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

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- H.329 would impose a significant administrative burden on Vermont schools with no corresponding increase in funding, while simultaneously exposing them to heightened legal exposure for any perceived failure to appropriately discharge that burden.
- The harassment definition as currently written reflects a careful balancing of important considerations in the school context, including the practical realities of responding to behavior among students still learning to interact appropriately with their peers.
- In contrast, the amendment is completely divorced from such considerations and would make schools responsible for private conduct among students outside of school which has no in-school effect and require that schools hold students to standards of conduct applicable to adults in professional workplaces.
- Declining to broaden the definition of harassment does not represent a judgment that the additional conduct captured by the proposed amendment is accepted in Vermont schools. Rather, it represents a conclusion that such conduct may be appropriately addressed by education professionals without mobilizing Title 16's harassment procedures.

House Bill 329 fundamentally changes the legal definition of "harassment" in a manner that would immediately and dramatically impact schools' operations—both with respect to their role as employers, as well as their supervision of and response to student conduct that may rise to the level of "peer harassment." The testimony offered here focuses on the latter.

I. ***Proposed Changes Would Make Schools Regulators of Private, Out-of-School Student Conduct Without Limitation***

Title 16 imposes upon schools a duty to respond to "notice" of student conduct that "may constitute harassment, hazing, or bullying" ("HHB"), 16 V.S.A. § 570 *et seq*. The statute currently limits that duty—appropriately so—to conduct of staff or students which affects a targeted student's performance or otherwise substantially impacts the environment that student is exposed to within the school setting. In this way, the legal duty of a school to monitor and discipline student or employee behavior defined as "harassment" is appropriately tied to its function—the provision of public education and public access to education consistent with Vermont's Public Accommodations Act ("VPAA").

Specifically, the amendments would:

1) Require school administrators to launch and pursue full investigations (with full written reports) of out-of-school student or employee conduct that may be harassment—on the basis of any protected category—***without regard to whether such conduct would ever be found to have "substantially" undermined a student's access to education or school resources*****.** Simply put, this change will immediately inject school administrators into the role of monitoring the ebb and flow of a myriad of private interactions and relationships among students (most of whom are minors) in a manner wholly unsupported by the purpose of the

peer harassment statute or the VPAA. This would serve over time to merely diminish the vital importance of mandated responses that are properly limited to and directed against behaviors which IN FACT affect school access and educational performance.

2) Prohibit student-on-student conduct regardless of whether it was found to be severe or pervasive. The "severe or pervasive" language is intended to reflect the reality that students are still learning to interact appropriately with their peers, and, in the course of this learning, may engage in behaviors which would be unacceptable in professional workplaces—in other words, those statutory terms reflect consideration of the practical realities of responding to student behavior. Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651-52 (1999). Removal of the "severe or pervasive" language would have the effect of placing school administrators in the role of policing entirely private conduct among students outside of school with no in-school effect.
3) Prohibit student-on-student conduct regardless of whether it is joined by the complainant as a participant. This language is entirely ambiguous—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) Prohibit student-on-student conduct regardless of whether it is also 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." Finally, with respect to conduct and its impact on bystanders - schools are already empowered to respond to such behaviors through their general code of conduct which typically prohibits conduct which generally impact the school environment and/or "general welfare" of the student body.
5) Prohibit student-on-student conduct regardless of whether it occurs outside of a student's school. Again, this would mean that conduct taking place, for example, between two students at a sleepover on a Saturday night, no matter how morally repugnant or concerning, but which has no effect on the target's in-school experience, will now be policed by schools.

Expanding the definition of harassment would sweep student conduct (which, as set forth above, is for good reason not governed by Title 16) into the category of conduct to which schools MUST respond through their HHB process. This process already absorbs significant commitments of administrative time and resources, diverting personnel resources to the serious, detailed and time-intensive task of investigating student and staff behaviors and drafting detailed findings and reports all within days and on a school days' notice.[1] If adopted as proposed, H.329 would serve to immediately outstrip the resources

[1] To understand the true impact these proposed changes would have, they must be placed in the context of what Title 16 and the VPAA already require of schools: to 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*

already committed and available to do this work - even within so called "gold" Districts - without offering any corresponding increase in funding. As a result, educational resources presently allocated elsewhere would be diverted to supporting the HHB process - all to support the regulation, monitoring and investigation of staff and student conduct which is neither severe nor pervasive nor substantially impacts educational access or environments.

II. ***Amendments Impose Liability Upon Schools for The Private Conduct of Employees and Students in Private Settings (With No Connection to Educational Rights)***

Because H.329 would effect corresponding changes to the definition of harassment in the VPAA, it would create a commensurate expansion of school district liability arising from responses to student-student harassment. 9 V.S.A. § 4501 *et seq*. Further, as the Vermont Human Rights Commission ("HRC") has jurisdiction to investigate, as relevant here, those complaints alleging "unlawful discrimination in violation of" the VPAA, the amendment would also expand the HRC's jurisdiction. 9 V.S.A. § 4552(b)(1). Even where successfully defended, such proceedings represent a significant cost to school districts in both legal fees and personnel time. The Legislature must be cautious in expanding school system liability – systems already suffering from the prolonged and tremendous strain of responding to COVID-19. To propose that schools regulate and monitor private activity and be held legally responsible where they fail – and where such conduct is unlinked to educational access and environments - such a proposal must be rejected as inappropriate.

All of these considerations weigh against adopting the changes 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. Finally it should be noted if adopted these changes, and their expansion of liability for schools, will likely result in restricted access to insurance coverage for Vermont schools.

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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 within five school days and prepare a written report setting forth the investigative findings and conclusions based on witness interviews, document reviews, and site visits, 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.

VSBIT, VSBA, VSA and VPA all share the legitimate concern this legislation addresses - that behaviors we all reasonably should expect in 2022 to be consigned to the past nevertheless continue 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 and in a manner divorced from clearly identified educational outcomes. <u>For all of these reasons we strongly urge this Committee NOT to forward this legislation out as currently drafted</u>.