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Recommendations for Eliminating the “Severe or Pervasive” Standard for School Harassment Claims

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The mission of the State of Vermont Human Rights Commission is to promote full civil and human rights in Vermont. We believe that the current standard for harassment contained in Title 16 prevents all students from fully enjoying their rights to an education that is safe, civil and positive. Therefore, the HRC recommends statutory changes that achieve the following goals:

- Clarify the definition of a hostile environment to be considered by both administrators and courts in considering harassment complaints
- Remove the requirement of a “substantial” adverse effect on students in the definition of harassment
- Remove a connection between a student’s harassment and their educational performance
- Eliminate the overly burdensome, restrictive, and confusing legal standard of “severe or pervasive” harassment in section 570f(c)(2) for court claims against schools
- Provide guidance for courts in applying the harassment standard that is consistent with harassment analyses under other state anti-discrimination statutes.

Definition of Harassment

The HRC believes that the current definition of harassment in education, at 16 V.S.A. § 11(a)(26) is unduly restrictive and could lead to misapplication. The definition is restated below, with HRC’s recommended changes. We support the addition of clarifying language in a new subsection 11(a)(26)(C) to more specifically address a hostile education environment.

(A) “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~~ education or access to school resources or creating an objectively intimidating, hostile, or offensive environment.

(B) “Harassment” includes conduct that violates subdivision (A) of this subdivision (26) and constitutes one or more of the following:

(i) Sexual harassment, which means conduct that includes unwelcome sexual advances, requests for sexual favors and other verbal, written, visual, or physical conduct of a sexual nature when one or both of the following occur:

(I) Submission to that conduct is made either explicitly or implicitly a term or condition of a student’s education.

(II) Submission to or rejection of such conduct by a student is used as a component of the basis for decisions affecting that student.

(ii) Racial harassment, which means conduct directed at the characteristics of a student's or a student's family member's actual or perceived race or color, and includes the use of epithets, stereotypes, racial slurs, comments, insults, derogatory remarks, gestures, threats, graffiti, display, or circulation of written or visual material, and taunts on manner of speech and negative references to racial customs.

(iii) Harassment of members of other protected categories, which means conduct directed at the characteristics of a student's or a student's family member's actual or perceived creed, national origin, marital status, sex, sexual orientation, gender identity, or disability and includes the use of epithets, stereotypes, slurs, comments, insults, derogatory remarks, gestures, threats, graffiti, display, or circulation of written or visual material, taunts on manner of speech, and negative references to customs related to any of these protected categories.

(C) Notwithstanding any judicial precedent to the contrary, the conduct described in this subdivision (a)(26) need not be severe or pervasive to constitute harassment. Creation of an intimidating, hostile or offensive environment based on any legally protected category also constitutes harassment. A hostile environment exists where conduct:

- (a) has or would have the effect of interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; or
- (b) reasonably causes or would reasonably be expected to cause a student to fear for the student's emotional safety; or
- (c) reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or
- (d) occurs off school property and creates or would foreseeably create a risk of substantial disruption with the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

The above subparts (a) thru (d) are borrowed from current law in New York State's education statute.

Additional Recommendations for Student Protections and Legal Claims

HRC believes that the severe or pervasive standard for harassment, which requires a "substantial and adverse" impact on a student's access to education, is unduly prohibitive. The standard can result in legal claims being dismissed by a court before being fully evaluated by a trier of fact. In order to prevail on a discrimination claim, 16 V.S.A. § 570f requires a plaintiff to show that the school was notified of harassment and that it failed to take prompt and appropriate remedial action. It is unduly and unfairly burdensome to also require students to prove that the harassment was so severe or so pervasive that it had a "substantial and adverse impact" on their educational access. Therefore, HRC proposes the below changes to clarify that the harassment alleged must meet the definition contained in 16 V.S.A. §11(a)(26) above, without imposing additional burdensome hurdles for plaintiffs.

