or national origin in public schools.<sup>139</sup> This does not include religion as a protected category. In such states, if a Muslim plaintiff has strong evidence to show that the school discriminated against her because of her ethnicity or national origin, she may pursue a state constitutional claim. However, Muslim plaintiffs may have stronger state constitutional claims in states with constitutions that include religion as a protected category. For instance, the North Carolina constitution maintains that everyone will be given equal protection of the laws and prohibits state discrimination based on race, color, religion, or national origin.<sup>140</sup> Note that this does not include sex as a protected category. The North Carolina constitution also guarantees the right to “the privilege of education” and equal educational opportunities for all students.<sup>141</sup>

Some states have legislation and statutes that specifically protect against religious discrimination in public schools. For example, the California Education Code protects against religious discrimination in three different provisions. Section 200 states that California must “afford all persons in public schools regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation . . . equal rights and opportunity in the education institutions of this state.”<sup>142</sup> Section 201 mandates that “all pupils have the right to participate fully in the educational process, free from discrimination and harassment.”<sup>143</sup> Lastly, § 220 states that:

[n]o person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation . . . in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.<sup>144</sup>

In 2016, the California legislature passed the Safe Place to Learn Act. The Act requires school districts to adopt and publicize a policy prohibiting discrimination, harassment, intimidation, and bullying on the basis of the categories in § 220. If a school personnel witnesses any such act, she must immediately intervene if safe to do so. The Act additionally requires districts to adopt and implement a complaint process, which includes but is not limited to a timeline and appeal process.<sup>145</sup>

However, some states like North Carolina do not have such protections. In March 2007, Senators Charlie Smith Dannelly and Jeanne Hopkins Lucas introduced an omnibus civil rights bill, Senate Bill 657, which recognized religion as a protected category in the areas of employment, public accommodations, and

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139. CAL. CONST. art. I, § 31.

140. N.C. CONST. art. I, § 19.

141. N.C. CONST. art. I., § 15; art. IX, § 2.

142. CAL. EDUC. CODE § 200 (West 2012).

143. EDUC. CODE § 201.

144. EDUC. CODE § 220.

145. EDUC. CODE § 234.1.

hate crimes.<sup>146</sup> The North Carolina General Assembly did not sign this bill into law. In May 2016, several North Carolina legislators introduced House Bill 1078, which also prohibited discrimination based on several categories including religion in schools, housing, employment, and lending. The bill would have required local boards of education to adopt a non-discrimination policy, which considered religion a protected category and allow students to file complaints with the North Carolina Human Relations Commission. The General Assembly rejected this bill as well.<sup>147</sup>

North Carolina does have a statute prohibiting discrimination based on race, religion, ethnicity, or gender, but it cannot be used to bring a civil action against a governmental unit or official.<sup>148</sup> The only North Carolina statute that explicitly prohibits discrimination based on religion and other classifications in schools applies solely to charter schools, perhaps because such schools operate under many of their own rules and therefore students may need extra protection.<sup>149</sup> The only statute focusing directly on religion and all public schools is N.C. Gen. Stat. § 115C-407.30, which gives students of all religions to have equal access to prayer and religious activity at school.<sup>150</sup> It also guarantees that students can express religious beliefs in school assignments free from discrimination based on content.<sup>151</sup> Teachers may not penalize or reward for students for such religious content in their work.<sup>152</sup> Although this does protect Muslim students in some situations, it is not nearly as comprehensive as the protective statutes in California.

States may have legislation and statutes that courts interpret as implicit protections against religious discrimination in public schools, such as California's Unruh Act of 1959. The Act guarantees that "all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."<sup>153</sup> Although it does not explicitly mention public schools, California courts have included public schools in the category of business establishments.<sup>154</sup> In public school cases, the Unruh Act does not require plaintiffs to show that the school intentionally discriminated against them. It is sufficient for plaintiffs to prove that the school district failed to adequately respond to discrimination.<sup>155</sup> Unruh case law shows that plaintiffs can pursue both statutory and punitive damages."<sup>156</sup>

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146. S.B. 657, Gen. Assemb., 2007 Sess. (N.C. 2007).

147. Act of May 10, 2016, 2016 N.C. Sess. Laws 1078.

148. N.C. GEN. STAT. § 99D-1 (West 2014).

149. *Id.* at § 115C-218.55.

