



S.103

**Kara Casey, Director of Economic Empowerment  
House Education Committee – May 5, 2023**

The Vermont Network strongly supports S.103, which, among other things, removes the *severe or pervasive* standard in employment and all public accommodations, including educational settings. I am here in support of the bill as amended by the House General and Housing Committee. In particular, the Network supports the amendment that includes schools, as educational settings are places of public accommodation. This will ensure that students are protected and supported when they experience harassment by adults or students in educational settings - in the same way that staff and teachers are protected and supported under S.103.

The Vermont Network wishes to highlight the importance of this bill in addressing sex and gender-based harassment. Sexual harassment is a form of sexual violence. This harassment can take many different forms, including unwelcome sexual advances and sexually explicit and offensive conduct. These behaviors can create a hostile and abusive educational environment. Harassment based on a student's protected characteristics can have long-term and detrimental impacts on both their mental health and their education.

### **Severe or Pervasive Standard**

The *severe or pervasive* standard is required in 16 V.S.A. § 570f a student who was harassed must show that they are a member of a protected category and that the conduct was severe or pervasive. I want to address some previous witness testimony and questions in Committee yesterday about whether schools apply the "severe or pervasive" standard when responding to reported harassment; and whether courts apply the "severe or pervasive" standard when determining school liability for harassment. The Vermont Agency of Education's (AOE) model harassment policy instructs schools to address sexual harassment only if it is "severe, persistent or pervasive" and 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." The policy follows the law, which is one of the reasons why it is timely right now to change the law to not require severe or pervasive – the policies are going to be modified this year and can reflect our requested change to the law.

The *severe or pervasive* standard creates an exceptionally high barrier for individuals to bring forth meritorious claims of sexual or gender-based harassment. Victims and survivors who have experienced long-range discrimination or severe instances of harassment have been prevented from bringing forth claims, due to this standard. As with many forms of sexual violence, individuals occupying more than one marginalized identity (such as race or gender identity) are impacted by issues of harassment in



much more complex ways. Under the *severe or pervasive* standard, students with intersecting identities must prove that they were subjected to *severe or pervasive* harassment on each separate basis. The totality of all harassing behavior and its impact cannot be adequately addressed with the current standard. In other words, without changing the standard we are creating an undue burden on people who occupy multiple protected identities.

If we are to change the *severe or pervasive* standard for employment while carving out educational settings, school employees subject to harassment and discrimination in schools will be treated differently than students. Just to underscore - schools will become safer for their employees than for their students. So if a teacher sexually harasses both a colleague and a student- the adult will have greater protections from that harassment than the child. Schools – and students – should not be excluded from S.103 - students also deserve the right to pursue a claim for harassment under the Public Accommodations Act. If we do not make this change, we are leaving kids behind – especially those with marginalized identities.

### **Examples**

Two very impactful examples were presented in the General and Housing Committee last week which I would like to share with you related to how the *severe or pervasive* standard hurts students:

- 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 and groping her all over her body. 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.” 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 sexual acts on school grounds. But a federal court said the acts happened in only a “single incident.” So, it was not “pervasive” enough because Jane Doe was not attacked on 2 separate occasions.

We hear from many students and parents who experience sex or gender-based harassment in Vermont schools. Many of these students and families experience deep frustration with the lack of adequate responses by schools. Many times, youth, and their families, are not aware of their options and experience multiple barriers. When harassment is not addressed earlier, it leads to many adverse outcomes including mental health struggles and even to families leaving schools or their communities altogether.

### **Updating School Policies**



Many sites of public accommodation, including schools, healthcare settings and prisons have statutory and institutional policies regarding harassment and discrimination. School policies take into account federal Title IX regulations. Vermont is set to update its school policies this year in accordance with new Title IX regulations. It is important to note that these regulations represent the minimum standard of protections that institutions must offer (and Vermont can and should offer greater protection from harassment and discrimination). From everything we know about the draft regulations that have been released, and the many advocates on the federal level we work with on Title IX, there will not be conflicts between S. 103 and Title IX. In fact, this is the opportune time to make this change, since the AOE will need to update its policies anyway.

The timing is right for S.103, because (1) the new statutory requirements can be incorporated into the new school policies that will be revised this year as a result of the new Title IX regulations and (2) because schools are also workplaces (and employment is covered in S. 103), schools will have to update their policies in accordance with the employment provisions of S.103.

### **School Response**

S.103 requires schools to investigate claims of harassment and allows students to receive the supports and protections they need. It does not dictate how schools should follow up on that discrimination or require a certain disciplinary action to take place; we would not support it if it did.

Although this bill is not about discipline, I would like to just take a moment to talk about the many ways for schools to address harassment without discipline, which has also been mentioned by other witnesses. First and foremost, schools should provide victim-centered responses. That means offering supportive measures to help the harassment victim feel safe at school. This can include a safety plan, so they don't have to be in the same classroom as their harasser and don't 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 the victim failed 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 who may also be a student, we support school efforts to use restorative, supportive and developmentally appropriate responses. However, this is not what this bill is about. This bill does absolutely nothing to dictate or even suggest what school responses ought to be. It simply sets the floor at which a school needs to act. School responses to students who harass others can, in fact, be helpful – and change the trajectory of a youth's behavior and prevent future harassment and abuse.



## **Student Wellbeing**

Vermont students have the right to be protected while learning. From data collected by the U.S. Department of Education, about one in five U.S. students ages 12-18 had been bullied between 2015-2019. About one in four of the students bullied between 2018-2019 were bullied due to their race, national origin, sexual orientation, religion, disability, or gender. Additional data from 2021 detailing impacts of the COVID-19 pandemic found that the risks for sexual and identity-based harassment disproportionately impact students of color, girls, and LGBTQIA+ students.

Vermont schools are not immune to harassment and its harmful impact on students. According to the Vermont results from the 2019 Youth Risk Behavior Survey (YRBS), 45 percent of students have been bullied on school property. Feeling sad or hopeless increased among Vermont high school students from 25 to 31 percent and among middle school students from 19 to 23 percent. There was an increase in the number of high school students who hurt themselves without wanting to die (16 to 19 percent), made a suicide plan (11 to 13 percent) and attempted suicide (5 to 7 percent). This legislation puts more tools in the toolbox for adults who want to protect children in our school systems.

By amending the Education Code to remove the *severe or pervasive* standard, you would send a strong message that harassment in Vermont schools based on sex, race, disability, religion, age, etc. will always be taken seriously. **Most importantly**, the earlier the harassment is addressed by the school, before it has to rise to the level of *severe or pervasive*, the earlier supports can be put into place for the student who has experienced harm. Schools will be educating kids, at a young age, that harassment is not acceptable anywhere, which can ultimately lead to communities and workplaces that are free from harassment and discrimination. We have to start with supporting and educating kids if we want to change the broader culture of harassment and discrimination.