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Written Testimony of Vermont School Boards Insurance Trust re: H.461

Contact: Jonathan Steiner, President

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H.461 would make precipitous changes to legal requirements for Vermont schools before the impact is known of changes to Federal Title IX regulations regarding sex based harassment, anticipated in the next month, and before related Procedures for the Prevention of Harassment, Hazing and Bullying of Students are updated in the coming months. Both will likely have significant impacts on the concepts addressed by H.461 and should be fully understood before further revisions are proposed.

H.461 seeks to decouple a school's liability under the Vermont Public Accommodations Act from circumstances which—in purpose or effect—impact a student's access to that school as a place of public accommodation in a manner unsupported by law. It would create significant additional liability for schools under the First Amendment, because a school's ability to constitutionally regulate student speech turns on whether that speech could create a substantial disruption to the learning environment. H.461 also amends the definition of illegal "harassment" in 26(A) in a way that is equally at odds with the school's ability to constitutionally regulate student speech.

H. 461 would impose two separate and fundamentally irreconcilable standards on schools seeking to respond to allegations of peer-to-peer harassment: a higher bar for circumstances in which a school may discipline a student for harassment, and a lower bar for civil suits for money damages filed against the school.

H.461 seeks to add new factors to the definition of illegal harassment set forth 26(A) with proposed section (C) that are moot, unnecessary or contradictory and would likely result in inconsistent application statewide.

Thank you for the opportunity to present Vermont School Boards Insurance Trust's (VSBIT) concerns regarding the changes Draft No. 1.1 of House Bill 461, dated April 11, 2023, proposes to make to 16 V.S.A. §§ 11(26)(A) and 570f(c). Below, we set forth our thoughts on the proposed changes and propose alternate language for your consideration should you elect to move forward with the Bill.

I. Proposed Changes are Premature

Title IX regulations issued in 2020 have impacted and affected the response of Vermont schools with respect to allegations of "sexual harassment" as prohibited by Title IX. Vermont schools are required to follow Title IX Procedures in their handling and treatment of those matters. The U.S. Department of Education's Office for Civil Rights has announced updates to these requirements will likely be issued next month, May 2023. Those changes will intersect with the statutes at issue in H. 461 and impact Vermont schools in ways unknown until those amendments are issued. Some

of the issues addressed in H. 461 may yet be contained in those changes and it is prudent to refrain from any Vermont statutory changes until those are released.

Additionally, Vermont schools implement the definitions at issue in H.461 through the state mandated Procedures for the Prevention of Harassment, Hazing and Bullying of Students. Those Procedures are also currently up for review. It is further understood those will not be finalized until the Title IX revisions can be received and considered - so as to ensure the Procedures address and reflect the Title IX regulatory updates. Similarly H. 461 should be tabled to allow this federal and state revision regulatory process to reach completion.

II. *Proposed Changes are Informed by Employment Law and Inappropriate In the Context of Regulating Minor Student Behaviors*

The “exemplars” submitted to the Committee in support of the proposed changes represent statutory changes in other states/jurisdictions which pertain to the regulation of adult employee behavior within the employment and labor context. This is significant as changes to the definitions of harassment when applied to students in schools are unique and distinct from regulation of employees – employee who in many cases work “at will.” (Simply put, students cannot be “fired.”) Regulating student conduct – and the impact of their behavior on the educational environment – must take into account the special considerations attendant to the need to preserve the educational context – including First Amendment protections for freedom of thought and speech – which occurs through demonstrating a connection between the regulated conduct and the educational access of the targeted student/victim. Additionally, those definitions must respect and acknowledge the limitations on a school system’s regulation of conduct of students – as being far more attenuated than that of an employer over its employees, and must take into account the contexts in which students interact, in and out of school. To import, wholesale, and without amendment, employment law liability concepts into this sphere, is inappropriate and ignores the existing structure of regulation that has evolved since Vermont’s first peer harassment statutes were passed over two decades ago, and recognized in the Vermont Supreme Court’s decision of Washington v. Pierce, 179 VT. 318 (2005), a structure that has, to this point, taken those special considerations into account.

