Report from the Working Group on Student Protections from Harassment and Discrimination in Schools

January 29, 2024

BACKGROUND

The Working Group on Student Protections from Harassment and Discrimination in Schools ("Working Group"), created per Act 29 of 2023 Section 5a, studies and gives recommendations for how to address harassment and discrimination experienced by students. Pursuant to statute, the Working Group will cease to exist on February 1, 2024.

Act 29 charges the Working Group to

> *"study the current protections for students against harassment and discrimination in schools and make recommendations for legislative action to ensure Vermont students have the appropriate protections from harassment and discrimination. In conducting its analysis, the Working Group shall consider and make recommendations on the following issues:*
> *1) eliminating the severe and pervasive standard for harassment and discrimination for students in educational institutions;*
> *2) compulsory educational attendance requirements for students who have been victims of harassment; and*
> *3) the resources required for schools to develop harassment prevention initiatives as well as supports for students who have experienced harassment."*

The group first met on Monday August 14, 2023 and met 15 times before submitting this report.

WORKING GROUP COMPOSITION

The members of the Working Group are

Name	Affiliation	Role
Heather Bouchey	State of Vermont Agency of Education	Interim Secretary of Education
Amanda Lucia Garces	Vermont Human Rights Commission (HRC)	Director of Policy, Education and Outreach
Sarah Robinson	Vermont Network Against Domestic & Sexual Violence	Deputy Director
Rebecca McBroom	Vermont National Education Association (NEA)	General Counsel
Heather Lynn	Vermont School Boards Association (VSBA)	Attorney
Jay Nichols	Vermont Principals' Association (VPA)	Executive Director

Chelsea Myers	Vermont Superintendents Association (VSA)	Associate Executive Director
Courage V Pearson	Outright VT	Director of Organizing
Xusana Davis	State of Vermont Office of Racial Equity (ORE)	Executive Director of Racial Equity
Lynn Stanley-Currier	Vermont Chapter of the National Association of Social Workers (NASW)	Executive Director
Cammie Naylor	Vermont Legal Aid (VLA)	Burlington Managing Attorney; Disability Law Project Staff Attorney
Henri Sparks	Harassment, Hazing, and Bullying Prevention Advisory Council (HHB)	Chairperson of Harassment, Hazing, and Bullying Prevention Advisory Council

WORKING GROUP PROCESS

Through a series of meetings, the Working Group explored the topics listed above from various perspectives. The Working Group received input from school principals, students, and caregivers through surveys, listening sessions, and public comment at Working Group meetings. Working Group members also watched and read select media excerpts describing the experiences of students in Vermont's schools. Some of the themes that emerged from this feedback include but are not limited to

- Quality of training for administrators and staff.
- Timing and ease of process.
- Availability of templates and toolkits for administrators and investigators, and language that is developmentally appropriate for involved parties.
- Differences and nuance in the needs of elementary schools compared to those in middle or high schools.
- Availability and credibility of restorative options that are balanced against punitive options.
- Need to balance legal and investigatory duties with primary instructional and operational duties.
- Confidentiality barriers.

After collecting and considering the available information, Working Group members engaged in a collaborative exercise through which they generated a set of potential recommendations and conducted a multi-vote/ranking exercise to identify which recommendations had strongest support among the members. Those recommendations are listed below. Some of the recommendations may appear to have multiple, disjointed elements (for example, Charge 3, Recommendation 1). This is intentional; the Working Group proposes these elements to be implemented in unison to maximize success and efficacy.

RECOMMENDATIONS

Charge 1: Eliminating the severe and pervasive standard for harassment and discrimination for students in educational institutions.

The Working Group dedicated substantial time to grappling with the complexities of this issue and the different perspectives surrounding it. Regrettably, time constraints did not allow for the level of research and education that would have been necessary for Working Group members to fully weigh the available options and their implications. See Appendices for detailed descriptions of the appointing organizations' viewpoints and additional considerations.

Charge 2: Compulsory educational attendance requirements for students who have been victims of harassment.

The Working Group deliberated on the mandatory attendance requirements for students who have experienced harassment and the associated challenges when students do not feel secure returning to school. In response to this issue, a sub-committee was established and conducted multiple public comment periods to gain deeper insights. Despite a relatively low turnout for the hearing, one particularly impactful story resonated, corroborating experiences shared by members of the working group. The toll on mental health due to bullying and harassment is profoundly debilitating for many students.

