Written Testimony of the Vermont School Boards Association re: H.523
Contact: Pietro J. Lynn, Esq.
House Committee on Education—February 8, 2024

Thank you for the opportunity to provide testimony on behalf of the Vermont School Boards Association's (VSBA) concerns regarding (1) the constitutionality of regulating speech in schools; (2) constitutional speech concerns identified within current Vermont statutory definitions of harassment and bullying; and (3) impacts on proposed H.523 and other related legislation.

I. First Amendment Considerations

Our harassment, hazing, and bullying prevention ("HHB") laws do not operate in a vacuum. The U.S. Supreme Court has long held that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969). While it is important that Vermont continue to support and improve school responses to harassment, bigotry and bullying of students within the school settings, any efforts to further expand regulation of student – and employee - speech must account for the Constitutional free speech rights. Failure to do so will not only expose districts, and their administrators to lawsuits, without immunity from alleged Constitutional violations, but potentially risks losing by court order all current protections under Vermont law for harassment and bullying.

The U.S. Supreme Court has declared that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). In other words, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction*." Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829, 115 S. Ct. 2510, 2516, 132 L. Ed. 2d 700 (1995). Speech prohibition must target the impact of such speech, and not the viewpoint or motive of the speaker.

First Amendment challenges to existing harassment statutory protections are no longer theoretical, they are the present reality for schools in Vermont. Recently, Vermont's federal District Court issued a lengthy decision outlining constitutional concerns with Vermont's current statutory protection for Vermont students from "harassment" (16 V.S.A. §11(a)(26)(A)). *Bloch v. Bouchey*, No. 2:23-CV-00209, 2023 WL 9058377, at *44 (D. Vt. Dec. 28, 2023). [1] The Court squarely criticized those portions of the current definition that, by its terms, prohibits conduct or speech in cases where no measurable educational impact exists. The December 2023 Order, declared that Agency of Education's Model Policy for the Prevention of Harassment, Hazing & Bullying (2015), (defining harassment as set forth in 16 V.S.A. §11a(26)(A)) was likely

[1] Issued on a motion for preliminary injunction which sought in part, a block on implementation of the state's harassment policies (which enforce 16 V.S.A. 11(a)(26)A)), the Court denied the motion but permitted the case to go forward, finding plaintiff's allegations sufficient to survive dismissal because he had "identified ways in which the policies may sweep in a substantial amount of protected speech for no countervailing educational purpose."

unconstitutional, observing specifically that its 'harassment' definition prohibits speech engaged in for a prohibited 'purpose' even if that speech produces no measurable educational impact.

For reference that definition is set forth below:

> Harassment means an incident or incidents of verbal, written, visual, or physical conduct including any incident conducted by electronic means based on or motivated by a student's or a student's family member's actual or perceived race, creed, color, national origin, marital status, sex, sexual orientation, gender identity, or disability ***that has the purpose*** or effect of objectively and substantially undermining and detracting from or interfering with a student's educational performance or access to school resources or creating an objectively intimidating, hostile, or offensive environment."
>
> 16 V.S.A. § 11(a)(26)(A) (emphasis added); Vermont (2015) AOE's Policy for the Prevention of Harassment, Hazing and Bullying of Students, Section IV.G.

The Court opined that in this respect that "the 'purpose or effect' clause permits school officials to (improperly merely) consider the speaker's motive in deciding whether the policy has been violated." *Bloch v. Bouchey*, No. 2:23-CV-00209, 2023 WL 9058377, at *26 (D. Vt. Dec. 28, 2023). In other words, the Court found that Vermont's current student harassment law impermissibly prohibits speech based on the speaker's motive or viewpoint rather than being reserved to those cases of speech found to actually have a measurable effect specifically on the learning environment.

Elsewhere, we have seen the Third Circuit Federal Court of Appeals overturn as unconstitutional a Pennsylvania school district's anti-harassment policy - a case cited by the Vermont District Court's *Bloch* decision. There, the Third Circuit invalidated a statutory definition of harassment almost identical to that of Vermont's, announcing:

> …the Policy's prohibition extends beyond harassment that objectively denies a student equal access to a school's education resources. Even on a narrow reading, the Policy unequivocally prohibits any verbal or physical conduct that is based on an enumerated personal characteristic and that "has the purpose or *effect* of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." (emphasis added). Unlike federal anti-harassment law, which imposes liability only when harassment has "a systemic effect on educational programs and activities," *Davis*, 526 U.S. at 633, 119 S.Ct. 1661 (emphasis added), the Policy extends to speech that merely has the "purpose" of harassing another. This formulation, by focusing on the speaker's motive rather than the effect of speech on the learning environment, appears to sweep in those "simple acts of teasing and name-calling" that the *Davis* Court explicitly held were insufficient for liability.

Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 210 (3d Cir. 2001).

In another similar case, the 11th Circuit held a school district's anti-harassment policy was "almost certainly constitutionally overbroad" where it prohibited a wide range of expression concerning certain characteristics, covered many forms of expression, employed a "totality of known circumstances" approach to determine whether speech "unreasonably alters another student's educational experience[,]" and potentially included failure to intervene to halt another student's speech as a violation. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1125 (11th Cir. 2022).

