Written Testimony of the Vermont School Boards Association re:
H.874 (Rep. Christie proposed amendment)
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House Committee on Education—March 27, 2024

Thank you for the opportunity to provide testimony on behalf of the Vermont School Boards Association's (VSBA) concerns regarding the Human Rights Commission's recently proposed amendments to statutory protections for Vermont students from acts of harassment and civil litigation enforcement remedies within H.523. Please note that Sections I and II below reprise information previously offered in writing to the Committee by the Association on February 8, 2024. It, however, remains essential context and background to the testimony herein provided regarding the proposed Amendments to H.523.

I. First Amendment Considerations

Our harassment, hazing, and bullying prevention ("HHB") laws do not operate in a vacuum. The U.S. Supreme Court has long held that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969). While it is important that Vermont continue to support and improve school responses to harassment, bigotry and bullying of students within the school settings, any efforts to further expand regulation of student – and employee - speech must account for the Constitutional free speech rights. Failure to do so will not only expose districts, and their administrators to lawsuits, without immunity from alleged Constitutional violations, but *recklessly endanger via court order all existing protections for students under Vermont law with respect to harassment and bullying*.

The U.S. Supreme Court has declared that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). In other words, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction*." Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829, 115 S. Ct. 2510, 2516, 132 L. Ed. 2d 700 (1995). Speech prohibition must target the impact of such speech, and not the viewpoint or motive of the speaker.

First Amendment challenges to existing harassment statutory protections are no longer theoretical, they are the present reality for schools in Vermont. Recently, Vermont's federal District Court issued a lengthy decision outlining constitutional concerns with Vermont's current statutory protection for Vermont students from "harassment" (16 V.S.A. §11(a)(26)(A)). *Bloch v. Bouchey*, No. 2:23-CV-00209, 2023 WL 9058377, at *44 (D. Vt. Dec. 28, 2023). [1] The Court

[1] Issued on a motion for preliminary injunction which sought in part, a block on implementation of the state's harassment policies (which enforce 16 V.S.A. 11(a)(26)A)), the Court denied the motion but permitted the case to go forward, finding plaintiff's allegations sufficient to survive dismissal because he had "identified ways in which the policies may sweep in a substantial amount of protected speech for no countervailing educational purpose."

squarely criticized those portions of the current definition that, by its terms, prohibits conduct or speech in cases where no measurable educational impact exists. The December 2023 Order, declared that Agency of Education's Model Policy for the Prevention of Harassment, Hazing & Bullying (2015), (defining harassment as set forth in 16 V.S.A. §11a(26)(A)) was likely unconstitutional, observing specifically that its 'harassment' definition prohibits speech engaged in for a prohibited 'purpose' even if that speech produces no measurable educational impact.

For reference that definition is set forth below:

> 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."
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> 16 V.S.A. § 11(a)(26)(A) (emphasis added); Vermont (2015) AOE's Policy for the Prevention of Harassment, Hazing and Bullying of Students, Section IV.G.

The Court opined that in this respect that "the 'purpose or effect' clause permits school officials to (improperly merely) consider the speaker's motive in deciding whether the policy has been violated." *Bloch v. Bouchey*, No. 2:23-CV-00209, 2023 WL 9058377, at *26 (D. Vt. Dec. 28, 2023). In other words, the Court found that Vermont's current student harassment law impermissibly prohibits speech based on the speaker's motive or viewpoint rather than being reserved to those cases of speech found to actually have a measurable effect specifically on the learning environment.

Elsewhere, we have seen the Third Circuit Federal Court of Appeals overturn as unconstitutional a Pennsylvania school district's anti-harassment policy - a case cited by the Vermont District Court's *Bloch* decision. There, the Third Circuit invalidated a statutory definition of harassment almost identical to that of Vermont's, announcing:

> …the Policy's prohibition extends beyond harassment that objectively denies a student equal access to a school's education resources. Even on a narrow reading, the Policy unequivocally prohibits any verbal or physical conduct that is based on an enumerated personal characteristic and that "has the purpose or *effect* of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." (emphasis added). Unlike federal anti-harassment law, which imposes liability only when harassment has "a systemic effect on educational programs and activities," *Davis*, 526 U.S. at 633, 119 S.Ct. 1661 (emphasis added), the Policy extends to speech that merely has the "purpose" of harassing another. This formulation, by focusing on the speaker's motive rather than the effect of speech on the learning environment, appears to sweep in those "simple acts of teasing and name-calling" that the *Davis* Court explicitly held were insufficient for liability.

Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 210 (3d Cir. 2001).

In another similar case, the 11th Circuit held a school district's anti-harassment policy was "almost certainly constitutionally overbroad" where it prohibited a wide range of expression concerning certain characteristics, covered many forms of expression, employed a "totality of known circumstances" approach to determine whether speech "unreasonably alters another student's educational experience[,]" and potentially included failure to intervene to halt another student's speech as a violation. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1125 (11th Cir. 2022).

