Testimony of Elizabeth Tang
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In Support of S.103 with the Education Amendment
Before the Vermont House Committee on Education
Thursday, May 4, 2023

Dear Chair Conlon and Members of the House Committee on Education:

My name is Elizabeth Tang, and I am a Senior Counsel for Education and Workplace Justice at the National Women's Law Center (NWLC). **I am writing in support of the amendment to S.103 to reject the "severe or pervasive" standard in schools ("the Education Amendment").** In April 2023, I provided similar oral and written testimony on S.103 to the House Committee on General & Housing and the Senate Committee on Education. NWLC has been working for over 50 years to remove barriers to the equal treatment of women and girls and is a national expert on sex-based harassment and Title IX. We have also been working closely with state legislatures across the country to address the many shortcomings in state antiharassment laws.

In this testimony, I will explain that:

- The "severe or pervasive" standard allows schools to ignore harassment;
- The Vermont School Board and Insurance Trust (VSBIT) has made a number of inaccurate claims in its oral and written testimonies to this Committee and the other Committees;
- The Education Amendment would not worsen unfair discipline or the school-to-prison pipeline;
- Vermont need not wait for the final Title IX regulations to pass the Education Amendment;
- Vermont should take harassment seriously, no matter where it occurs or who the victim is.

I. Many students suffer under the current "severe or pervasive" standard.

The "severe or pervasive" standard has been very harmful to students across the country. For example:

- M.H. was a ninth-grade student in New York when a classmate attacked her in a stairwell, pressing her against the wall with all of his weight; biting her neck; and groping her all over her legs, stomach, and breasts while she tried to push him off and told him to "get off." This was very clearly a sexual assault. But a federal court held the sexual assault was not "severe" enough because "M.H. was not raped."[1] In other words, the court said that any sexual assault that is not a rape is not "severe" enough.
- Jane Doe in Georgia was in tenth grade when an older student forced her to perform oral sex on him and masturbated in her presence on school grounds. But a federal court said the oral rape and unwanted masturbation happened in only a "single incident."[2] So, it was not "pervasive" enough because Jane Doe was not orally raped on two separate occasions.

Many other courts have come to the same conclusion. **By the logic of these courts, numerous student victims of sexual assault can fail the "severe or pervasive" test if: (1) they are sexually assaulted—but not raped; *and* (2) if they are sexually assaulted only one time.** The Committee should take action to prevent Vermont students from being subjected to such extreme interpretations of "severe or pervasive."

II. The VSBIT witness has repeatedly and incorrectly claimed that the Education Amendment is not necessary to protect students from harassment.

I would like to correct a number of inaccurate claims made by the VSBIT witness to your Committee, the Senate Committee on Education, and the House Committee on General & Housing ("the Committees").

[1] *Carabello v. N.Y.C. Dep't of Educ.*, 928 F. Supp. 2d 627, 635, 643 (E.D.N.Y. 2013).
[2] *Doe v. Gwinnett Cnty. Sch. Dist.*, No. 1:18-CV-05278-SCJ, 2021 WL 4531082, at *1 (N.D. Ga. Sept. 1, 2021).

A. VSBIT has repeatedly and incorrectly claimed that Vermont already does not use a "severe or pervasive" standard in schools.

The VSBIT witness has repeatedly argued that it is not necessary to reject the "severe or pervasive" standard in schools because Vermont already does not require it. For example, she has repeatedly testified to the Committees that Vermont law's definition of harassment does not include a "severe or pervasive" requirement,[3] while omitting the key fact that there is another provision of Vermont law that does contain the "severe or pervasive" requirement.[4] She also claimed in her May 3, 2023, testimony to your Committee that: (1) schools do not apply the "severe or pervasive" standard when responding to reported harassment; and (2) courts do not apply the "severe or pervasive" standard when determining school liability for harassment.[5] Both claims are patently false: (1) The Vermont Agency of Education's (AOE) model harassment policy instructs schools to address sexual harassment only if it is "severe, persistent or pervasive;"[6] and (2) Vermont law clearly states that students cannot sue their schools for failing to address harassment unless they can show the harassment was "severe" or "pervasive."[7] (In any case, if the VSBIT witness's claim were true—that Vermont schools already do not use a "severe or pervasive" standard—then VSBIT should not oppose having this existing practice codified in state law.)

