

# STATE OF NEW YORK

814

2023-2024 Regular Sessions

## IN ASSEMBLY

January 11, 2023

Introduced by M. of A. SOLAGES, THIELE, JEAN-PIERRE, K. BROWN -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the executive law, the civil rights law and the education law, in relation to certain discriminatory practices; and to amend the education law, in relation to the hiring and qualification of professionals in education

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as  
2 the "Hiring Outstanding Professionals in Education (HOPE) Act".

3 § 2. Section 296 of the executive law is amended by adding eleven new  
4 subdivisions 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33 to read as  
5 follows:

6 23. It shall be an unlawful discriminatory practice for an employer or  
7 licensing agency to bar any member of a protected class from employment  
8 opportunity by violating an established law or policy that would have  
9 provided such member of the protected class with equal employment oppor-  
10 tunity.

11 24. The only legitimate business or occupational necessity exemption  
12 for excluding a protected class from equal employment opportunity shall  
13 be a real occupational qualification or a lawful protected status  
14 oriented contract.

15 25. It shall be an unlawful discriminatory practice for a person or  
16 agency to deny equal opportunity to a full and productive life by  
17 assigning or approving an advantage or disadvantage in opportunity to  
18 persons according to age, race, creed, color, national origin, sexu-  
19 al orientation, gender identity or expression, military status, sex,  
20 disability, predisposing genetic characteristics, familial status, mari-  
21 tal status, status as a victim of domestic violence or previous condi-  
22 tion of servitude.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 26. It shall be an unlawful discriminatory practice for a person or  
2 agency to violate federal civil rights law or engage in an unlawful  
3 discriminatory practice as defined by federal civil rights law.

4 27. It shall be an unlawful discriminatory practice for a person or  
5 agency to engage in disparate treatment. Unlawful discriminatory prac-  
6 tice by disparate treatment occurs when:

7 (a) the individual being discriminated against is a member of a  
8 protected class and the employer, institution or person knows the indi-  
9 vidual's protected class or knows that members of the protected class  
10 require equal treatment;

11 (b) the act favors or assigns advantage to one protected class over  
12 another protected class; and

13 (c) the reason for the act did not include a documented or otherwise  
14 verified assessment or evaluation of members of both the favored  
15 protected class and the unfavored protected class or the reason for the  
16 act did not justify a person of one protected class being favored over a  
17 person of another protected class.

18 28. It shall be an unlawful discriminatory practice for a person or  
19 agency to engage in acts of disparate impact. Unlawful discriminatory  
20 practice by disparate impact occurs when such person or agency:

21 (a) identifies a specific policy or practice that favors or assigns  
22 advantage to one protected class over another protected class;

23 (b) establishes adversity or harm to a protected class or a member of  
24 a protected class;

25 (c) establishes a significant disparity between a favored protected  
26 class and an unfavored protected class; and

27 (d) establishes a causal connection, that the policy or practice  
28 reasonably or logically led, wholly or in part, to the adversity or  
29 harm.

30 29. It shall be an unlawful discriminatory practice for a person or  
31 agency to engage in acts of unlawful discriminatory practice by mali-  
32 cious treatment. Unlawful discriminatory practice by malicious treatment  
33 occurs when:

34 (a) an actor's usage of derogatory or demeaning language related to a  
35 protected status of the complainant or executing a demeaning act against  
36 the protected status of the complainant before, during or after the  
37 alleged act of discrimination within a time equal to the lawful statute  
38 of limitations for filing a civil suit against the act;

39 (b) adversity or harm as a result of such language or act is estab-  
40 lished.

41 (c) causal connection, that the act reasonably led, wholly or in part,  
42 to adversity or harm is established.

43 30. It shall be an unlawful discriminatory practice for a public agen-  
44 cy to engage in a contractual agreement in an amount greater than fifty  
45 thousand dollars without a documented competitive process that provided  
46 equal opportunity to persons without favor or advantage to any protected  
47 class.

48 31. It shall be an unlawful discriminatory practice for an employer to  
49 give employment opportunity to a candidate of one protected class that  
50 does not meet a statutory or published minimum or required qualification  
51 while denying employment opportunity to a candidate of a different  
52 protected class that meets the same statutory or published minimum or  
53 required qualification.

