GLAD LAW
GLBTQ Legal Advocates & Defenders

ACLU
AMERICAN CIVIL LIBERTIES UNION
Maine

TESTIMONY IN SUPPORT OF
LD 1647, AN ACT TO AMEND THE MAINE HUMAN RIGHTS ACT TO PROVIDE ADDITIONAL REMEDIES FOR EDUCATIONAL DISCRIMINATION

Committee On Judiciary
April 28, 2025

Dear Senator Carney, Representative Kuhn, and Members of the Committee on Judiciary,

GLBTQ Legal Advocates & Defenders (GLAD Law) is a nonprofit legal organization that works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. We appreciate the opportunity to submit this testimony together with ACLU of Maine in support of LD 1647, An Act to Amend the Maine Human Rights Act to Provide Additional Remedies for Educational Discrimination.

LD 1647 would allow victims of intentional educational discrimination to recover the full range of compensatory damages for the resulting harms, including emotional harms, when proven. These damages were historically available under federal law until 2022, when the U.S. Supreme Court severely limited remedies. LD 1647 is a common-sense, technical legal fix that restores the status quo as it existed before 2022 when those damages were available, and in doing so reaffirms Maine's commitment to building an education system where all students can thrive.

Compensatory damages are an important form of relief for unlawful discrimination.

Compensatory damages perform two key functions in civil rights law. First and foremost, compensatory damages seek to provide "make-whole" relief for victims of unlawful discrimination. In other words, these damages compensate victims for all the harm they have experienced, which in many cases may be primarily or exclusively emotional in nature. "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is

unacceptable as a member of the public" because of his sex, sexual orientation or gender identity, physical or mental disability, ancestry, national origin, race, color or religion.[1]

Second, compensatory damages awards ensure that defendants are held accountable for their unlawful conduct and the resulting harm. And the mere prospect of such damages can effectively deter discrimination and incentivize inclusive practices, and thereby further the fundamental aim of civil rights laws.[2]

Courts have long considered broad compensatory damages, including damages for emotional harm, an appropriate remedy for intentional educational discrimination.

Educational discrimination is prohibited by both state and federal law. At the state level, the Maine Human Rights Act prohibits educational discrimination "on the basis of sex, sexual orientation or gender identity, physical or mental disability, ancestry, national origin, race, color or religion."[3] Currently, the only monetary damages available for a violation are $20,000 in civil penal damages (or $50,000 or $100,000 for repeat offenders).[4] These amounts are far lower than the kinds of damages available in other lawsuits and pale in comparison to the costs of bringing litigation.

At the federal level, a constellation of statutes prohibit discrimination in educational programs receiving federal financial assistance. Title VI of the Civil Rights Act of 1964 covers discrimination based on race, color, and national origin; Title IX of the Education Amendments of 1972 covers discrimination based on sex; and Section 504 of the Rehabilitation Act of 1973 covers discrimination based on disability. All these statutes were enacted under Congress's Spending Clause authority.

Historically, these federal antidiscrimination statutes were widely held to allow much broader relief than the MHRA. Specifically, compensatory damages were generally considered available under each statute. This understanding arose from the Supreme Court's 1992 decision in *Franklin v. Gwinnett County Public Schools*. In that case, the Court held that "a damages remedy is available" under Title IX; that Congress had not "limited the remedies available"; and that federal courts could award "any appropriate relief" to students whose rights had been violated.[5]

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[1] *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 236 (2022) (Breyer, J., dissenting) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 292 (1964) (Goldberg, J., concurring)).
[2] *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (stating that awards of monetary relief in the form of backpay can serve as "the spur or catalyst" to eliminate unlawful employment discrimination).
[3] 5 M.R.S. § 4602(1).
[4] 5 M.R.S. § 4613(2)(B)(7). In some cases, the civil penal damages may go to the Maine Human Rights Commission, leaving the student with no recompense for the harms they experienced. *See id.*
[5] *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 73, 76 (1992).

Over the next thirty years, the ordinary practice in federal courts was to "award or assume the availability of emotional distress damages in a wide variety of cases involving the antidiscrimination provisions in Title VI and related statutes" like Title IX and Section 504.[6] Guidance from the federal Department of Justice has likewise recognized "the availability of emotional distress damages to remedy violations" of these antidiscrimination statutes.[7]

In one particularly influential decision, the Eleventh Circuit aptly explained why awarding emotional distress damages makes sense: In cases of sexual harassment and many other cases of intentional educational discrimination, "emotional distress is the only alleged damage to the victim and thus the only 'available remedy to make good the wrong done.'"[8]

In 2022, the U.S. Supreme Court departed from this longstanding trend and dramatically limited the damages available for intentional discrimination under federal law, likely leaving many victims without a remedy.