§ 570f. Harassment; notice and response

(a)(1) An educational institution that receives actual notice of alleged conduct that may constitute harassment shall promptly investigate to determine whether harassment occurred. After receiving notice of the alleged conduct, the school shall provide a copy of its harassment policy, including its harassment investigation procedure, to the alleged victim and the alleged perpetrator. If either the alleged victim or the alleged perpetrator is a minor, the copy of the policy shall be provided to the person's parent or guardian. Nothing in this section shall be construed to prohibit educational institutions from investigating and imposing disciplinary consequences upon students for misconduct. Elementary and secondary school officials shall strive to implement the plan developed in accordance with subdivision 1161a(a)(6) of this title in order to prevent misconduct from escalating to the level of harassment.

(2) If, after notice, the educational institution finds that the alleged conduct occurred and that it constitutes harassment, the educational institution shall take prompt and appropriate remedial action reasonably calculated to stop the harassment.

(b) A claim may be brought under the Fair Housing and Public Accommodations Act pursuant to 9 V.S.A. chapter 139 only after the administrative remedies available to the claimant under the policy adopted by the educational institution pursuant to subsection 166(e) or section 570 of this title or pursuant to the harassment policy of a postsecondary school have been exhausted. Such a showing shall not be necessary where the claimant demonstrates that:

(1) the educational institution does not maintain such a policy;

(2) a determination has not been rendered within the time limits established under section 570a of this title;

(3) the health or safety of the complainant would be jeopardized otherwise;

(4) exhaustion would be futile; or

(5) requiring exhaustion would subject the student to substantial and imminent retaliation.

(c)(1) To prevail in an action alleging unlawful harassment filed pursuant to this section and 9 V.S.A. chapter 139, the plaintiff shall prove ~~both of the following:~~

~~(1) The that the student was subjected to unwelcome conduct harassment based on the student's or the student's family member's actual or perceived membership in a category protected by law by 9 V.S.A. § 4502.~~

~~(2) The conduct was either:~~

~~(A) for multiple instances of conduct, so pervasive that when viewed from an objective standard of a similarly situated reasonable person, it substantially and adversely affected the targeted student's equal access to educational opportunities or benefits provided by the educational institution; or~~

~~(B) for a single instance of conduct, so severe that when viewed from an objective standard of a similarly situated reasonable person, it substantially and adversely affected the targeted student's equal access to educational opportunities or benefits provided by the educational institution.~~

(2) In determining whether conduct constitutes unlawful harassment:

(i) Courts shall apply the definition of harassment contained in subsection 11(a)(26) of this title;

(ii) The determination shall be made on the basis of the record as a whole, according to the totality of the circumstances, and a single incident may constitute unlawful harassment.

(ii) Incidents that may be harassment shall be considered in the aggregate with varying types of conduct and conduct based on multiple characteristics viewed in totality rather than in isolation.

(iii) Conduct may constitute unlawful harassment, regardless of whether:

(I) the complaining student is the person being harassed;

(II) the complaining student acquiesced or otherwise submitted to or participated in the conduct;

(III) the conduct is also experienced by others outside the protected class involved in the conduct;

(IV) the complaining student was able to continue the student's education or access to school resources in spite of the conduct;

(V) the conduct resulted in physical or psychological harm; or

(VI) the conduct occurred outside the complaining student's school.

(3) Behavior that a reasonable person with the same protected characteristic would consider to be a petty slight or trivial inconvenience shall not constitute unlawful harassment pursuant to this chapter.

The HRC believes that the above amendments would rightfully align the educational harassment analysis with the analysis courts use in employment, housing, and other public accommodations discrimination claims under existing state law. It provides clarity for courts as to how to apply the standard, and explicitly directs courts to use the definition of harassment from the education statute at 16 V.S.A. §11 (as amended). The above amendments to 16 V.S.A. §§ 11 and 570f, when taken in conjunction, will serve to better protect our most vulnerable and marginalized students by allowing more equitable pursuit of legal claims against schools who fail to act on harassment complaints.