Vermont House Committee on General and Housing
Testimony in Support of S.103 with an Education Amendment
Elizabeth Tang, Senior Counsel, National Women's Law Center
Friday, April 21, 2023 at 2:30pm

Good afternoon, Chair 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. My colleagues and I hear directly from survivors every day, including through our Legal Network for Gender Equity, which, since its launch in 2018, has 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'd like to make 2 points today regarding S.103. **First, I'm testifying in support of S.103 and its rejection of the "severe or pervasive" standard**, which many courts, including the Second Circuit (which covers Vermont), have interpreted in harmful and outdated ways. As a result, cases involving what most people would consider to be egregious harassment have been thrown out and not given a full and fair hearing. **Second, I urge the Committee to extend the scope of S.103 to protect students as well.**

Before I go on, I want to give a content warning that I will be discussing some distressing and graphic incidents of sex-based harassment in my testimony.

The "severe or pervasive" standard has deprived too many workers across the country who suffer harassment of any meaningful recourse.

Here are 2 workplace examples:

At a Costco in New York, a woman's manager told her that he would not approve her vacation request if she did not have sex with him. He offered to punch her timecard so she would be paid for hours she was not at work if she did have sex with him. When she refused, he called her to demand she come back from vacation early and threatened to fire or transfer her if she didn't. He also said he would give her money, make her a full-time employee but let her work part-time, and take her on vacations and to a fitness club if she would have sex with him. When she refused, he cut her working hours and threatened to suspend or fire her. Yet the Second Circuit (which covers Vermont) held that all of this harassment was not "severe or pervasive."[1]

As another example, a male employee in Maryland had to deal with his manager asking personal questions about his sex life, regularly commenting on his physical appearance, and even putting a magnifying glass over his crotch. At one point, his manager entered the restroom with him, pretended to lock the door, and said, "Ah, alone at last," while approaching him. Yet, a federal appellate court looked at all of this harassment and said it was not "severe or pervasive."[2]

In short, the "severe or pervasive" standard simply does not reflect the realities of our workplaces, of power dynamics, or of our modern understanding of unacceptable harassment. And the "severe or pervasive" standard is especially harmful to people with multiple marginalized identities, like women of color, because judges often separate the sex-based harassment from the race-based harassment in their analysis, concluding that none of the conduct in isolation is "severe or pervasive" enough.

[1] Mormol v. Costco Wholesale Corp., 364 F.3d 54 (2nd Cir. 2004).
[2] Hopkins v. Balt. Gas and Elec. Co., 77 F.3d 745 (4th Cir. 1996).

Because of this, more and more states and cities are rejecting the "severe or pervasive" standard.

Maryland[3] and the District of Columbia[4] passed legislation similar to S.103 last year, rejecting the "severe or pervasive" standard. Montgomery County, Maryland[5] did so in 2020, New York State[6] in 2019, California in 2018,[7] and several more states are considering similar bill this year. Notably, New York City rejected the "severe or pervasive" standard all the way back in 2016,[8] and it continues to have a thriving economy today. In fact, offering harassment-free workplaces seems like a winning way for a state and businesses to attract talent. So, I urge you to join this movement.

S.103 would ensure that Vermont's antiharassment laws are able to work as they were intended and to capture misconduct that no one should condone.

In particular, the bill includes helpful rules of interpretation and factors for courts to use to avoid falling into pitfalls that many courts have fallen into under the "severe or pervasive" standard. For example:

- S.103 would ensure that a single harassing incident could constitute unlawful harassment, meaning victims would not have to wait for their harasser to harass or assault them again and again before asking for help.
- S.103 would ensure that victims of quid pro quo harassment (e.g., "I'll give you a promotion if you have sex with me") can get help even if they agree to the unwanted sexual activity out of fear of losing their job, apartment, use of public transit, etc.
- S.103 would recognize that psychological injuries are just as legitimate as physical injuries, and that victims do not need to have physical injuries to be seriously harmed by harassment.
- S.103 would recognize that harassment that occurs outside of the four walls of a workplace or a public accommodation can nevertheless interfere with a victim's access to the workplace or public accommodation—such as when a worker is sexually assaulted by a coworker at an afterwork happy hour, or when a patient is sexually harassed by a pharmacist on the street, and now these victims are afraid to go to work or to pick up their prescriptions.
- S.103 would ensure that survivors of workplace harassment are treated as harassment victims even if they are able to continue carrying out their job duties, meaning they would not be penalized under the law just because they are exceptionally resilient and excel in their jobs even in the aftermath of harassment.