Current Constitutional Law therefore holds that where speech is prohibited based on motive or viewpoint of the speaker alone it almost certainly will be found unconstitutional, as both overbroad, and violating "bedrock principle(s)" of First Amendment law.

II. Constitutional Concerns Raised by Current Statutory Definition of "harassment" of Students in Vermont Schools

A. Current Statutory Law

1. *Vermont Student Harassment Statutory Definition*

The Agency of Education's Model Policy for the Prevention of Harassment, Hazing, and Bullying – applied to all Vermont Schools, pursuant to 16 V.S.A. § 570a(a)(1) – enforces the statutory current definition of harassment:

> 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.

16 V.S.A. § 11(a)(26)(a). Vermont schools are charged with enforcing this definition; investigating cases where a student or employee's conduct "might" violate it; and disciplining violations of it. As explained above, as currently enacted Vermont students or employees can be found under this statute to have engaged in "harassment" for speech merely where their *purpose* is to impact a student's access, performance, or environment – despite no evidence that such speech in fact adversely impacted the targeted student's educational access performance, or environment. Again, in *Bloch* Vermont's District Court flagged this language as potentially unconstitutional. And the Third Circuit, in a decision cited by the Vermont District Court, invalidated it as unconstitutional with respect to an almost identical Pennsylvania school district policy definition.

2. *Vermont Bullying Statutory Definition*

Troublingly, the statutory definition of bullying is similarly susceptible to First Amendment attacks. Pursuant to 16 V.S.A. §11(32), it is defined as:

> any overt act or combination of acts, including an act conducted by electronic means, directed against a student by another student or group of students and that:
> (A) is repeated over time;
> (B) is intended to ridicule, humiliate, or intimidate the student; and
> (C)(i) occurs during the school day on school property, on a school bus, or at a school-sponsored activity, or before or after the school day on a school bus or at a school-sponsored activity; or
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> (ii) does not occur during the school day on school property, on a school bus, or at a school-sponsored activity and can be shown to pose a clear and substantial interference with another student's right to access educational programs.

16 V.S.A. §11(32).

For conduct that occurs within school, the statute prohibits speech without contemplating, nor requiring proof of measurable impact on the educational access of the targeted student. The statute focuses solely on the *motive* of the speaker. Constitutional challenges to the Vermont bullying statute therefore may be attempted on this basis.

B. *Litigation*

The threat of litigation stated here is not theoretical. A national legal advocacy group has brought multiple suits against Vermont schools over the past 18 months based upon alleged First Amendment violations, all testing Vermont's harassment protections.[2] We are told to expect further challenges. With the *Bloch* decision, we are further on notice that a court could—as many judges do—invalidate not just portions, but the entirety of the bullying and harassment statutes. Vermont students would immediately feel the impact of such an action and lose existing protections. Vermont schools, already strapped for money and facing staffing shortages, could be liable in any such litigation for damages and attorney's fees.

To safeguard both our students and schools, the only legislative changes to Sections 11(a)(26) and 570f of Title 16, contemplated should be shoring them up against Constitutional challenges - rather than expanding the basis for those challenges. That would be the best protection for Vermont students and their rights.

III. H.523

The Human Rights Commission's Proposed amendments to H.523, again, run afoul of the above considerations and would place Schools throughout Vermont in the untenable position of either choosing either to comply with Vermont law, or Constitutional law. When legal challenges to

[2] *See Allen v. Orange Southwest School District, et al.*, No. 2:22-CV-00197 (D. Vt.); *Bloch v. Bouchey*, *et al.*, No. 2:23-CV-00209 (D. Vt.); *Mid Vermont Christian School, et al. v. Bouchey, et al.*, No. 2:23-CV-00652 (D. Vt.).

implementation of those statutes by Vermont schools ensue – as they surely will – Boards will be left with the choice of paying out financial settlements to claimants or proceeding to pay for a defense with the likely ultimate outcome being an unfavorable court ruling invalidating the rights currently enjoyed by Vermont students under existing statutes.

A. 16 V.S.A. §11(a)(26)

1. Amendment To 16 V.S.A. §11(a)(26) - Subsection (A)

Section 11(a)(26) defines the term "harassment" as it relates to conduct directed against students in Vermont schools. Taking into account the precedent explained in Section I above, the Commission's proposed amendment likely violates First Amendment protections. The regulation of expressive behavior in places of public accommodation are limited by First Amendment considerations in that they may only do so where those behaviors have a measurable effect specifically on the learning environment. Yet, despite court rulings on this basis, the Commission continues to propose amendments which would expand 'harassment' as defined by Vermont law by removing the language necessary to allow the statute to survive Constitutional scrutiny. The amendment would remove the words "substantially" from the phrase "*objectively and substantially undermining …education …(or) access (to education)."* It would also remove the words "educational performance" from the phrase "*detracting from or interfering with a students educational performance"* - leaving the phrase to read only "detracting from or interfering with a student's…education."