It is recommended that due consideration be given to cases where students may be facing mental disabilities that impact their ability to attend school. It is important to emphasize that the intention is not to penalize victims of harassment or discrimination by compelling their attendance when they are not emotionally prepared. Likewise, there was discussion about being cautious not to create a situation where students are inadvertently missing out on educational opportunities and activities due to unaddressed issues. Striking a balance that supports the well-being of students while ensuring their access to education remains a priority.

Recognizing the diversity of student needs, the Working Group proposes a nuanced approach to compulsory attendance. A one-size-fits-all strategy is insufficient. Instead, the Working Group recommends the advocate for attendance requirements that consider individual circumstances, ensuring a more effective response to diverse attendance challenges.

Further, to better address instances of harm, the Working Group urges AOE to create guidance documents that emphasize the importance of tailored responses for all students struggling with safety and emotional issues and that schools be provided with resources and protocols to respond effectively to bullying and harassment, acknowledging the unique aspects of each case. Guidance documents should also reflect best practices for re-entry into education spaces. It should emphasize emotional, academic, and social support to facilitate a successful reintegration process for returning students. While this recommendation focuses specifically on attendance related to harassment and discrimination, the Working Group further urges schools to review

current policy, 16 V.S.A. §176, which outlines the compulsory attendance requirements more broadly.

Charge 3 (Part 1): The resources required for schools to develop harassment prevention initiatives and supports for students who have experienced harassment.

Recommendation 1. Explore and fund alternative staffing solutions that will acknowledge and address the administrative burdens this work imposes on school-building instructional leaders, such as principals. Staffing solutions should be flexible in nature to accommodate different district and school configurations. The Working Group noted that positive approaches to HHB prevention, investigation, and staff training should be collaborative and might require a team approach.

The Working Group heard extensively from all members that the considerable requirements of the existing Hazing, Harassment, and Bullying policies detract from school administrators' ability to fulfill their role as instructional leaders while families and children involved in these processes do not feel supported when they must interact with the processes. Further, all Working Group members agree that greater emphasis on education and prevention efforts is necessary. Proactive approaches will provide greater support to all within schools, especially our children, rather than a reactive system. Fulfilling these needs might require the reconfiguration of existing roles, a district-wide coordinator, or other innovative approaches to creating a safe and welcoming environment for all students. Individuals/teams assigned to or hired would focus on the following:

(a) supporting education efforts with students on behavior expectations related to but not limited to, hazing, harassment, and bullying.
(b) training building staff on issues related to hazing, harassment, and bullying; and
(c) performing all Hazing, Harassment, and Bullying investigations.

As important as reconsidering staffing around HHB is, any mandates regarding staffing changes need to be funded, so as not to create greater pressures on already stressed school budgets and personnel.

The Working Group also briefly discussed the current definition of School Administrator in the Agency of Education Policy. The push for greater flexibility and innovation in staffing around HHB investigations would benefit from a more clear and flexible definition of School Administrator in the AOE Policy.

Recommendation 2. Dedicate district-wide funding for primary prevention efforts, such as HHB investigation efforts and programs to support social and emotional learning, inclusion, and belonging.

Working Group members recognized the need for targeted investment to prevent harassment and discrimination in schools. These investments may include programs to support healthy school climates that integrate social and emotional learning, inclusion, and belonging into all facets of schooling. The Working Group also discussed the considerable cost and time commitment of the

current HHB process and recommends the legislature consider targeted funding for both prevention and investigation.

Recommendation 3. Agency of Education creates a set of guidance documents that includes but is not limited to topics of [1] best practices for re-entry into educational spaces; [2] discussion about how to move from a punitive to a restorative practice framework in responding to HHB issues; and [3] guidance on differentiated responses for complainants and accused students, which includes considerations for disability-related behavior.

The Working Group discussed the need for statewide leadership from the Agency of Education to share best practices and to support school districts in their prevention efforts. School districts cannot and should not need to operate in silos across the state on this important and challenging issue.

Charge 3 (Part 2): Supports for students who have experienced harassment.

Recommendation: Provide stronger support for community-based partnerships between community organizations and schools (these include but may not be limited to community-based domestic and sexual violence organizations, Community Justice Centers, and caregiver groups.) and add capacity to mental health designated agencies to support schools in mental health crisis prevention and support.

Stronger support is needed to build community-based partnerships between community organizations and schools (including community-based domestic and sexual violence organizations, Community Justice Centers, caregiver groups, etc.).