III. *Proposed Changes to Current Definition of Illegal “Harassment” In Schools – 16 V.S.A. § 11(a)(26)*

A. Changes to the Definition of Harassment – Removal of “Substantially”

For context, the definition of “harassment” set forth in 16 V.S.A. § 11(a)(26), is used by schools in two important respects.

This definition is the touchstone used by Schools to identify matters that may require investigation under its legally mandated Procedures for the Prevention of Harassment, Hazing and Bullying (Vermont Agency of Education, 2015)¹. Once launched, a student’s conduct will be judged under

¹ Title 16 requires that the policies adopted by schools with respect to harassment, hazing, and bullying prevention “shall be at least as stringent as model policies developed by the Secretary”

that definition in order to determine whether or not the school's harassment policy has been "violated" by their conduct. In short, the definition provides the authority to schools to take disciplinary action against the respondent students.

As currently written, harassment is defined as:

(26)(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 or access to school resources or creating an objectively intimidating, hostile, or offensive environment.

H.461 would remove the hi-lighted word "substantially." This change would expand the scope of prohibited conduct to include conduct with an **unsubstantial impact on the targeted student's educational performance or access to school resources**. Such a standard is at odds with the public accommodations act and discrimination statutes – which when applied to the school context are empowered to preserve non-discriminatory access to educational opportunities and resources. Where the conduct has no measurable or substantial impact it cannot be considered discriminatory. To sever and remove any educational interest as a basis for the schools to regulate and punish these behaviors exposes schools to First Amendment challenges. Additionally, removing the term would be confusing when taken together with proposed amendment Section (C)(iv) (stating that behavior "that a reasonable person with the same personal characteristic would consider to be petty, slight or trivial inconvenience shall not constitute harassment"). It is unrealistic to expect school administrators, on a daily basis, to apply a definition of conduct that requires them to parse the difference between "objective" impacts (without substantial impacts) while excluding "petty, slight or trivial" impacts. The goal in the contexts of K-12 instructional contexts must be clarity so that rules are easily understood and consistently and reliably enforced across settings.

In addition, such a change is unnecessary, to preserve the authority of schools to act in cases where "substantial educational impact" is not the focus of the allegation. The vast majority of

of Education, and that "[a]ny school board that fails to adopt one or more of these policies shall be presumed to have adopted the most current model policy or policies published by the Secretary." 16 V.S.A. § 570(b). The Secretary's Model Policy on the Prevention of Harassment, Hazing, and Bullying provides that though the accompanying Model Procedures are separated from the Policy for ease of use, "[t]he Model Procedures are expressly incorporated by reference as though fully included within this Model Policy." HHB Model Policy at section I. Thus, through § 570(b), the Vermont Legislature imbued both the Model Policies and the Model Procedures with the full force of state law.

“harassment” cases are in fact substantiated on the alternative (and already existing) basis that the conduct was found “objectively” to create an intimidating, hostile, or offensive environment.

As currently defined, harassment prohibits behavior that is based on or motivated by protected category of a student or student family member’s actual or perceived membership in a protected category, where that conduct can further be shown to meet ANY of the following, EITHER:

- (1) It has the purpose of objectively and substantially undermining and detracting from or interfering with a student’s educational performance; OR
- (2) It has the purpose of objectively and substantially undermining and detracting from a student’s access to school resources; OR
- (3) It has the purpose of creating an objectively intimidating, hostile or offensive environment;

OR, despite no such demonstrated purpose it nevertheless is found to have -

- (1) The EFFECT of objectively and substantially undermining and detracting from or interfering with a student’s educational performance; OR
- (2) The EFFECT of objectively and substantially undermining and detracting from a student’s access to school resources; OR
- (3) The EFFECT of creating an objectively intimidating, hostile or offensive environment.