Similarly, the VSBIT witness has repeatedly testified that Vermont schools are already trained and instructed to address reported misconduct, as long as it "might" be harassment."[8] She has also previously testified to the other Committees that AOE already requires a "robust procedure" in response to all reported harassment."[9] This is not true. AOE's model harassment policy only instructs schools to address sexual harassment if the harassment is considered "severe, persistent or pervasive."[10] The reality is: if Vermont schools do not think an incident of reported harassment "might" rise to the level of "severe or pervasive," then they are not instructed to follow any procedures whatsoever. In contrast, the Education Amendment would ensure that schools must follow AOE's "robust procedure" whenever reported harassment has the effect of "undermining and detracting from or interfering with a student's education or access to school resources"—even if it is not considered "severe or pervasive."[11]

B. VSBIT has repeatedly and incorrectly claimed that the Education Amendment would force schools to regulate harassing behaviors that have "no nexus to education."

The VSBIT witness has repeatedly and inaccurately claimed in her oral and written testimonies to the Committees that the Education Amendment would force schools to regulate behavior even if there is "no nexus to education," no "demonstration of an impact on either access to educational opportunities or benefits," "neither a purpose nor effect of impacting a student's access to the school," and "no measurable impact educational or otherwise."[12] This is all patently false. The plain text of the Education Amendment clearly states that schools would only have to respond to conduct that has the "purpose or *effect* of objectively undermining and detracting from or interfering with a student's *education* or *access to school resources* or creating an objectively *intimidating, hostile, or offensive environment*."[13] Notably, this language is nearly identical to S.103's workplace standard, which would require employers to address

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[3] Vermont's definition of harassment is here: 16 V.S.A. § 11(a)(26)(A).
[4] Vermont's "severe or pervasive" standard is located here: 16 V.S.A. § 570f(c)(2)(A)-(B).
[5] VSBIT Oral Testimony at 36:03-36:22 (May 3, 2023): "And again, severe or pervasive is not in that definition. So, it's not used, not applied, to make any determination as to whether or not a school will respond to behaviors that might be quote harassment. Nor will it be applied by any court determining whether or not the school properly did respond."
[6] Vermont Agency of Education, Policy on the Prevention of Harassment, Hazing and Bullying of Students, Section IV(G)(1) (Aug. 16, 2016) [hereinafter AOE Harassment Policy].
[7] 16 V.S.A. § 570f(c)(2)(A)-(B).
[8] It is not exceptional for Vermont schools to have to respond to reported misconduct that "might" be harassment. All anti-harassment law applies this standard—whether in schools, workplaces, etc.—because there is no other way of addressing harassment; one cannot know whether something is in fact harassment until after one has investigated it.
[9] The procedure is located here: Vermont Agency of Education, Model Procedures on the Prevention of Harassment, Hazing and Bullying of Students, (Aug. 16, 2016) [hereinafter AOE Harassment Procedures].
[10] AOE Harassment Policy, *supra* note 6, at Section IV(G)(1).
[11] Draft Amendment (Apr. 11, 2023) at 1.
[12] *See*, *e.g.*, VSBIT Oral Testimony at 49:28-49:45 (May 3, 2023): "But the bill would remove the additional component, and I haven't heard an explanation for why, that there be some demonstration of an impact on either access to educational opportunities or benefits."; VSBIT Written Testimony, at 7, 8 (May 2, 2023).
[13] Draft Amendment (Apr. 11, 2023) at 1.

harassment when it has the "purpose or effect of interfering with an individual's work or creating an intimidating, hostile, or offensive work environment."[14]

C. VSBIT has repeatedly and incorrectly claimed that the Education Amendment would require schools to violate students' First Amendment rights.

Again, this is untrue. First, the Education Amendment would explicitly exclude from the definition of "harassment" in education any incidents that are a "petty slight or trivial inconvenience."[15] This amendment language is identical to the bill language in S.103 in the workplace and public accommodations provisions,[16] which have not raised any First Amendment concerns. Second, the U.S. Supreme Court affirmed in 2020 in *Mahanoy v B.L.* that schools have an interest in regulating harassing and bullying speech, including even *off-campus* harassing and bullying speech, and that regulating this type of student speech is consistent with the First Amendment.[17] Third, other states and cities have already rejected the "severe or pervasive" standard in workplaces and public accommodations, and those laws still stand. Specifically, Maryland and the District of Columbia passed similar laws last year; Montgomery County, Maryland in 2020; New York State in 2019; California in 2018; and New York City in 2016.[18] None of these states or cities have had their laws overturned due to First Amendment violations.

Relatedly, the VSBIT witness has repeatedly bolstered her free speech concerns by citing lawsuits filed by the Alliance Defending Freedom (ADF).[19] ADF is a hate group. It has openly bragged about its role in overturning *Roe v. Wade*, has advocated to criminalize LGBTQ+ people and forcibly sterilize transgender people, and has been listed as a hate group by the Southern Poverty Law Center since 2016. In contrast, Vermont is a national progressive leader; Vermont was the first state to enshrine reproductive freedom in its state constitution and has recognized transgender rights since 2007. I urge you not to take your cues from an extremist organization that is so dangerously opposed to your state's most fundamental values.