54 32. It shall be an unlawful discriminatory practice for a person who  
55 receives a complaint of discrimination or retaliation to refuse to adju-

1 dicate the complaint or otherwise address the complaint for relief  
2 because it is a complaint claiming discrimination or retaliation.

3 33. The following acts and only the following acts shall be exemptions  
4 and exceptions to the provisions of this article and any of the laws  
5 that said article supports and protects:

6 (a) Acts that set forth in writing an intention to provide equal  
7 opportunity to a protected class that has historically been denied equal  
8 opportunity.

9 (b) Acts that set forth in writing an intention to correct unlawful  
10 discrimination for or against a protected class.

11 (c) Acts that for which no possible inference of unlawful discrimi-  
12 nation can be established by disparate treatment evidence, disparate  
13 impact evidence, malicious treatment evidence or any other direct or  
14 indirect evidence.

15 § 3. Section 292 of the executive law is amended by adding three new  
16 subdivisions 42, 43 and 44 to read as follows:

17 42. The term "real occupational qualification", means the possession  
18 of a governmentally or privately issued certification, license, diploma,  
19 or degree, or a scored examination or assessment of knowledge, skills or  
20 abilities required for the employment position.

21 43. The term "lawful protected status oriented contract" shall be  
22 defined as a legally binding agreement between two parties to compensate  
23 an individual for products or services related directly to that individ-  
24 ual's protected status or to compensate a company because of the compa-  
25 ny's status as a minority or woman-owned enterprise, including but not  
26 limited to employing test subjects by race or color because of scientifi-  
27 c studies on the effects of suntan lotion, employing physical education  
28 teachers by gender because of locker room supervision, employing a lead-  
29 er of a religious institution by creed because of religious integrity,  
30 and purchasing from a minority-owned business enterprise or a woman-  
31 owned business enterprise in an effort to comply with local, state or  
32 federal laws or to diversify spending portfolios fairly amongst the  
33 citizenry.

34 44. The term "significant disparity" shall include but not be limited  
35 to the following:

36 (a) A probability of occurrence less than one-half of one percent.

37 (b) A protected class being advantaged or disadvantaged with a ratio  
38 beyond 4:1 or 1:4 within protected class populations for a specific and  
39 reasonable municipal area utilizing mutually agreed upon statistics,  
40 relevant data supplied by the municipality, or the most recent census  
41 data for said municipality.

42 (c) The combination of a probability of occurrence less than one  
43 percent and a ratio of disproportionality beyond 1:8 or 8:1 as set forth  
44 in paragraph (b) of this subdivision.

45 § 4. The education law is amended by adding a new section 3009-a to  
46 read as follows:

47 § 3009-a. Hiring outstanding professionals in education. 1. No person  
48 shall be appointed to a certificated position in a public school unless  
49 the position was publicly advertised for a minimum of fourteen consec-  
50 utive days within the period of one hundred eighty days prior to the  
51 date of appointment. The fourteen consecutive days may only be reduced  
52 to seven consecutive days to appoint a classroom teacher within the  
53 fourteen days prior to the first day of student attendance in August or  
54 September.

55 2. No person shall be appointed to a certificated position in a public  
56 school without having applied for the certificated position in response

1 to a public advertisement of the certificated position on or before the  
2 published deadline.

3 3. No person shall be appointed to a certificated position prior to a  
4 school-conducted examination or scored assessment of fitness of at least  
5 three different persons for the specific certificated position. Such  
6 examinations or scored assessments of fitness may be, but are not limit-  
7 ed to, one-to-one interviews, panel interviews, content area examina-  
8 tions, writing samples, demonstration lessons, and sample lesson plans  
9 with signed records of such examinations or scored assessments along  
10 with applicant documents and demographic data being physically filed for  
11 a minimum of seven years and electronically filed permanently. The  
12 three different persons may be reduced to a competitive examination of  
13 two persons or to an examination of one person if and only if less than  
14 three persons apply to a public advertisement as defined in subdivision  
15 nine of this section.