In a 2022 decision called *Cummings v. Premier Rehab Keller*, the Supreme Court held for the first time that emotional distress damages are not available under Section 504.[9] To reach this conclusion, the Court suggested that victims of educational discrimination may only recover "the *usual* contract remedies in private suits."[10] Although the Court did not delineate the precise scope of contract remedies available, the dissenters interpreted the majority opinion as allowing damages only for "economic harm."[11] Because "victims of intentional discrimination may sometimes suffer profound emotional injury without any attendant pecuniary harms," the rule set forth in *Cummings* could be read to "leave those victims with no remedy at all."[12]

Already, some courts have applied the reasoning in *Cummings* to close the courthouse doors to victims of educational discrimination under federal statutes like Section 504, Title VI, and Title IX.[13] And the potential for reduced damages awards due to *Cummings* is likely affecting access to justice already.[14] Maine attorneys using contingency-fee model typically are

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[6] Brief for the United States as Amicus Curiae at 20–22, *Cummings v. Premier Rehab Keller, PLLC*, available at https://www.supremecourt.gov/DocketPDF/20/20-219/180110/20210525164611783_20-219%20Cummings%20vf.pdf; *see also* Pet'n for Certiorari at 13–15, *Cummings*, available at https://www.supremecourt.gov/DocketPDF/20/20-219/150912/20200821131921758_Cummings%20Petition%20-%20Final.pdf.

[7] *Id.* at 20; *see also* U.S. Dep't of Justice, Civil Rights Division, Title VI Manual: Section IX – Private Right of Action & Individual Relief Through Agency Action, § IX.A.2, https://www.justice.gov/crt/fcs/T6Manual9 (last visited Apr. 24, 2025).

[8] *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1199 (11th Cir. 2007) (quoting *Franklin*, 503 U.S. at 66).

[9] *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 222 (2022).

[10] *Id.* at 221 (emphasis in original).

[11] *Id.* at 240 (Breyer, J., dissenting).

[12] *Id.* at 240–41 (Breyer, J., dissenting).

[13] *See Without Remedies: The Effect of Cummings and the Contract Law Analogy on Antidiscrimination Spending Clause Plaintiffs*, 138 Harv. L. Rev. 1407, 1427–28 (2025).

[14] *See id.* at 1426 (hypothesizing that the potentially reduced damages for discrimination post-*Cummings* "could lead to a significant decline in the number of antidiscrimination Spending Clause cases that are filed at all").

not able to accept cases with such a low potential for even paying back their hours of work and expenses. The availability of relatively modest civil penalties under the MHRA does little to soften the blow. As a result, victims of intentional educational discrimination in Maine may be left without a realistic opportunity to enforce their rights or to seek remedies for the harm they have experienced.

In other words, after *Cummings*, there is a significant risk that schools will not be held accountable even for clear violations of students' rights. This forces students and their families to bear the whole cost of unlawful discrimination against them and leaves the promise of the MHRA unfulfilled.

LD 1647 would restore the pre-*Cummings* status quo.

With federal remedies for educational discrimination uncertain at best after *Cummings*, victims must increasingly rely on state laws to enforce their legal rights and remedy the harms they have suffered. Many states, including the majority of New England states, already authorize broad compensatory damages for educational discrimination.[15] LD 1647 would bring Maine into alignment with these states as well as historical federal practice while minimizing the disruption caused by *Cummings*.

LD 1647 would also correct a legal anomaly that was introduced by *Cummings*. Under the MHRA, victims of intentional *employment* discrimination may recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, [and] other nonpecuniary losses."[16] These damages are available against any employer with 15 or more employees—including school districts and other government employers.[17]

Prior to *Cummings*, victims of intentional educational discrimination could recover even more expansive damages under federal antidiscrimination statutes. But now, students must increasingly rely on the MHRA, which allows only low-value civil penalties for educational discrimination. That means, for example, a *teacher* who is sexually assaulted by a school

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[15] *See* 9 V.S.A. §§ 4501–02, 4506(a) (Vermont); N.H. RSA § 354-A:21(II)(d), 21-a(I), 27–28 (New Hampshire); *Bd. of Educ. of New Haven v. Comm'n on Human Rights & Opportunities*, 344 Conn. 603, 635 n.29, 280 A.3d 424, 445 (2022) (explaining how victims of education discrimination in Connecticut can seek the remedies available for discriminatory practices); *Tomick v. UPS*, 324 Conn. 470, 482, 153 A.3d 615, 623 (2016) (holding that the Connecticut legislature intended to provide compensatory damages for discriminatory practices); Alaska Stat. § 14.18.100(a), (b) (allowing for "civil remedies"); Cal. Educ. Code §§ 220, 262.3–4 (California); *Donovan v. Poway Unified Sch. Dist.*, 167 Cal. App. 4th 567, 591, 84 Cal. Rptr. 3d 285, 302 (2008) (holding that the "civil law remedies" referenced in California's education statute refers to "money damages"); N.J. Stat. §§ 10:5-5(l), 10:5-13(a) (New Jersey); Va. Code §§ 2.2-3900, 3908 (Virginia); RCW § 28A.642.010, 040 (Washington). *See also* Mass. Gen. Laws ch. 214 § 1C, ch. 151C § 2(g) (authorizing damages for sexual harassment in certain educational institutions in Massachusetts).