The culture of a school will reflect the culture of the community if community members are meaningfully involved in the programs and social life of the school. Communities hold resources and expertise that can augment school services and support schools in providing non-discriminatory access for Vermont students in schools. Schools cannot and should not be islands unto themselves. The Working Group encourages schools to assess and inventory their community assets to identify where their communities hold particular strengths and expertise. These assets may include mental and physical health supports, ethnic and cultural diversity, professional development opportunities, trauma-informed and crisis-intervention care, and established coalitions. These efforts, in turn, will also help identify the broader needs within a community. Further, a statewide asset map created by AOE would help identify the resources and support systems around the state that might be expanded to better address needs in Vermont where there are resource deficits.

In coordination with school-based professionals trained and skilled in community outreach and/or social work, teams can be developed to organize and coordinate programs with community organizations and individuals to best serve the needs of students at any given time or in any situation. To accomplish this, the State will need to provide funding to develop and maintain these partnerships.

When students are connected to supportive adults and communities, they are less likely to bully and harass others, and when confronted by bullying or harassment, they are more resilient and recover more quickly from its effects. Further, schools and children benefit when students' academic and co-curricular pursuits, family cultures, and social and civic interests are mirrored and supported by the actions of others. Recommendations in the Education Quality Standards describe multifaceted approaches to address and prevent the challenges that interfere with a student's ability to access a high-quality, creative, respectful, and rigorous education. Therefore, we envision schools that

- create a culture of belonging and connectedness; and
- leverage community partnerships to prioritize the prevention of harassment, suicide, violence, discrimination, drug use, and other forms of avoidable personal and social harm.

Mental health designated agencies provide critical partnerships with schools to help with mental health crisis prevention and support. In some cases, the capacity of designated agencies has not been able to keep up with the evolving mental health needs of students. These agencies provide professional support that might be outside the scope of school-based professionals and/or schools cannot hire school-based professionals that fit the needs of all their students due to the critical staffing shortage. Many of the extreme and disruptive behaviors that students in schools are exhibiting are directly related to the mental health crisis exacerbated by the pandemic and persist today.

ADDITIONAL ITEMS FOR FURTHER CONSIDERATION

The Working Group worked diligently to meet its statutory mandate within the designated timeframe and is proud of the insight it has gained. Still, these issues are rife with complexity and must all balance the needs and goals of communities across the state. For that reason, the Working Group did not arrive at consensus (or even a definitive conclusion) on every proposal that it discussed. Nonetheless, those additional considerations are listed below for informational purposes so the Legislature and other interested parties can explore them further.

Ensure that continued HHB work is done in concert with the other related work happening in schools: The Working Group discussed and prioritized the need to understand how prevention and investigation efforts related to Hazing, Harassment, and Bullying relate to other initiatives happening in Vermont Education. This includes but is not limited to threat assessments, restorative justice approaches, and multi-tiered systems of support. Mapping this landscape could create a cohesive and integrated framework for addressing various challenges related to student well-being and safety.

Broadening the School Administrator Definition: The concept of broadening the statutory definition of "School Administrator" aims to provide school districts with more options for effectively managing and overseeing HHB process as well as the Title IX process. Diversifying

the roles within the School Administrator category may address the complexities of handling harassment and discrimination issues within educational institutions.

Framing "Protection" in Positive Terms: Schools should additionally be encouraged and charged with engaging in specific, identified, positive actions that will safeguard students from and respond to acts of harassment and discrimination. This includes creating shared understanding of what "protection" means in each school community, using positive terms that will ensure a proactive stance in safeguarding students from harassment and discrimination. Establishing clear and positive processes may create a foundation that fosters a safe and inclusive environment for all Vermont students.

Expanding the HHB Council: Expanding and enhancing the existing HHB Council involves incorporating a more diverse representation, including parents and caregivers, students, administrators, and other stakeholders who can contribute valuable perspectives. Broadening the composition of the HHB Council may strengthen its efficacy in addressing and preventing harassment and discrimination issues in the education system.

APPENDIX A

Issue Date: January 26, 2024

AOE Recommendations: Working Group on Student Protections from Harassment and Discrimination in Schools

Working Group Charge 1: Study the elimination of the severe and pervasive standard for harassment and discrimination for students in educational institutions.

On December 18, several Working Group members, the Vermont School Boards Association, the Vermont Superintendents Association and the Vermont Principals' Association, presented a set of proposed amendments to the provisions of Title 16 defining harassment and the causes of action for a civil harassment claim. The Agency examined these proposals and found them to be a thoughtful compromise from the original position held by those member organizations, as well as a much-needed improvement to student protections already in statute.

