Testimony of Elizabeth Tang
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In Support of S.103 and H.461 with Anti-Harassment Protections in Education

Before the Vermont House Committee on General & Housing
and Vermont Senate Committee on Education

Thursday, April 27, 2023

Dear House and Senate Chairs and Committee Members:

My name is Elizabeth Tang, and I am a Senior Counsel for Education and Workplace Justice at the National Women's Law Center (NWLC). 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 Title IX and gender equity in education. Since the launch of NWLC's Legal Network for Gender Equity in 2018, we have received more than 6,000 requests for assistance related to sex-based harassment in schools and workplaces. We have also been working closely with state legislatures across the country to address the many shortcomings in state antiharassment laws.

I am writing in support of the amendments to S.103 and H.461 ("the Amendments") to reject the "severe or pervasive" standard in schools. This testimony supplements my original oral and written testimony on S.103 submitted to the House Committee on General & Housing (see attached).

In this testimony, I will:

- Explain how the "severe or pervasive" standard still allows schools to ignore harassment against students;
- Correct seven (7) inaccurate statements made by the Vermont School Board and Insurance Trust (VSBIT) witness in her oral testimonies to the Committees;
- Clarify that the Amendments would not exacerbate unfair discipline or the school-to-prison pipeline;
- Clarify that Vermont need not wait for the final Title IX regulations to pass the Amendments;
- Urge Vermont to take harassment seriously, no matter where it occurs or who the victim is.

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

As I stated in my previous testimony to the House Committee on S.103, 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.

[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).

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 Committees should take action to prevent Vermont students from being subjected to such extreme interpretations of "severe or pervasive."

II. The VSBIT witness incorrectly suggested that the Amendments are not necessary to protect students from harassment.

I would like to correct seven inaccurate statements made by the VSBIT witness to the Committees in her oral testimonies opposing the Amendments.

A. The VSBIT witness incorrectly suggested that Vermont law already does not require student harassment victims to meet the "severe or pervasive" standard.

The VSBIT witness argued that it is not necessary to reject the "severe or pervasive" standard in schools because Vermont's definition of harassment in Title 16, Section 11 does not include a "severe or pervasive" requirement.[3] But she neglected to mention that there is another provision of Vermont law—Title 16, Section 570f—that states that students cannot sue their schools for failing to address harassment unless they can show the harassment was "severe" or "pervasive."[4] (The VSBIT witness also claimed that school officials already do not consider whether harassment is "severe or pervasive." But if schools already reject the "severe or pervasive" standard, then they should not oppose having this existing practice codified in state law.)

B. The VSBIT witness incorrectly suggested that a Vermont agency model policy already requires schools to address all reported sexual assaults.

The VSBIT witness argued that it is not necessary to reject the "severe or pervasive" standard in schools because Vermont schools are already required to address all reported sexual assaults. In support of her argument, she pointed out that the Vermont Agency of Education's (AOE) model harassment policy already defines "sexual harassment" to include "sexual assault."[5] So, she suggested that the stories that I and other witnesses have shared about the difficulties student sexual assault survivors have faced do not apply in Vermont. But she neglected to mention that AOE's model harassment policy only requires schools to address sexual assault (or other sexual harassment) if it is considered "severe, persistent or pervasive."[6] As I explained above, unfortunately, some courts have held that sexual assault is not "severe or pervasive."

C. The VSBIT witness incorrectly suggested that Title IX already requires schools to provide supportive measures to all students who report sexual harassment.

The VSBIT witness argued that it is not necessary to reject the "severe or pervasive" standard in schools because the current Title IX regulations already require schools to provide supportive measures to all students who report sexual harassment.[7] But she did not mention that supportive measures are only required if the reported sexual harassment is both "severe" and "pervasive"[8]—an even harsher standard than Vermont's current "severe or pervasive" standard. And under the *proposed* Title IX regulations that are scheduled to be finalized in May 2023, schools would *not* have to provide supportive measures unless the alleged sexual harassment meets the "severe or pervasive" standard.

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[3] 16 V.S.A. § 11(a)(26)(A).
[4] 16 V.S.A. § 570f(c)(2)(A)-(B).
[5] 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].
[6] AOE Harassment Policy, *supra* note 5, at Section IV(G)(1).
[7] 34 CFR § 106.44(a)
[8] 34 CFR § 106.30.