[16] 5 M.R.S. § 4613(2)(B)(8)(e).

[17] *Id.*

administrator can likely recover compensatory damages under the MHRA for her emotional distress, but a *student* who suffers the exact same harm cannot.

The difference in available remedies post-*Cummings* does not make sense. Discrimination against students is just as harmful as or even more harmful than employment discrimination. Students have little or no control over the school they attend. They often cannot escape a hostile learning environment, which could persist for months or years as they progress through school. And students are generally younger and more vulnerable than working adults. Research shows that educational discrimination can be devastating for a young person's social and psychological development and their sense of dignity and self-worth.[18] It can also negatively affect a young person's educational achievement and opportunities.[19] LD 1647 responds to these concerns by making compensatory damages available in the education context as well as the employment context—just as they were before *Cummings*.

LD 1647 will not open the floodgates for litigation.

As noted above, LD 1647 would simply restore the pre-*Cummings* status quo, which did not involve a flood of educational discrimination complaints to the MHRC or the courts.

Indeed, educational discrimination litigation is relatively rare in Maine. This may in part be because the substantive legal standards for proving intentional educational discrimination (and intentional discrimination generally) are very challenging to meet, and it is the plaintiff's case to prove. But it is likely also attributable to the many disincentives for students to enforce their rights. Litigation is often burdensome, invasive, or even traumatizing for young people and their families. Lawsuits also often involve risks to privacy and reputation that many parents do not want their children to assume.

Further, as in many cases, claims of educational discrimination are not lightly pursued because the student and the school are necessarily in a long-term relationship that the student will not want to embitter. Given these realities, it is generally preferable for all parties to proceed through on-the-ground advocacy and problem solving. LD 1647 would facilitate this kind of practical problem solving in two ways. First, by making compensatory damages available, LD 1647 would incentivize school districts to proactively create a positive and inclusive learning environment and to promptly address concerns about possible discrimination and harassment. Second, the potential for recovering compensatory damages would likely increase students' access to legal counsel who are skilled at advising clients about the merits of their potential legal claims and at negotiating early resolutions of those claims.

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[18] *See, e.g.*, Bailey Wylie, *Closing the Door on Human Dignity: How the Supreme Court Blocked the Path to Relief for Victims of Title IX Discrimination*, 26 St. Mary's L. Rev. on Race & Social J. 101, 125, 127 (2024).

[19] *See, e.g., id.*; Jessika H. Bottiani et al., *Buffering Effects of Racial Discrimination on School Engagement: The Role of Culturally Responsive Teachers and Caring School Police*, 90 J. Sch. Health 1019 (2020).

The Maine Human Rights Commission process further alleviates any concern that LD 1647 could cause a dramatic increase in lawsuits. The MHRC process exists to resolve complaints of discrimination before litigation and is often successful in facilitating early resolution.

For the unusual case that cannot be resolved through collaborative problem solving, informal advocacy, or early settlement, LD 1647 would ensure that victims of intentional discrimination can seek appropriate redress. This strikes an appropriate balance between the needs of students, families, school districts, and the judicial system.

LD 1647 would improve the learning environment for all students.

In addition to restoring individual students' access to make-whole relief for educational discrimination, LD 1647 will likely influence school district behavior in ways that benefit all students. Reestablishing liability for compensatory damages restores a significant incentive for schools to proactively create a welcoming environment for all students. It also incentivizes schools to stop discrimination or harassment before it rises to the level of a legal violation. In other words, LD 1647 will encourage schools to be more responsive to complaints of harassment and discrimination, which improves the overall school climate. Research shows that positive school climates promote student learning and are linked with improved academic performance for all students.[20]

Passing LD 1647 would also reaffirm the State's commitment to ensuring that every student has access to a quality education in a school where they will be treated fairly and equally. This legislation sends a message to all Maine's students that they are welcome in our schools.

For all these reasons, GLAD Law and ACLU of Maine respectfully urge this committee to vote "ought to pass" on LD 1647.

Sincerely,

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Mary Bonauto, Senior Director of Civil Rights & Legal Strategies
Hannah Hussey, Staff Attorney
GLBTQ Legal Advocates & Defenders, Portland, Maine

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[20] *See, e.g.*, Organisation for Econ. Co-operation and Dev., Equity and Inclusion in Education: Finding Strength through Diversity 248 (2023) ("Research indicates that a positive school climate promotes students' abilities to learn . . . with a number of studies having shown that school climate is directly related to academic achievement, at all school levels").