150. *Id.* at § 115C-407.30.

151. *Id.* at § 115C-407.30(a)(6).

152. *Id.*

153. CAL. CIV. CODE § 51 (West 2016).

154. Jamison, *supra* note 49, at 537.

155. *Id.* at 539.

156. *Id.*

Lastly, states have varying levels of access to resources. For example, California's Departments of Education and Justice dedicate detailed webpages to civil rights, whereas North Carolina's equivalent departments do not.<sup>157</sup> The North Carolina Department of Public Instruction has only a non-discrimination statement and contact information for inquiries or complaints at the bottom of its "Legal Notices" webpage.<sup>158</sup> Although this difference in their websites does not necessarily mean California's protections are stronger than those of North Carolina, the absence of such information on the websites of states such as North Carolina creates a barrier for residents who wish to learn more about their rights and legal protections.

#### IV. POLICY RECOMMENDATIONS

One way for state governments to protect against discrimination in schools is to issue interdisciplinary guidelines that define what constitutes a "hostile environment" for elementary and secondary school students. Scholars and practitioners from the fields of psychology, education, anthropology, and others should write these guidelines. Courts can use these guidelines to analyze plaintiff's claims of hostile educational environments.

To assist courts and interdisciplinary guideline committees, states should also collect data and publish statistics on the instances of discrimination against Muslims in elementary and secondary schools. The numbers will help courts, guideline committees, and other policymakers understand the scope of the issue and address the problems with appropriate measures.

The dearth of cases about discrimination against Muslims in elementary and secondary public schools shows that most victims do not litigate these matters. There may be various reasons why these issues are not reaching the courts, such as the slow and costly process of litigation, the fact that students may graduate before the case finishes, parents' desire for their children to learn how to respond to discrimination, and parents' and students' desires to maintain amicable relationships with the school community. Thus, the following are policy recommendations that do not concern litigation.

Local school boards should engage with Muslim families, school staff, and all students about discrimination. They can invite Muslim families in the public school system to discuss their students' needs. If the families' schedules are tight, school boards may solicit comments from Muslim families electronically. School boards should mandate staff trainings or workshops on why discrimination is prohibited by law, how to avoid discriminating against students, and to provide general competence on conflicts or accommodation requests that may arise. State

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157. *Civil Rights: Laws And Legislation*, STATE OF CALIFORNIA DEP'T OF JUSTICE, <https://oag.ca.gov/civil/lawleg#civilRights> (last visited Mar. 22, 2017); *Equal Opportunity and Access*, CALIFORNIA DEP'T OF EDUCATION (Feb. 8, 2017), <http://www.cde.ca.gov/re/di/eo/>; *Civil Rights Review*, CALIFORNIA DEP'T OF EDUCATION (Mar. 9, 2017), <http://www.cde.ca.gov/ta/cr/cterights.asp>; *Top Issues*, N.C. DEP'T OF JUSTICE, <http://www.ncdoj.gov/Top-Issues.aspx> (last visited Mar. 22, 2017).

158. *Legal Notices*, NORTH CAROLINA DEP'T OF PUBLIC INSTRUCTION, <http://www.dpi.state.nc.us/legalnotices/> (last visited Mar. 22, 2017).

governments should include in their standard curricula a variety of religions and cultures for their students to study. State governments should seek guidance from a diverse array of experts on these topics to help schools and teachers plan their lessons.

States like North Carolina can learn from California and incorporate a webpage on civil rights resources on their state board websites. On a policy level, many states can also follow California's example by establishing complaint procedures for public school students and their families and by enacting legislation that directly prohibits discrimination on the basis of religion and other protected classes in public elementary and secondary schools. Muslims comprise a small but hyper-visible minority which may deter students and their families from filing a complaint or reporting to the media for fear of their own safety and invasion of privacy. Advocates should therefore urge states to not only establish and enforce complaint procedures, but to also provide anonymous complaint mechanisms.

In conclusion, multiple actors must push from a variety of angles to create a more inclusive educational environment for Muslim students. Whether through litigation or policy, states have several tools they can use to protect Muslim students. In the meantime, attorneys, scholars, and concerned citizens must continue to hold schools, school boards, and state and local governments accountable for upholding the constitutional and civil rights of Muslim students.