The Agency also considered a proposal presented on January 16 by other working group members including the Human Rights Commission and the Vermont Disability Law Project. The essence of this proposal was to recommend the amendments to Title 16 that were at one time included in S.103 during the first year of the current biennium. The Agency had process-based concerns with the limited time the Working Group had remaining to discuss these recommendations. Additionally, the Agency remained in favor of the proposal from VSBA, VSA and VPA.

The Agency recommends the following recommended amendments (The VSBA, VSA and VPA proposals) as the best approach to ensuring the appropriate balance between the interest in ensuring the most protective environment for students against the interests of due process for individuals (both students and staff) accused of harassment and the interests of school districts and the State in not creating undue liability for actions not reasonably within the control or knowledge of the school district.

1. Strengthen Title 16's definition of "harassment" to add protections against "hostile environment" sexual harassment

Currently, only the AOE Model Policy on the Prevention of Harassment, Hazing and Bullying prohibits a category of sexual harassment commonly known as "hostile environment" harassment. The statutes do not include a definition of or prohibition against hostile environment harassment; they only prohibit what is commonly called "quid pro quo" harassment. This statutory gap ought to be addressed as follows.

16 V.S.A. § 11

***

(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.

(26)(B) “Harassment” includes conduct that violates subdivision (A) of this subdivision (26) and constitutes one or more of the following:

(i) Sexual harassment, which means conduct that includes unwelcome sexual advances, requests for sexual favors and other verbal, written, visual, or physical conduct of a sexual nature and any of the following:

(a) When one or both of the following occur:

(I) Submission to that conduct is made either explicitly or implicitly a term or condition of a student’s education.

(II) Submission to or rejection of such conduct by a student is used as a component of the basis for decisions affecting that student.

(b) A hostile environment is created. A hostile environment exists where the harassing conduct denies or limits the student’s ability to participate in or benefit from the educational program on the basis of sex.

2. Update the Standard Governing Harassment Claims Under the Vermont Public Accommodations Act (VPAA)

The only instance of language resembling the judicial standard that is often called the “severe and pervasive” standard in Title 16 is in describing the elements that a harassment claim for civil damages must establish to prevail. In 16 V.S.A. § 570f, current law requires that the plaintiff has to prove two factors. The first factor is that the plaintiff student was subjected to unwelcome conduct based on the student’s or student’s family member’s membership in a class protected by the VPAA. The second factor, the harm element, is stated in terms of whether the alleged conduct was a single instance or multiple instances. In very general terms, when the alleged harassment occurred in multiple instances, it has to be “so pervasive” as to substantially and adversely impact the plaintiff’s access to educational opportunities or benefits. When the alleged harassment is a single instance, the conduct must have been “so severe” that the plaintiff was substantially and adversely impacted in their access to educational opportunities or benefits. These definitional ways of describing the harm experienced by

the plaintiff student can be updated and broadened to respond to the concerns of the Working Group as follows.

16 V.S.A. §570f "Harassment; notice and response"

….

(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.~~

When viewed from an objective standard of a similarly situated reasonable person, the targeted student's equal access to educational opportunities or benefits provided by the educational institution was substantially and adversely affected.

APPENDIX B

Human Rights Commission
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Montpelier, VT 05633-6301
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Vermont Human Rights Commission's Recommendations For Act 29 Working Group Charge #1: Eliminating the severe or pervasive standard for harassment in educational institutions

The mission of the State of Vermont Human Rights Commission is to promote full civil and human rights in Vermont. We contend that the current standard for harassment outlined in Title 16 poses a barrier to students fully experiencing their rights to a safe, respectful, civil, and positive educational environment. Therefore, the HRC recommends statutory amendments that aim to achieve the following objectives:

- Clarify the definition of a hostile environment to be considered by both administrators and courts in considering harassment complaints
- Remove the requirement of a "substantial" adverse effect on students in the definition of harassment
- Remove a connection between a student's harassment and their educational performance
- Eliminate the overly burdensome, restrictive, and confusing legal standard of "severe or pervasive" harassment in section 570f(c)(2) for court claims against schools, and
- Provide guidance for courts in applying the harassment standard that is consistent with harassment analyses under other state anti-discrimination statutes.