These are all rules or frames of analysis that are already found in federal law but are often incorrectly or inconsistently applied. This bill would help courts avoid those incorrect and harmful interpretations and provide all parties with a full and fair hearing.

My second ask to you is to amend S.103 to also reject the "severe or pervasive" standard in schools.

I'll share 2 examples of how this standard hurts students: 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."[9] In other words, the court said that any sexual assault that is not a rape is not "severe" enough.

As another example, 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

[3] Md. Code, SG § 20-601.
[4] D.C. Law 24-172.
[5] Montgomery County § 27-19.
[6] N.Y. EXEC § 296.
[7] Cal. Gov. Code § 12923.
[8] N.Y.C. LOCAL L. NO. 35, §2(c).
[9] Carabello v. N.Y.C. Dep't of Educ., 928 F. Supp. 2d 627, 635, 643 (E.D.N.Y. 2013).

oral rape and unwanted masturbation happened in only a "single incident."[10] So, it was not "pervasive" enough because Jane Doe was not orally raped on 2 separate occasions.

Many other courts have come to the same conclusion. By the logic of these courts, numerous student victims of sexual assault 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. This should not be the standard that Vermont students have to meet.

If there is a concern that S.103 would punish students for minor mistakes while they are still learning and growing:

S.103 already contains language providing that conduct that is a "petty slight or trivial inconvenience" is not unlawful harassment. But more importantly, an education amendment to S.103 would not hold students liable for harassment. It would hold **schools** liable for not doing anything when students are harassed. Under a "severe or pervasive" standard, too many schools are not responsible at all when they fail to do anything about even egregious incidents of harassment—like when M.H. was attacked in a school stairwell and suffered biting and groping all over her body while she tried to escape, or when Jane Doe was orally raped on school grounds and forced to watch when her rapist masturbated to her. Remember, many courts have held that these types of sexual assaults are not "severe or pervasive," which means schools do not have to do anything in response. An education amendment to S.103 would fix that.

Furthermore, S.103 would not require a specific school disciplinary response to harassment. 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 failed a test because they had to sit next to their rapist or 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.

In summary, an education amendment to S.103 would ensure that schools address harassment and abuse instead of just sweeping it under the rug.

If there is a concern that an education amendment to S.103 would make it too administratively burdensome for schools to update their policies:

I want to point out that schools are also already workplaces. This means schools would already be required to update their policies in accordance with S.103, as written, to protect school employees from workplace harassment. So, adding students to these protections would not create substantively greater burdens for schools, as they would already be updating their policies.

If there is a concern that there will be more lawsuits against schools:

[10] Doe v. Gwinnett Cnty. Sch. Dist., No. 1:18-CV-05278-SCJ, 2021 WL 4531082, at *1 (N.D. Ga. Sept. 1, 2021).

We at NWLC have not seen evidence that lawsuits are increasing as a result of these new state laws in Maryland, DC, New York, California, and New York City.

But even if there were more lawsuits (which we have not seen), it is still the case that 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. Again, schools are also workplaces. So, if a teacher has harassed both a student and another 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.

The bottom line is that, by amending the Education Code to reject the "severe or pervasive" standard, you would send a strong message to all Vermont residents that harassment based on sex, race, disability, religion, age, etc. will always be taken seriously—regardless of where it occurs.

You would ensure that a child who is sexually abused by her teacher at school receives the same protections under Vermont antiharassment law as a child who is sexually abused by her parents' landlord at home.[11]

You would ensure that a high school student who experiences religious harassment from a classmate at school receives the same protections under Vermont antiharassment law as when he is religiously harassed later that day by the same student, who is also his coworker at his afterschool job.

And you would make a huge difference in the lives of so many Vermont students, by protecting them from experiencing the devastating court losses that many students like M.H. and Jane Doe have already suffered.

In conclusion, I urge you to report S.103 favorably out of committee and to extend its protections to include students.

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

[11] S.103 would amend the public accommodations code, which covers harassment affecting the "sale or rental of a dwelling."