Their stated justification for this proposal - that the amendments is necessary to "more specifically address a hostile education environment" is wholly undermined by the fact that it leaves untouched the very portion of the statute's definition which defines "hostile environment." At the same time it serves to gut from the definition the very language that arguable permits the statute to survive Constitutional scrutiny. The proposed amendment to subsection "A" of 16 V.S.A. §11(a)(26) must not be adopted.

2. Amendment To 16 V.S.A. §11(a)(26) – Proposed New Subsection (C)

The Commission also seeks - as it did last term with respect to S.103 - to add an additional subsection to the definition of "harassment" – subsection (C) which, on its own is both unnecessary and legally reckless and confusing. The first sentence of the proposed additional subsection (C) reads:

> "*Notwithstanding any judicial precedent to the contrary, the conduct described in this subdivision (a)(26) need not be severe or pervasive to constitute harassment."*

If passed, all Vermont school administrators would be required to grapple with this language within the definition of harassment and apply it *every day* as they decide when to initiate harassment investigations and to how to determine when "harassment" has in fact occurred. Ignoring judicial precedent in this context would mean ignoring the December 2023 *Bloch* ruling which highlighted the constitutional prohibition on schools seeking to regulate expressive conduct absent measurable impacts on educational performance or access. The amendment then goes further to suggest that a District in fact need not find impacts that are either shown to be

severe or pervasive.[3] It takes little imagination to see how these two sentences, following one on the other, and in combination will operate to encourage administrators to *ignore concepts of impact entirely*, something *Bloch* pointed out the Constitution does not allow.

The Amendment also adds subsections (a)-(d), further expanding on its unconstitutional approach, stating that harassment can be found to exist, even when it only:

> "(a) has or would have the effect…;" or
> "(b) …would reasonably be expected to cause" or
> "(c) …would reasonably be expected to cause" or
> "(d) (for off campus conduct) is foreseeable that the conduct, threats or intimidation might reach school property."

Each will draw a Constitutional challenge for as Judge Reiss stated in *Bloch* favorably citing the Third Circuit Court of Appeal's decision striking down (in full) a school's policy prohibiting conduct where it was found merely have had an intended 'purpose' to affect access or performance, without ***proof of such actual impact***. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001).

The Commission's amendment, if adopted, contains the same legal flaw as the 'purpose' prohibition invalidated by the Third Circuit, and will not survive legal challenge. While the purpose of Section C in total appears to seek to avoid the reach of the Constitution, by both 'ignoring' its existence and the judicial decisions upholding it, Constitutional challenges will not be survived by such an approach.

B. Amendment to 16 V.S.A. §570f©(1)

Section 570f taken as a whole, rather than defining what is and is not prohibited "student harassment" under Vermont law, outlines the requirements for Vermont schools in responding to such harassment of which they are on "notice." Subsection (c)(1) then proceeds to outline when a civil claim may prevail against a Vermont school for any alleged failure to so appropriately respond. Again, this statute does not define what "harassment" is – that is defined in Section 11 of Title 16.

As currently written subsection (c)(1)) imposes civil liability for money damages against a Vermont school when the harassing conduct 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
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> (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

[3] It bears noting that such language "severe or pervasive" does not currently exist within 11(a)(3)(26)(A)'s definition of harassment.

affected the targeted student's equal access to educational opportunities or benefits provided by the educational institution.

Thus the statute *properly* recognizes the premise that a school can only be held legally and financially responsible for conduct which has the power to regulate. Conversely, it acknowledges that schools may not be held legally responsible for conduct which have no measurable impact on the claimant student's access to education or educational benefits.

The Commission's proposal, however, ignores those limits by simply removing them from the civil liability statute entirely. It replaces them with a lengthy and confusing serious of considerations which (as with those proposed to the definition of harassment within Title 16, Section 11(a)(26)(A)) direct juries and judges to first ignore judicial precedent; to require that schools be held responsible for conduct that has no measurable impact of educational access or performance – urging them in turn to ignore the strictures of the First Amendment - and to hold schools responsible without limitation for off campus conduct (despite the limits imposed on them by the Constitution). **If implemented, a Vermont school will thus face financial exposure for conduct over which it has no power to regulate**. Put another way, there is no way for a Vermont school to avoid or withstand a civil claim under this new legal standard while also abiding by the Constitution.

Vermont's harassment statute has been in place for over twenty years. In that time countless Vermont students have benefited from it's protections. Statutory challenges, where successful, are not surgical strikes. Where a statute is found to be unconstitutional a court will ordinarily overturn the statute *in its entirety*. The proposed amendments will result in litigation which risk removing protections enjoyed by students for decades. Any legislation considered by the Committee should be limited only to efforts to shore up these existing statutes in a manner that is designed to insulate them from Constitutional challenge rather than to expose them to it. The Association would be happy to assist in this work. What cannot happen, however, is adoption of the Commission's proposed amendments to both the definition of harassment and the civil suit statutes (16 V.S.A. §570f), which will remove language that protects against those challenges. Such misguided but well-intentioned revisions will result in legal action that ultimately will strip students, teachers, and schools of the very protections our statutes aim to provide.