Definition of Harassment

The HRC contends that the current definition of harassment in education, at 16 V.S.A. § 11(a)(26) is unduly restrictive and could lead to misapplication. The definition is restated below, with HRC's recommended changes. We support the addition of clarifying language in a new subsection 11(a)(26)(C) to more specifically address a hostile education environment.

(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~~ education or access to school resources or creating an objectively intimidating, hostile, or offensive environment.

(B) "Harassment" includes conduct that violates subdivision (A) of this subdivision (26) and constitutes one or more of the following:

(i) Sexual harassment, which means conduct that includes unwelcome sexual advances, requests for sexual favors and other verbal, written, visual, or physical conduct of a sexual nature when one or both of the following occur:

(I) Submission to that conduct is made either explicitly or implicitly a term or condition of a student's education.

(II) Submission to or rejection of such conduct by a student is used as a component of the basis for decisions affecting that student.

(ii) Racial harassment, which means conduct directed at the characteristics of a student's or a student's family member's actual or perceived race or color, and includes the use of epithets, stereotypes, racial slurs, comments, insults, derogatory remarks, gestures, threats, graffiti, display, or circulation of written or visual material, and taunts on manner of speech and negative references to racial customs.

(iii) Harassment of members of other protected categories, which means conduct directed at the characteristics of a student's or a student's family member's actual or perceived creed, national origin, marital status, sex, sexual orientation, gender identity, or disability and includes the use of epithets, stereotypes, slurs, comments, insults, derogatory remarks, gestures, threats, graffiti, display, or circulation of written or visual material, taunts on manner of speech, and negative references to customs related to any of these protected categories.

(C) Notwithstanding any judicial precedent to the contrary, the conduct described in this subdivision (a)(26) need not be severe or pervasive to constitute harassment. Creation of an intimidating, hostile or offensive environment based on any legally protected category also constitutes harassment. A hostile environment exists where conduct:

(a) has or would have the effect of interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; or
(b) reasonably causes or would reasonably be expected to cause a student to fear for the student's emotional safety; or
(c) reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or
(d) occurs off school property and creates or would foreseeably create a risk of substantial disruption with the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

The above subparts (a) thru (d) are borrowed from current law in New York State's education statute.

Additional Recommendations for Student Protections and Legal Claims

HRC contends that the stringent "severe or pervasive" standard for harassment, which requires a "substantial and adverse" impact on a student's access to education, is unduly prohibitive. The standard can result in legal claims being dismissed by a court before being fully evaluated by a trier of fact. In order to prevail on a discrimination claim, 16 V.S.A. § 570f requires a plaintiff to show that the school was notified of harassment and that it failed to take prompt and appropriate remedial action. It is unduly and unfairly burdensome to also require students to prove that the harassment was so severe or so pervasive that it had a "substantial and adverse impact" on their educational access. Therefore, HRC proposes the changes outlined to clarify that the alleged harassment must meet the definition contained in 16 V.S.A. §11(a)(26) above, without imposing additional burdensome hurdles for plaintiffs.

§ 570f. Harassment; notice and response

(a)(1) An educational institution that receives actual notice of alleged conduct that may constitute harassment shall promptly investigate to determine whether harassment occurred. After receiving notice of the alleged conduct, the school shall provide a copy of its harassment policy, including its harassment investigation procedure, to the alleged victim and the alleged perpetrator. If either the alleged victim or the alleged perpetrator is a minor, the copy of the policy shall be provided to the person's parent or

guardian. Nothing in this section shall be construed to prohibit educational institutions from investigating and imposing disciplinary consequences upon students for misconduct. Elementary and secondary school officials shall strive to implement the plan developed in accordance with subdivision 1161a(a)(6) of this title in order to prevent misconduct from escalating to the level of harassment.

(2) If, after notice, the educational institution finds that the alleged conduct occurred and that it constitutes harassment, the educational institution shall take prompt and appropriate remedial action reasonably calculated to stop the harassment.

(b) A claim may be brought under the Fair Housing and Public Accommodations Act pursuant to 9 V.S.A. chapter 139 only after the administrative remedies available to the claimant under the policy adopted by the educational institution pursuant to subsection 166(e) or section 570 of this title or pursuant to the harassment policy of a postsecondary school have been exhausted. Such a showing shall not be necessary where the claimant demonstrates that:

(1) the educational institution does not maintain such a policy;

(2) a determination has not been rendered within the time limits established under section 570a of this title;

(3) the health or safety of the complainant would be jeopardized otherwise;

(4) exhaustion would be futile; or

(5) requiring exhaustion would subject the student to substantial and imminent retaliation.