D. The VSBIT witness incorrectly suggested that AOE already requires schools to respond to all harassment with a "robust procedure."

The VSBIT witness argued that it is not necessary to reject the "severe or pervasive" standard in schools because AOE's model harassment procedure already requires a "robust procedure" in response to all reported harassment.[9] But she again omitted that this procedure is only required if the reported harassment is "severe or pervasive." So, if a student experiences harassment that does not meet the "severe or pervasive" standard, they would not be entitled to any procedure whatsoever.[10] In contrast, the Amendments would ensure that schools must follow AOE's "robust procedure" whenever 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 "severe or pervasive."[11]

E. The VSBIT witness incorrectly claimed that the Amendments would force schools to discipline student harassers even when there is no "nexus to education" or no "discrete effect" on the victim.

This is patently false. The Amendments plainly state that schools would only have to respond to conduct that has the "*effect*" of "undermining and detracting from or interfering with a student's *education* or access to *school resources*."[12] In other words, the Amendment explicitly requires both a clear nexus to education and an "effect" on the victim. Furthermore, a school's response need not include a particular disciplinary response, as there are many ways a school can respond to harassment to protect a student's access to education, such as providing supportive measures (see **Section III.B** below).

F. The VSBIT witness incorrectly claimed that the Amendments would require schools to violate students' First Amendment rights.

This is not true. First, the Amendments would exclude from the definition of "harassment" incidents that are a "petty slight or trivial inconvenience."[13] 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.[14] 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.[15] None of these states or cities have had their laws overturned due to First Amendment violations.

G. The VSBIT witness incorrectly claimed that the Amendments would impose "strict liability" on schools for students harassing each other.

This is patently false. Under the Amendments, 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";[16] 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."[17] In other words, schools are and would continue to be held to an actual notice standard and a negligence standard—not a strict liability standard.

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[9] 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 5, at Section IV(G)(1); *see also* 16 V.S.A. § 570f(c)(2)(A)-(B).
[11] Draft Amendment (Apr. 11, 2023) at 1.
[12] *Id.* at 1.
[13] *Id.* at 3.
[14] *Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. ___ (2021).
[15] 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).
[16] Draft Amendment (Apr. 11, 2023) at 1.
[17] 16 V.S.A. § 570f(a)(1), (a)(2), (c)(2)(A)-(B).

III. The Amendments would not exacerbate unfair discipline or the school-to-prison pipeline.

NWLC is a leading advocate against school policies that have a discriminatory impact on Black and brown students. We particularly oppose exclusionary school discipline policies that push these students out of school and into the school-to-prison pipeline, which disproportionately harms Black and brown students. As a part of our advocacy, NWLC serves as a co-chair of the Federal School Discipline and Climate Coalition, and we support the #PoliceFreeSchools campaign. We are confident that the Amendments 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*.[18] 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.[19] 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.[20] 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.[21] In other words, nearly all students who are currently being suspended are being 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 Amendments would not require schools to discipline students for harassment. They 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 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 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 and H.461 are not discipline bills, but NWLC is happy to assist on a separate discipline bill.

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

The Amendments do not address discipline at all. Rather, they would simply require schools to protect harassment victims, including by taking non-disciplinary actions. Separately, NWLC would be happy to assist the Committees 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.

IV. Vermont need not wait for the final Title IX regulations to pass the Amendments.

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, we already know that the *proposed* regulations would require schools to address only "severe or pervasive" sexual harassment. It is highly unlikely that the *final* Title IX regulations will deviate even further from the *current* regulations, which apply a "severe and pervasive" standard.[22] So, it is highly likely that the final regulations will only require schools to address sexual harassment if it is "severe or pervasive." In contrast, the Amendments 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."[23]

In summary, Vermont need not worry that the final Title IX regulations will conflict with the Amendments. The Committees need not wait for the final Title IX regulations before taking decisive action to better protect students from harassment. In fact, passing the Amendments 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 the Amendments, the Committees 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 apartment at 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 and H.461 with the Amendments favorably out of your Committees.

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

[22] 34 C.F.R. § 106.30.
[23] Draft Amendment (Apr. 11, 2023) at 1.