16 4. No person shall be appointed to a certificated position without  
17 possessing the requisite certificate for the certificated position  
18 according to commissioner regulations.

19 5. No person shall be appointed to a certificated position in a public  
20 school because of affinity for or animus against a race, creed, color,  
21 national origin, sex, marital status, sexual orientation, gender identi-  
22 ty or expression, or disability, as such term is defined in section two  
23 hundred ninety-two of the executive law, except when such actions are  
24 taken to correct the impacts of a documented unlawful discriminatory  
25 practice.

26 6. The notice of employment opportunity for a certificated position  
27 located in subdivision one of this section shall be deemed a civil right  
28 for persons who hold the requisite certification, according to commis-  
29 sioner regulations, for the certificated position.

30 7. Appointments that promote temporary employees to positions as  
31 probationary employees without conducting a requirement herein are  
32 strictly prohibited.

33 8. No person shall be appointed to a certificated position without  
34 conducting a requirement of this section except as an acting or interim  
35 appointment because of an unforeseen resignation, incapacitation, death  
36 or dutiful reassignment of an employee. Such appointments are limited to  
37 one year in duration and may not be reappointed, renewed or extended.

38 9. For the purposes of this section, "publicly advertised" shall mean  
39 solicited in writing without intentional concealment from any person.

40 10. Persons appointed to certificated positions outside of the  
41 requirements set forth in this section shall be unqualified for the  
42 appointed certificated position for all purposes of this chapter.

43 11. Any person who was qualified for and not appointed to a certif-  
44 icated position has a cause of action for resulting damages against the  
45 school, officers or employees that engaged in any violation of subdivi-  
46 sions one through eight of this section.

47 § 5. Section 3009 of the education law is amended by adding a new  
48 subdivision 3 to read as follows:

49 3. For the purposes of this section and section three thousand ten of  
50 this chapter, an "unqualified teacher" for a public school certificated  
51 position shall be any person who does not or did not meet all of the  
52 requirements to be appointed to said public school certificated posi-  
53 tion.

54 § 6. The education law is amended by adding a new section 3039 to read  
55 as follows:

1 § 3039. Discrimination based on affinity for or animus against a  
2 protected class is prohibited. Notwithstanding any provision of law to  
3 the contrary, no board of education in any city, union free, common or  
4 central school district in this state shall hereafter prohibit, prevent,  
5 disqualify or discriminate against any person who is physically and  
6 mentally qualified from competing, participating, or registering for an  
7 examination for or from qualifying for, a position licensed or certifi-  
8 cated by the department, or be excluded from and denied equal employ-  
9 ment opportunity, or penalized in a final rating by reason of his or her  
10 membership in a protected class or retaliated against after he or she  
11 formally alleged discrimination. Any such rule, requirement, resolution,  
12 regulation, penalization, exclusion, denial, discrimination or retali-  
13 ation of such board or its employees shall be void. Nothing contained in  
14 this section shall prevent such board from adopting reasonable require-  
15 ments for positions, except where such requirements for such positions  
16 are already limited and prescribed by law. Nothing contained in this  
17 section shall prevent action to correct the impacts of documented unlaw-  
18 ful discriminatory practice.

19 § 7. Paragraph (a) of subdivision 1 of section 296 of the executive  
20 law, as separately amended by chapters 202 and 748 of the laws of 2022,  
21 is amended to read as follows:

22 (a) For an employer or licensing agency[~~, because of an individual's~~]  
23 to refuse to hire or employ or to bar or to discharge from employment an  
24 individual, or to discriminate against an individual in compensation or  
25 in terms, conditions or privileges of employment, or to deny an individ-  
26 ual the opportunity to obtain employment without discrimination, because  
27 of malicious treatment, disparate treatment or disparate impact accord-  
28 ing to age, race, creed, color, national origin, citizenship or immi-  
29 gration status, sexual orientation, gender identity or expression, mili-  
30 tary status, sex, disability, predisposing genetic characteristics,  
31 familial status, marital status, or status as a victim of domestic  
32 violence, or previous condition of servitude to refuse to hire or employ  
33 or to bar or to discharge from employment such individual or to discrim-  
34 inate against such individual in compensation or in terms, conditions or  
35 privileges of employment.