(c) (1) 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~~ that the student was subjected to ~~unwelcome conduct~~ harassment 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.~~

(2) In determining whether conduct constitutes unlawful harassment:

(i) Courts shall apply the definition of harassment contained in subsection 11(a)(26) of this title;

(ii) The determination shall be made on the basis of the record as a whole, according to the totality of the circumstances, and a single incident may constitute unlawful harassment.

(ii) Incidents that may be harassment shall be considered in the aggregate with varying types of conduct and conduct based on multiple characteristics viewed in totality rather than in isolation.

(iii) Conduct may constitute unlawful harassment, regardless of whether:

(I) the complaining student is the person being harassed;

(II) the complaining student acquiesced or otherwise submitted to or participated in the conduct;

(III) the conduct is also experienced by others outside the protected class involved in the conduct;

(IV) the complaining student was able to continue the student's education or access to school resources in spite of the conduct:

(V) the conduct resulted in physical or psychological harm; or

(VI) the conduct occurred outside the complaining student's school.

(3) Behavior that a reasonable person with the same protected characteristic would consider to be a petty slight or trivial inconvenience shall not constitute unlawful harassment pursuant to this chapter.

The HRC believes that the above amendments would appropriately align the educational harassment analysis with the analysis courts use in employment, housing, and other public accommodations discrimination claims under existing state law. It provides clarity for courts as to how to apply the standard, and explicitly directs courts to use the definition of harassment from the education statute at 16 V.S.A. §11 (as amended). The above amendments to 16 V.S.A. §§ 11 and 570f, when taken in conjunction, will serve to better protect our most vulnerable and marginalized students by allowing more equitable pursuit of legal claims against schools who fail to act on harassment complaints.

APPENDIX C

Act 29
Student Harassment and Discrimination Working Group
Vermont Network Memo

Act 29 of 2023 created a Working Group on Student Protections from Harassment and Discrimination in Schools. Act 29 charges the Working Group to "study the current protections for students against harassment and discrimination in schools and make recommendations for legislative action to ensure Vermont students have the appropriate protections from harassment and discrimination. Among the three charges to the working group, the General Assembly requested that the Working Group examine "eliminating the severe or pervasive standard for harassment and discrimination for students in educational institutions". Because there was no consensus and divergent stakeholder views on this charge, Working Group members were invited to submit organizational memos regarding the elimination of the severe or pervasive standard in school-based harassment and discrimination.

Severe or Pervasive Standard in Current Policy

Elements of Vermont statute and administrative policy utilize a severe or pervasive standard in evaluating school-based harassment. The severe or pervasive standard can be found in Vermont's statute on school based sexual harassment. Vermont statute provides a right to seek damages through a civil action brought against their Vermont school resulting from acts of harassment. This right to recovery for sexual harassment cases is limited by 16 VSA §570(f) which requires that, to prevail, a victim of sexual harassment must demonstrate that 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.*

In addition, the Vermont Agency of Education's (AOE) model harassment policy instructs schools to address sexual harassment only if it is "**severe, persistent or pervasive**".

The Impacts of Severe or Pervasive Standard

The *severe or pervasive* standard creates an exceptionally high barrier for individuals to bring forth meritorious claims of sexual or gender-based harassment. In addition, as with many forms of sexual violence, individuals occupying more than one marginalized identity (such as race or gender identity) are disproportionately impacted by issues of harassment in much more complex ways. Under the *severe or pervasive* standard, students with intersecting identities must prove that they were subjected to *severe or pervasive* harassment on **each** separate basis, not on the totality of all harassing behavior.

Past Legislative Action on Eliminating the *Severe or Pervasive* Standard

The impacts of the severe or pervasive standard have been recognized and addressed by the General Assembly in recent years. In 2022, the General Assembly eliminated the severe or pervasive standard in employment and, in 2023, the standard was eliminated in all other areas of public accommodation exempting educational settings. This means that employees at a school do not need to demonstrate that the harassment they experience is severe or pervasive, but the students in the same school must meet a higher burden.

Policy Proposals for Moving Forward

The Vermont Network believes that the following amendments will address our concerns. They are equally important and are not mutually exclusive.

- **Remove the language that passed in 2023 exempting Title 16** from the elimination of the severe or pervasive standard in places of public accommodations.
    - This will eliminate the *severe or pervasive* standard in **all** places of public accommodations and ensure that students are well protected.