For these reasons we would ask that the word “substantially” be retained within the definition of “harassment” in 26(C).

B. Changes to the Definition of Harassment – “C” Factors

In addition, H.R. 461 adds a new subsection - “C”, enumerating factors of consideration (or removing them from consideration) with respect to a finding of “harassment.” Some of the objections detailed below are that the proposed changes are mooted or unnecessary by existing law and regulations. Many are already included within Vermont Agency of Education’s Procedures for the Prevention of Harassment, Hazing and Bullying of Students – procedures which are currently up for review in the coming months. For the same reasons raised with respect to Title IX, we would suggest it would be prudent to allow that process to be first completed before statutory changes of this type are made. Additionally we raise first an additional point on that concern - while it may appear that the creation of duplicative or irrelevant law would do no harm, school administrators and staff are flooded yearly with new legal mandates and requirements. As stated previously K-12 instructional contexts require clarity with rules that are easily understood and consistently and reliably enforced across settings. Unnecessary, duplicative changes to the law take away the precious time and resource of professional development training and increase the chance for misinterpretation and error in application which only serve to undermine the very rights these statutes are aimed at protecting. Our position with respect to each element of Section (C) is set forth as follows -

Section (C)(i) (requiring determinations on the ‘basis of the record as a whole’) and (ii) (that incidents be considered viewed “in totality rather than in isolation”) are moot and unnecessary as they are already imposed on schools within the Vermont Agency of Education’s 2015 Procedures for the Prevention of Harassment, Hazing and Bullying of

Students², Section III.E “Standard Used to Assess Conduct” –which states in part “*Whether a particular action constitutes a violation of this policy requires determination based on all the facts and surrounding circumstances*” and further states “*the investigator shall consider the surrounding circumstances, the nature of the behavior, past incidents or past or continuing patterns of behavior, the relationships between the parties involved and the context in which the alleged incidents occurred.*” We would ask that this section be struck from the bill as duplicative and unnecessary.

Section (C) (iii) (I) (stating that conduct may constitute unlawful harassment regardless of whether the “*complaining student is the person being harassed*”) is unnecessary as there is no current requirement that a target of harassing behavior “complain” or “file” a complaint in order to trigger a duty to respond to harassing behavior. Rather, Vermont Agency of Education’s 2015 Procedures for the Prevention of Harassment, Hazing and Bullying of Students, III.A. mandates a school launch an investigation in response to the school’s knowledge of information that provides “reasonable belief” that the alleged conduct “may” constitute “harassment.” Under current law where a party or student comes forward who was not harassed but reports behavior that “may” constitute harassment, the school will still respond. To suggest that the school will only respond if a complainant comes forward would only confuse administrators applying this rule. We would ask that this section be struck from the bill as unnecessary.

Section (C)(iii)(II) (stating that conduct may constitute unlawful harassment regardless of whether a targeted *student acquiesced or otherwise submitted to conduct*) is unnecessary as this is not a factor under the current definition to determining whether conduct constitutes “harassment.” As previously explained above the analysis focuses first on the basis or motivation for the conduct, and then considers whether the alleged harasser either intended to cause impact to educational performance, access or to create a hostile environment, or, barring that, whether their conduct in EFFECT accomplished those aims. “Acquiescence” in the moment – is irrelevant. To suggest that it is considered, with this amendment would only confuse administrators applying this rule. We would ask that this section be struck from the bill as irrelevant and unnecessarily confusing for administrators.

² Title 16 requires that the policies adopted by schools with respect to harassment, hazing, and bullying prevention “shall be at least as stringent as model policies developed by the Secretary” of Education, and that “[a]ny school board that fails to adopt one or more of these policies shall be presumed to have adopted the most current model policy or policies published by the Secretary.” 16 V.S.A. § 570(b). The Secretary’s Model Policy on the Prevention of Harassment, Hazing, and Bullying of Students provides that though the accompanying Model Procedures are separated from the Policy for ease of use, “[t]he Model Procedures are expressly incorporated by reference as though fully included within this Model Policy.” HHB Model Policy at section I. Thus, through § 570(b), the Vermont Legislature imbued both the Model Policies and the Model Procedures with the full force of state law.

