Testimony of VSBIT, VSBA, VSA, and VPA re: H.329
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Introduction and History of Bill

House Bill 329 proposes sweeping changes to the legal definition of "harassment" across multiple statutes. These changes would immediately and dramatically impact the operation of Vermont schools—both with respect to their role as employers, but also in their responses to student conduct that may rise to the level of peer harassment. The testimony offered here focuses on the latter.

As initially drafted, the H.329 would have amended the definition of "harassment" both in Title 16, which sets forth the legal requirements for a school responding to notice of student conduct that may constitute harassment, hazing, or bullying ("HHB"), 16 V.S.A. § 570 *et seq*., and the Vermont Public Accommodations Act ("VPAA"), 9 V.S.A. § 4501 *et seq*., which imposes liability on schools, as places of public accommodation, for hostile school environment claims based on peer harassment. Washington v. Pierce, 2005 VT 125, ¶ 18. Presently, Title 16 tells schools how they must respond when they learn of alleged conduct which may meet the definition of harassment—namely, by launching an HHB investigation—and the VPAA imposes liability for responses which fall short of what Title 16 requires.[1]

After learning of these proposed changes, the Vermont School Boards Insurance Trust, Vermont School Boards Association, Vermont Superintendents Association, and Vermont Principals Association submitted written testimony to the House Committee on General, Housing, and Military Affairs, raising the following concerns about the effect the alterations to the definition of harassment would have on schools. Under the amended definition, schools would be required to launch and pursue full investigations of:

1. Out-of-school conduct between students which could constitute harassment on the basis of any protected category—without regard to whether such conduct could ever be found to "substantially" undermine a student's access to education or school resources. This would place school administrators in the role of policing the ebb and flow of myriad private relationships among students in a manner wholly unconnected to the purpose of either Title 16 or the VPAA. Over

[1] Under Title 16, schools must initiate an HHB investigation every time the school receives notice that conduct meeting the definition of harassment "may have occurred." *See* Model Procedures for the Prevention of HHB at II.A; *see also* 16 V.S.A. § 570(b) ("Each school board shall develop, adopt, ensure the enforcement of, and make available . . . harassment, hazing, and bullying prevention policies that shall be at least as stringent as model policies developed by the Secretary."). Specifically, such notice gives rise to an obligation for the school administrator to launch an investigation within one school day, to provide written notice of the announcement of the investigation to the parties and their parents or guardians, for the investigator to complete that investigation—including witness interviews and collection of evidence—within five school days and prepare a written report setting forth the investigative findings and conclusions, and to provide written notice of the results of the investigation to the parties and their parents or guardians within five school days of the conclusion of the investigation. *See* Model Procedures for the Prevention of HHB at III.A, F, G, H. In a harassment investigation, the complainant student has the right to both an internal and independent post-investigative review of the investigator's determination. *See* id. at V.A, B. And, if determined to have engaged in prohibited conduct, the respondent has a right to appeal that determination "directly to the school board of the school district." *See* id. at V.A.

time, this added burden would serve to diminish the vital importance of mandated responses directed against behaviors which in fact affect a student's access to education.

2. Student-student conduct which, if proved, could never be found either "severe" or "pervasive." That statutory language reflects the practical realities of responding to behavior by students who are still learning to interact appropriately with their peers—and who may, in the course of this learning, engage in behaviors which would be unacceptable in professional workplaces. Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651-52 (1999). Removal of that language destroys the careful balance struck in determining what type of conduct must be addressed by mobilizing an HHB investigation.
3. Student-student conduct which was joined by the complainant as a participant. This language is unclear—what does it mean to participate in one's own harassment? Passing such ambiguous language would compel schools to bear the substantial financial risk inherent in attempting to construe it. For this very reason, the language itself may be susceptible to a claim that it is void for vagueness under due-process principles, because it does not give those seeking to comply with the law fair notice of what the law requires.
4. Student-student conduct regardless of whether it is experienced by students *outside* of the protected class. Again, the plain language of this provision is unclear, and schools will bear the risk of an erroneous interpretation in derogation of their due-process rights. As a practical matter, it is difficult to understand how an incident which would meet the harassment definition because it was "based on or motivated by" a student's membership in a protected class could simultaneously be "experienced by others outside of the protected class." Moreover, with respect to such conduct and its impact on bystanders, schools are already empowered to respond through their general code of conduct, which typically prohibits behaviors which negatively impact the school environment and/or "general welfare" of the student body.