36 § 8. Subdivision 2 of section 40-c of the civil rights law, as amended  
37 by chapter 8 of the laws of 2019, is amended to read as follows:

38 2. No person shall, because of age, race, creed, color, national  
39 origin, sex, marital status, sexual orientation, gender identity or  
40 expression, predisposing genetic characteristics, familial status,  
41 status as a victim of domestic violence, previous condition of servi-  
42 tude, or disability, as such term is defined in section two hundred  
43 ninety-two of the executive law, be subjected to any discrimination in  
44 his or her civil rights, [~~or~~] to any harassment, as defined in section  
45 240.25 of the penal law, or to any form of victimization, as defined in  
46 articles one hundred twenty, two hundred forty, two hundred forty-one,  
47 two hundred forty-two or four hundred eighty-five of the penal law in  
48 the exercise thereof, by any other person or by any firm, corporation or  
49 institution, or by the state or any agency or subdivision of the state.

50 § 9. Section 40-d of the civil rights law, as amended by chapter 191  
51 of the laws of 1982, is amended to read as follows:

52 § 40-d. Penalty for violation. Any person who shall violate any of the  
53 provisions of the foregoing section, or subdivision three of section  
54 240.30 or section 240.31 of the penal law, or who shall aid or incite  
55 the violation of any of said provisions shall for each and every  
56 violation thereof be liable to a penalty of not less than one [~~hundred~~]

1 ~~thousand~~ dollars nor more than five [~~hundred~~] ~~thousand~~ dollars, to be  
2 recovered by the person aggrieved thereby in any court of competent  
3 jurisdiction in the county in which the defendant shall reside. In addi-  
4 tion, any person who shall violate any of the provisions of the forego-  
5 ing section shall be deemed guilty of a class A misdemeanor. At or  
6 before the commencement of any action under this section, notice thereof  
7 shall be served upon the attorney general.

8 § 10. Subdivision 2-b of section 3813 of the education law, as amended  
9 by chapter 474 of the laws of 1996, is amended to read as follows:

10 2-b. Except as provided in subdivision two of this section and,  
11 notwithstanding any other provision of law providing a longer period of  
12 time in which to commence an action or special proceeding, no action or  
13 special proceeding shall be commenced against any entity specified in  
14 subdivision one of this section more than one year after the cause of  
15 action arose; provided, however, that nothing contained in this subdivi-  
16 sion shall pertain to civil rights or human rights causes of action or  
17 be deemed to modify or supersede any provision of law specifying a  
18 shorter period of time in which to commence an action or special  
19 proceeding against any such entity. For purposes of this subdivision, a  
20 cause of action against the school district of residence for reimburse-  
21 ment of tuition costs incurred pursuant to subdivision four of section  
22 thirty-two hundred two of this chapter by the school district in which a  
23 family home at board is located shall arise as of the date payment for  
24 the amount claimed was denied.

25 § 11. The executive law is amended by adding a new section 297-a to  
26 read as follows:

27 § 297-a. Tolling. Statutes of limitations for filing causes of action  
28 according to this article shall be tolled for the length of time a civil  
29 rights or human rights administrative agency investigates and makes  
30 conclusions about alleged violations of this article, measured from the  
31 day a complaint was filed in writing to the day of the conclusion was  
32 issued in writing.

33 § 12. The civil rights law is amended by adding two new sections 49  
34 and 49-a to read as follows:

35 § 49. Cause of action. Any person who is qualified for a public  
36 contract who has been deprived of equal opportunity to the public  
37 contract shall have a cause of action based on the deprivation thereof.

38 § 49-a. Tolling. Statutes of limitations for filing causes of action  
39 according to article four of this chapter shall be tolled for the length  
40 of time a civil rights or human rights administrative agency investi-  
41 gates and makes conclusions about alleged violations of article four of  
42 this chapter, measured from the day a complaint was filed in writing to  
43 the day of the conclusion was issued in writing.

44 § 13. This act shall take effect immediately.