D. VSBIT has repeatedly and incorrectly claimed that the Education Amendment would impose "vicarious liability" on schools for students harassing each other.

For example, VSBIT's written testimony incorrectly claims that the Education Amendment "would make schools vicariously liable for the conduct of students … for behaviors where there is no measurable impact educational or otherwise," and that "vicarious liability" would apply "even where that conduct does not have the EFFECT of impacting the student educational performance or access."[20] This is patently false. The plain text of the Education Amendment clearly states that schools would be liable only if: (1) a student suffers harassment that has the effect of "undermining and detracting from or interfering with a student's education or access to school resources" or creating an "intimidating, hostile, or offensive environment";[21] and (2) the school has "actual notice" of the harassment; and (3) the school fails to take "prompt and appropriate remedial action reasonably calculated to stop the harassment."[22] In other words, schools are currently held—and would continue to be held—to an actual notice standard and a negligence standard—not a vicarious liability standard.

III. The Education Amendment would not worsen unfair discipline or the school-to-prison pipeline.

NWLC is a leading advocate against exclusionary school discipline policies that push Black and brown students out of school and into the school-to-prison pipeline. As a part of our advocacy, NWLC serves as

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[14] S.103, Official Version As Passed by the Senate, at 18 (Mar. 23, 2023).
[15] Draft Amendment (Apr. 11, 2023) at 3.
[16] S.103, Official Version As Passed by the Senate, at 17, 20 (Mar. 23, 2023).
[17] *Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. ___ (2021).
[18] Md. Code, SG § 20-601; D.C. Law 24-172; Montgomery County § 27-19; N.Y. Exec. § 296; Cal. Gov. Code § 12923; N.Y.C. Local L. No. 35, §2(c).
[19] *See*, *e.g.*, VSBIT Oral Testimony at 46:20-47:03 (May 3, 2023): "For example, I don't know if you've heard of the Alliance for the Defense of Freedom [sic], the ADF. … They are connected to lots of lawsuits including the work with respect to the *Roe v. Wade* litigation and others. They already filed a lawsuit in Vermont on these rules. And you know, their aim and their goal is to find cases that will allow them in every state to challenge and push back protections because they believe they infringe upon free speech, freedom of religion, freedom of thought with respect to religion and religious practices."
[20] VSBIT Written Testimony, at 8 (May 2, 2023).
[21] Draft Amendment (Apr. 11, 2023) at 1.
[22] 16 V.S.A. § 570f(a)(1), (a)(2), (c)(2)(A)-(B).

a co-chair of the Federal School Discipline and Climate Coalition, and we support the #PoliceFreeSchools campaign. We are confident that the Education Amendment would not exacerbate these problems.

A. Virtually no students are currently being disciplined for harassment.

Unfair school discipline and the school-to-prison pipeline are serious issues. For example, the U.S. Department of Education's Civil Rights Data Collection (which is based on data reported by every school district in the country) shows that each year, 8% of boys, including 18% of Black boys and 14% of disabled boys, receive out-of-schools suspensions *for any type of misconduct*.[23] Clearly, there are racial and disability disparities in discipline *overall*.

But virtually no students are being disciplined *for harassment*. When it comes to *sex-based harassment*, only 0.3% of boys, including 0.3% of Black students and 0.3% of disabled boys, receive an out-of-school suspension.[24] As for *race-based harassment*, only 0.1% of all boys, 0.2% of Black boys, and 0.1% of disabled boys receive an out-of-school suspension.[25] And for *disability-based harassment*, only 0.1% of all boys, 0.1% of Black boys, and 0.1% of disabled boys receive an out-of-school suspension.[26] In other words, nearly all currently suspended students are suspended for non-harassing conduct. Many students—particularly Black students—are being suspended for subjective conduct and minor misconduct, like "being defiant," "talking back," violating a dress code, etc. These are behaviors that do not actually harm anyone and should not be punished at all.

B. Schools can address harassment without disciplining the harasser.

The Education Amendment would not require schools to discipline students for harassment. It simply would ensure that schools actually have to address harassment instead of sweeping it under the rug. There are many ways for schools to address harassment without discipline. First and foremost, schools should provide victim-centered responses. That means offering supportive measures to help the harassment victim feel safe at school, like a safety plan so they do not have to be in the same classroom as their harasser and do not have to run into their harasser in the hallways, at recess or lunch, in afterschool activities, and on the bus to/from school. If a harassment victim starts skipping school because they are afraid of seeing their harasser, a school can excuse those absences instead of marking the student truant. If a victim's grades have gone down or they have trouble studying or learning because of the harassment, the school can give the student a tutor to help them catch up on schoolwork or give the student an extension on their homework. If the victim fails a test because they had to sit next to their harasser in class during the test, the school can let them retake it in a different environment. These are just some of many examples of supportive measures that schools can offer.