After learning of these concerns, the Committee struck the proposed changes to Title 16 from H.329. However, it **left undisturbed the proposed changes to the definition of harassment in the VPAA.** This compromise fails to ameliorate the above stated concerns as schools are compelled to respond under both statutes. It additionally fails to recognize that duties imposed upon schools by the VPAA and Title 16 have evolved over time and build on one another in the context of school's responses to student-student conduct. To merely refrain from revising the harassment definition in Title 16 as originally proposed, while proceeding to amend the definition within the VPAA, fails to mitigate the impacts originally flagged with our testimony, and ignores the new conflict between Title 16 and VPAA that will be created by proceeding in this fashion which will in turn give rise to a new category of concerns.

If adopted, schools would remain liable under the VPAA for inadequate responses to conduct which, while not encompassed by the existing definition of harassment, would fall within the expanded definition (and the concerns related to that expansion are again detailed above). It should be noted that, if adopted, this change, and its corresponding expansion of liability for schools, will therefore likely result in severe restrictions on access to insurance coverage for Vermont school districts. Moreover, the disconnect between Title 16 and the VPAA definition would result in liability for conduct with no legal definition for what that conduct is, or how the "adequate" or "legally appropriate" school based response would be defined. As a matter of risk-management, it may be that schools faced with this situation are compelled

to proceed as though the harassment definitions in Title 16 were consistent with the definitions in the VPAA, launching HHB investigations in response to conduct defined as harassment under the VPAA even though Title 16 would include no such requirement.

As the Vermont Supreme Court has observed, "the definition of harassment in [Title 16] mirrors the VPAA's definition of unlawful conduct in the context of harassment in schools." Washington, 2005 VT 125, ¶ 22. It is impossible to overstate the degree to which these two statutes are intertwined, or to predict all potential impacts that inconsistent definitions might have on Vermont schools, which would be governed by both. However, one key aspect of the interrelationship is that a complainant's exhaustion of the Title 16 process is a "a critical element of a VPAA action claiming discrimination based on student harassment." Allen v. Univ. of Vermont, 2009 VT 33, ¶ 31; Washington, 2005 VT 125, ¶ 16 ("[T]he Legislature has conditioned a harassment victim's ability to seek relief in court under the VPAA on the victim's exhaustion of his or her administrative remedies, or proof of a valid reason for not exhausting those remedies."). In short H.329's would result in circumstances where Vermont limitation on suits filed under VPAA require a demonstration that the plaintiff exhausted "administrative remedies," and yet for the new class of cases against schools that will be created by H.329 (which we oppose for the original reasons cited) that remedy will have in fact *never existed* in the first place because the alleged conduct only met the VPAA definition of harassment, and not Title 16.

The amendments to the VPAA's definition of harassment, H.329 as presently written implicate the same concerns that led the Committee on General, Housing, and Military Affairs to strike the proposed changes to Title 16 (see above page one) and amending "only" the VPAA still expands the duties of schools without tying that duty to regulating and ensuring school access or environments, while additionally throwing into doubt the implementation of already existing legal remedies and rights in peer harassment cases. This would cause yet more confusion, exposure and administrative burdens without, again any demonstrable benefit to school access or environments. These considerations weigh heavily against adopting the changes to the VPAA proposed through H.329.

Inherent in that conclusion is the vitally important recognition that schools can, should, and *routinely do* respond to conduct which does not fall within the current definition of harassment outside of the HHB procedures. Indeed, they are compelled to do so through 16 V.S.A. § 834(a), which provides that school districts and their employees owe students a duty of care to prevent students from being exposed to unreasonable risk, from which it is foreseeable that injury is likely to occur. Thus, the definition of harassment in Title 16 and the VPAA does not evince a Legislative judgment as to the "floor" of student behavior tolerated in Vermont schools. Rather, it reflects a carefully considered judgment that some types of behavior by students still learning how to interact with their peers may be appropriately addressed in the first instance without initiating full scale HHB investigations and incurring corresponding legal exposure.

Our organizations all share the legitimate concern this legislation addresses—that behaviors we all reasonably should expect in 2022 to be consigned to the past nevertheless persist, and in some environments are even encouraged. Our organizations remain committed to examining the role schools should play in addressing and responding to that reality. However, H.329 improperly shifts

that responsibility onto an already overburdened education system in a manner divorced from clearly identified educational outcomes. <u>For all of these reasons, we strongly urge this Committee NOT to recommend forwarding this legislation out as currently drafted</u>.