- Amend the **sexual harassment damages statute (16 VSA §570(f)) and accompanying AOE policy** to eliminate the severe or pervasive standard within the sexual harassment sections.
    - The sexual harassment statute must be enhanced to prohibit a hostile environment caused by sexual harassment, as with other forms of school-based harassment.
    - Currently, the sexual harassment stature is the only statute which explicitly requires a severe or pervasive showing. This is unacceptable and incredibly harmful to victims of sexual harassment.
    - Through this working group, the Vermont Network worked with counsel from the Vermont School Boards Association (VSBA). Through this process, we determined that we are likely in consensus with the VSBA and many other stakeholders, on moving forward with this amendment.

- Modify Vermont's Peer Harassment Statute 16 V.S.A. § 11(a)(26)(A); to **not require a substantial and adverse impact on educational opportunities in order for a victim to prevail.**

We thank the General Assembly for their attention to this issue. We believe that all schools should be places where children can learn and grow – and that victims of sexual harassment should be well supported in every community in the state.

APPENDIX D

vermont nea
THE UNION OF VERMONT EDUCATORS

To: Xusana Davis
From: Rebecca McBroom, Vermont-NEA General Counsel
Date: January 26, 2024
Re: Working Group on Student Protections from Harassment and Discrimination in Schools – Position Regarding Elimination of the Sever or Pervasive Standard

Vermont-NEA members, like all educators, put students first every day. Together with parents, our members are dedicated to a safe, nurturing, and trauma-free learning environment for all students. We unequivocally denounce any type of hazing, harassment, and bullying of students, especially those from historically marginalized communities, those suffering from trauma, economic displacement, food insecurity, or unstable housing. Vermont-NEA members work tirelessly to ensure our schools are havens for students to learn and safe places for educators to work.

To this end, VTNEA endeavors to make our schools safe havens for all students, and we are committed to ensuring that our students have the legal protections they deserve. VTNEA has thereby engaged as a member of this Working Group for the past several months. The Working Group met on 15 occasions and discussed a myriad of issues related to this subject. From our perspective the group faced some challenges related to its assignment. First, the Act 29 charges were exceedingly broad. For this reason, I believe that the group followed several paths related to harassment and bullying in our schools, but the vastness of the subject matter ultimately hindered our ability to engage in sufficiently robust conversations concerning statutory modifications to the severe and pervasive standard earlier in the process. Group members' major differences in relation to the severe and pervasive standard were not defined until the final meetings, and I wonder whether we could have narrowed the issues if we had discussed those differences at an earlier date.

For those reasons, and considering the major concerns in response to the two main proposals (VSBA's and HRC's), VTNEA proposes the following statutory changes to the severe and pervasive standards in the relevant statutory sections:

- Modify 16 V.S.A. § 11(a)(26)(A) to add a new definition in statute that includes "hostile environment" as a form of harassment. For this new definition, ADD:
  A hostile environment exists where conduct:
  1. Has or would have the effect of unreasonably interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; or
  2. reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or

3. reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or
4. occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

- Eliminate the "severe and pervasive language" from 16 V.S.A. § 570(f) as it relates to sexual harassment. Modify the language so that if a "substantial and adverse impact on educational opportunities" is required for a student to prevail in a legal action, that those educational opportunities are defined as including impacts on the mental and emotional wellbeing of the student. Furthermore, "substantial" and "adverse" should not simply replace "severe and pervasive" to have the same effect.

In conclusion, although the central charge of this group was focused on litigation and potential civil damages, I would be remiss not to state that Vermont public school educators hold the safety and wellbeing of students as a paramount concern. Schools are microcosms that reflect our lager societal problems and the pervasive systemic challenges we face in our communities. Daily, our educators resolutely strive to meet the needs of every student who walks through the school doors. What our schools ultimately need regarding this issue, are more resources, more training, and clear guidance that provide our educators with the tools they need to make schools the safe havens that our students deserve and that our educators want to maintain.