Section (C)(iii)(III) (stating that conduct may constitute unlawful harassment regardless of whether the conduct experienced by “*others outside of the protected class involved in the conduct*”) again is unnecessary. What is relevant is whether the conduct meets the definition of harassment – and currently whether a student experiences harassment does not rise or fall on whether others nearby may have or may have NOT been affected by similar behavior. We would ask that this section be struck from the bill.

Section (C)(iii)(IV) (stating that conduct may constitute unlawful harassment regardless of whether “*the complaining student³ was able to continue the student’s education or access to school resources in spite of the conduct*”) conflicts directly with the definition of 26(A) even with the amendments proposed by H.461. Even with the proposed amendments educational access will remain a relevant consideration with respect to a finding of harassment *in those cases where that finding rests on a conclusion that the conduct had the EFFECT of objectively and (substantial or not) undermining and detracting from or interfering with a student’s educational performance OR access to school resources.* If passed, an administrator attempting to apply the definition of harassment in such a case would be confronted with the basic definition in 26(A) - above - while being told by subsection (C) that such considerations are *irrelevant*. The cumulative effect would be to gut the factor of “*objectively undermining and detracting from educational performance*” (or access) from the analysis of harassment entirely. It is wholly contradictory and confusing. It is also inappropriate as the removal of that factor in certain cases will place the school in the untenable position of acting in conflict with First Amendment protections - as stated above. Finally, as also stated earlier, there is no need to make such a change as impacts on educational performance and access are not the sole measure of discriminatory access for all cases under the current definition. Conduct may still be alternatively found to be harassment where, even when performance or access is UNAFFECTED, but the conduct nevertheless objectively would create an intimidating, hostile, or offensive environment for the targeted student. We would ask that this section be struck from the bill.

Section (C)(iii)(V) (stating that conduct may constitute unlawful harassment regardless of whether the conduct “*resulted in a physical or psychological injury*”) is additionally irrelevant. This appears to be an import from employment law contexts - Vermont’s definition does not require, nor has it been interpreted to require, that a student show “*physical or psychological injury*” before a school investigates harassment or concludes harassment exists. The focus under the current definition is impacts on educational access, performance and/or environment. We would ask that this section be struck from the bill.

Section (C)(iii)(VI) (stating that conduct may constitute unlawful harassment regardless of whether the conduct occurred “*outside the complaining student’s school*”) is also moot. The current definition has does not limit a school’s duty to respond based on the location

³ Again the inclusion of the term “complaining student” continues the misapprehension that a school will only respond to harassment where the victim “complains” – again this is not the case as schools respond to their “notice” of harassment, not complaints.

of the behavior. Again, what is required is that there be a showing of behavior that is based on or motivated by protected category of a student or student family member's actual or perceived membership in a protected category, where that conduct can further be shown to meet ANY of the following, EITHER:

- (1) Has the purpose of objectively and substantially undermining and detracting from or interfering with a student's educational performance;
- (2) Has the purpose of objectively and substantially undermining and detracting from a student's access to school resources;
- (3) Has the purpose of creating an objectively intimidating, hostile or offensive environment;

OR, it despite no such purpose it nevertheless had

- (4) The EFFECT of objectively and substantially undermining and detracting from or interfering with a student's educational performance;
- (5) The EFFECT of objectively and substantially undermining and detracting from a student's access to school resources;
- (6) The EFFECT of creating an objectively intimidating, hostile or offensive environment;

The location of the behavior is immaterial to a determination of harassment as set forth above and which represents the current law. We would ask that this section be struck from the bill.