As for the harasser, the school can connect the harasser to a mental health counselor who can help the harasser understand why their behavior was wrong. The counselor could even uncover past abuse or trauma in the harasser's life that has caused them to act out and abuse others. This could help the student change their future behavior and not harass others again.

C. S.103 is not a discipline bill, but NWLC is happy to assist on a separate discipline bill.

S.103's Education Amendment does not address discipline at all. Rather, it would simply require schools to protect harassment victims, including by taking non-disciplinary actions. Separately, NWLC would be happy to assist the Committee on another bill to address the real problem of discriminatory and exclusionary discipline and the school-to-prison pipeline, for example, by prohibiting schools from suspending and expelling students for subjective conduct and minor misconduct that often targets Black and brown students.

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[23] Government Accountability Office, *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities* (Mar. 2018), Table 12.
[24] *Id.* at Table 21.
[25] *Id.*
[26] *Id.*

IV. Vermont need not wait for the final Title IX regulations to pass S.103 with the Education Amendment.

Federal law is a floor, not a ceiling. Federal law states the bare minimum of what schools have to do; states can always provide stronger protections. In the case of the federal Title IX regulations, the *current* regulations apply a "severe and pervasive" standard,[27] whereas the *proposed* regulations would apply a "severe or pervasive" standard.[28] The *final* standard is unlikely to deviate even further from the *current* standard; so, the *final* Title IX regulations are highly likely to apply a "severe or pervasive" standard. In contrast, the Education Amendment would provide stronger protections for students, by requiring schools to address harassment (including sexual harassment) if it undermines and detracts from or interferes with a student's education or access to school resources—even if it is not "severe or pervasive."[29]

The AOE witness testified to your Committee on May 4, 2023 that Vermont should wait for the upcoming Title IX regulations because the new regulations may "add some steps" and create more "prescriptive" "investigation processes," "paperwork process," or "documentation" requirements than what is currently required.[30] But even if that is the case, there would still be no conflict between Title IX and S.103 because the Education Amendment only specifies the level of harassment that schools would have to address. It does not dictate any specific "steps," "paperwork, "documentation," or other "investigation processes" that schools would have to use to address harassment.

In summary, Vermont need not worry that the final Title IX regulations will conflict with S.103's Education Amendment. The Committee need not wait for the final Title IX regulations before taking decisive action to better protect students from harassment. In fact, passing S.103 with the Education Amendment now would enable Vermont schools to update their policies only once instead of twice in response to changes in both the federal Title IX regulations and state law.

V. Vermont law should take harassment seriously, no matter where it occurs or who the victim is.

By voting yes on S.103 with the Education Amendment, the Committee would send a strong message to all Vermont residents that harassment based on sex, race, disability, religion, age, etc. is always taken seriously—regardless of where it occurs or who the victim is.

- Children in schools should not be forced to suffer worse harassment and abuse than adults in workplaces before they are allowed to ask for help. Schools are also workplaces. If a parent volunteer harasses both a student and a teacher at the same school, it would be dangerous and frankly absurd for the school to be required to help the teacher victim but not the student victim, even though both victims experienced the exact same level of harassment.
- If a child is harassed because of her disability at school and then harassed again because of her disability in her home, Vermont law should protect her equally at home and at school.
- If a high school student is religiously harassed by a classmate at school and then religiously harassed again later by the same classmate at his afterschool job, Vermont law should protect him equally at work and at school.

In conclusion, I urge you to report S.103 with the Education Amendment favorably out of your Committee.

Thank you for your time and consideration. I'm happy to answer any questions you may have.

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[27] 34 C.F.R. § 106.30.
[28] U.S. Dep't of Educ., Title IX Proposed Rule Chart, at 1 (June 23, 2022).
[29] Draft Amendment (Apr. 11, 2023) at 1.
[30] Agency of Education Oral Testimony at 40:37-41:41 (May 4, 2023): "The investigation processes are so prescriptive when it comes to those Title IX investigations, that we really don't want to inadvertently add to, and I think the Committee has heard of, the paperwork process, what some folks have called the bureaucratic processes, I call the documentation of efforts on these important investigations … I'm anticipating that these new Title IX regulations are actually going to add some steps and might thwart our efforts to streamline our state processes, as least when it comes to any sex discrimination, harassment. So, we really don't know how it will shake out and we're asking that consideration of any changes to the definition of harassment wait until the implications of that federal work is known."