Current Constitutional Law therefore holds that where speech is prohibited based on motive or viewpoint of the speaker alone it almost certainly will be found unconstitutional, as both overbroad, and violating "bedrock principle(s)" of First Amendment law.

II. Constitutional Concerns Raised by Current Statutory Definition of "harassment" of Students in Vermont Schools

A. Current Statutory Law

1. *Vermont Student Harassment Statutory Definition*

The Agency of Education's Model Policy for the Prevention of Harassment, Hazing, and Bullying – applied to all Vermont Schools, pursuant to 16 V.S.A. § 570a(a)(1) – enforces the statutory current definition of harassment:

> an incident or incidents of verbal, written, visual, or physical conduct, including any incident conducted by electronic means, based on or motivated by a student's or a student's family member's actual or perceived race, creed, color, national origin, marital status, sex, sexual orientation, gender identity, or disability that has the purpose or effect of objectively and substantially undermining and detracting from or interfering with a student's educational performance or access to school resources or creating an objectively intimidating, hostile, or offensive environment.

16 V.S.A. § 11(a)(26)(a). Vermont schools are charged with enforcing this definition; investigating cases where a student or employee's conduct "might" violate it; and disciplining violations of it. As explained above, students or employees can be found to engage in "harassment" for speech merely where their *purpose* is to impact a student's access, performance, or environment – despite no evidence that such speech in fact adversely impacted the targeted student's educational access performance, or environment. Again, the Vermont District Court flagged this language as potentially unconstitutional. And the Third Circuit, in a decision cited by the Vermont District Court, invalidated it as unconstitutional with respect to an almost identical Pennsylvania school district policy definition.

2. *Vermont Bullying Statutory Definition*

Troublingly, the statutory definition of bullying is similarly susceptible to First Amendment attacks. Pursuant to 16 V.S.A. §11(32), it is defined as:

> any overt act or combination of acts, including an act conducted by electronic means, directed against a student by another student or group of students and that:

(A) is repeated over time;

(B) is intended to ridicule, humiliate, or intimidate the student; and

(C)(i) occurs during the school day on school property, on a school bus, or at a school-sponsored activity, or before or after the school day on a school bus or at a school-sponsored activity; or

(ii) does not occur during the school day on school property, on a school bus, or at a school-sponsored activity and can be shown to pose a clear and substantial interference with another student's right to access educational programs.

16 V.S.A. §11(32).

For conduct that occurs in school, the statute prohibits speech without contemplating, nor requiring proof of measurable impact on the educational access of the targeted student. The statute focuses solely on the motive of the speaker. We can expect Constitutional challenges to the Vermont bullying statute to be brought on this ground.

B. *Litigation*

A national legal advocacy group has brought multiple suits against Vermont schools over the past 18 months based upon alleged First Amendment violations, all testing Vermont's harassment protections.[2] We expect further challenges. With the recent District Court decision, we are now on notice that a court could—as many judges do—invalidate not just portions, but the entirety of the bullying and harassment statutes. Vermont students would immediately feel the impact of such an action. Beyond that, Vermont schools, already strapped for money and facing staffing shortages, could be liable in any such litigation for damages and attorney's fees.

To safeguard our students and schools, the First Amendment must be accounted for in any future legislative proposals, to narrowly tailor statutes so that they protect children while adhering to constitutional limitations.

III. H.523

H. 523 seeks to remove the requirement from protections applied to Vermont students any consideration of whether or not the conduct at issue was "severe or pervasive[3]." This phrasing while encompassing the need to have measurable educational impact shown before proscribing speech or expressive conduct, is not absolutely necessary to avoid sanctioning for First

[2] *See Allen v. Orange Southwest School District, et al.*, No. 2:22-CV-00197 (D. Vt.); *Bloch v. Bouchey*, *et al.*, No. 2:23-CV-00209 (D. Vt.); *Mid Vermont Christian School, et al. v. Bouchey, et al.*, No. 2:23-CV-00652 (D. Vt.).

[3] It must be pointed out that currently 16 V.S.A. § 11(a)(26)(a)'s statutory definition of harassment does not contain any "severe or pervasive" language. It only is contained within the Vermont Agency of Education's model policy prohibiting "sexual harassment" where it creates a "hostile environment." The Vermont Agency of Education can change its policy without any legislative action.

Amendment concerns. What cannot happen, however is for any changes to the definition of harassment, or civil suit statutes (16 V.S.A. §570f), that would remove substantial language that would preserve the need to demonstrate measurable educational impact before regulating speech and expressive activities. Instead, should any changes to the statutory definition of "harassment" in Vermont schools be contemplated, redressing the First Amendment deficiencies identified by the District Court, and set forth above, should be made priority. Otherwise, well-intentioned revisions could wind up stripping students, teachers, and schools of the very protections our statutes aim to provide.

Thank you for considering VSBA's input on H.523 and related legislation.

Should you have any questions, please contact Pietro J. Lynn, Esq., of Lynn, Lynn, Blackman & Manitsky, P.C. or Sue Ceglowski, VSBA.