Section (C)(iv) (stating that behavior "that a reasonable person with the same personal characteristic would consider to be petty, slight or trivial inconvenience shall not constitute harassment") is not objected to. As applied to conduct occurring within the K-12 context, particularly younger grades, such a clarification would be useful and welcome.

IV. Proposed Amendments to 16 V.S.A. § 570f(c) – Standard for Prevailing under the Vermont Public Accommodations Act for Peer Harassment Claims.

The proposed changes to the Subsection 570f are also objected to.

H.461 dramatically expands school liability for peer harassment (student on student behaviors) to encompass any circumstance in which the challenged conduct has neither a purpose nor effect of impacting a student's access to the school as a place of public accommodation – without regard to its impact. To be clear, this would make schools *vicariously liable for the conduct⁴ of students* - over whom their degree of control and regulation is far more attenuated than that of employees or supervisors in their employ – for behaviors where there is no measurable impact educational or otherwise, but merely was engaged in with an improper motive.

As a practical matter, if passed, what could a school do in the future to avoid such liability? The State's Policy for the Prevention of Harassment, Hazing, and Bullying must, pursuant to 16 V.S.A. § 570a(a)(1), define harassment consistent with § 11(a)(26), and as such, is the basis for a school taking disciplinary action.

⁴ Including conduct outside of school if the other proposed amendments to (26)(A) are adopted.

That definition requires a finding that the conduct was based on or motivated by student or student family member's actual or perceived membership in a protected category and that either:

- (1) Has the purpose of objectively and substantially undermining and detracting from or interfering with a student's educational performance;
- (2) Has the purpose of objectively and substantially undermining and detracting from a student's access to school resources;
- (3) Has the purpose of creating an objectively intimidating, hostile or offensive environment;

OR, it despite no such purpose it nevertheless had

- (4) The EFFECT of objectively and substantially undermining and detracting from or interfering with a student's educational performance;
- (5) The EFFECT of objectively and substantially undermining and detracting from a student's access to school resources;
- (6) The EFFECT of creating an objectively intimidating, hostile or offensive environment.

Which means, for those cases where the conduct has discernable purpose, and where it can not be found "objectively" to create an intimidating, hostile or offensive environment, a school will still be held legally and vicariously financially responsible for the conduct of a non-employee student, even where that conduct does not have the EFFECT of impacting the student educational performance or access. Such conduct likely will often involve speech. The bill incentivizes schools to discipline speech where no discernable interest of educational access is implicated.

In that circumstance, the school district would face substantial exposure under the First Amendment to the U.S. Constitution and Article 15 of the Vermont Constitution, both for damages and for the attorneys fees of the plaintiff student. This is so because a school's ability to permissibly regulate student speech arises where that speech leads "school authorities to forecast substantial disruption of or material interference with school activities[.]" Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 514 (1969); *see also* State v. Masic, 2021 VT 56, ¶ 7 (noting that claims under Article 13, which is coextensive with its federal analogue, are considered under a First Amendment analysis). In our view, the proposed changes to § 11(a)(26) are still in accord with constitutional limitations, but the proposed changes to § 570f(c) would purport to require schools to regulate conduct which they do not have the actual capacity to regulate.

That said, the current standard of liability warrants revision. As currently constituted it requires a demonstration that the conduct be shown to be "unwelcome" which is a factor at the school enforcement level only with respect to "sexual harassment" matters. Students however are protected by federal law for sexual harassment and so removal of that factor would not eliminate their protection under that alternative legal standard. The section, however, must retain factors 2(A) and (B) which provide educational institutions the basis for acting against certain conduct which otherwise are protected by state and federal law.

In order to address these issues, we would propose the following alternative language with respect to Section 16 V.S.A. 570f(c) as follows:

(c) 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 student was subjected to ~~unwelcome~~ conduct 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.

Thank you for considering our input on this section of H.461. Should you have any questions, please contact Jonathan Steiner, VSBIT President.