APPENDIX E

To: House Committees on General and Housing and on Education, and the Senate Committees on Economic Development, Housing and General Affairs, and on Education

From: Vermont School Boards Association; Vermont Superintendents Association; Vermont Principals' Association; Henri Sparks, Chairperson of the Harassment, Hazing, and Bullying Prevention Advisory Council

Date: January 26, 2024

Re: Report from the Working Group on Student Protections from Harassment and Discrimination in Schools; Appendix pertaining to Charge 1 – Severe and Pervasive

The Vermont School Boards Association (VSBA), Vermont Superintendents Association (VSA), and Vermont Principals' Association (VPA), and Henri Sparks, Chairperson of the Harassment, Hazing, and Bullying Prevention Advisory Council ("Submitting Members") unequivocally advocate for schools free from harassment, prioritizing prevention and acknowledging the intricate growth of young individuals. Administrators should be supported in creating an environment promoting empathy, inclusivity, and respectful communication. Harassment in schools often reflects broader societal issues, making it a collective responsibility to prevent harm. By fostering a safe and supportive learning environment, we ensure that educators, parents, students, and communities contribute to the well-being of our youth and respect the complexities of their development.

The General Assembly charged the working group with considering and making recommendations on the following issues: (1) eliminating the severe and pervasive standard for harassment and discrimination for students in educational institutions; (2) compulsory education attendance requirements for students who have been victims of harassment; and (3) the resources required for schools to develop harassment prevention initiatives as well as supports for students who have experienced harassment.

Regarding Charge 1 of the Working Group on Student Protection from Harassment and Discrimination in Schools, the Submitting Members support the proposed statutory and policy changes outlined in the proposal presented on December 18, 2024, which was authored by the Vermont School Boards Association with review from the Vermont Network Against Domestic & Sexual Violence representative Sarah Robinson. These proposed changes were in response to the concerns raised with the Working Group about how the terms "severe and pervasive" could operate to restrict student protections. The changes include:

1. 16 V.S.A. §11(a)(26)(B)(i) be amended to explicitly provide statutory protection for students from "hostile environment" sexual harassment from both students and school employees, and that it do so without reference to the terms "severe, persistent or pervasive."

2. Amendment to the civil suit statute of 16 V.S.A. §570f that would set a standard of proof for litigants that replaces consideration of "severe" or "pervasive" depending on whether there were single or multiple instances and replaces it with a single standard which retains a negligence standard.

In regards to the additional revisions to 16 V.S.A. 570f presented by the Human Rights Commission ("HRC Proposal"), the Submitting Members are unable to support these changes. The changes, if implemented, would create stricter liability standards for schools while not accounting for the complexity of youth development, the nuance of school environments as compared to workplace environments, and students' First Amendment rights. They would also have unintended impacts at odds with many of the stated objectives of the Working Group.

With respect to the proposed revisions from the Human Rights Commission to revise the definition of Harassment in 16 V.S.A. § 11(a)(26)(C), the Submitting Members do not support the revision. It is the belief of our Organizations that these revisions will not provide any additional substantive protections to students, while complicating and further confusing work that already involves the nuances of school environments, and youth development. As such, the Submitting Members also strongly encourage any proposed revisions be thoroughly vetted by the House and Senate Education Committees for their considerable impact on school environments.

The following additional resource is a legal analysis of the proposed revisions.

Report from the Working Group on Student Protections from Harassment and Discrimination in Schools
APPENDIX PERTAINING TO "CHARGE 1"
SUBMITTED ON BEHALF OF VERMONT SCHOOL BOARDS' ASSOCIATION, VERMONT PRINCIPALS' ASSOCIATION, VERMONT SUPERINTENDENTS ASSOCIATION
January 26, 2024

I. Background

The Working Group on Student Protections from Harassment and Discrimination in Schools ("Working Group") was established in Act 29 of 2023, setting forth in relevant the following powers and duties:

> *"(c) Powers and duties. The Working Group shall study the current protections for students against harassment and discrimination in schools and make recommendations for legislative action to ensure Vermont students have the appropriate protections from harassment and discrimination. In conducting its analysis, the Working Group shall consider and make recommendations on the following issues:*
>
> (1) *eliminating the severe and pervasive standard for harassment and discrimination for students in educational institutions."* (hereinafter "Charge 1")

The Working Group first convened on August 14, 2023 and thereafter met an additional 14 public meetings,[1] through January 2024. While not all meetings were exclusively devoted to consideration of Charge 1, a significant number of those meetings involved discussions around the group's charge to make recommendations to the Legislature on "*eliminating the severe and pervasive standard for harassment and discrimination for students in educational institutions."* Despite these efforts a Group-wide consensus was not reached on a sole proposal. Accordingly, the Group voted unanimously to have the Report contain no singular proposal on Charge 1, and instead members were provided an opportunity to share with the Legislature their views on those proposals via attached Appendices.

The organizations of Vermont School Boards' Association, Vermont Principals' Association and Vermont Superintendents Association ("Submitting Members") provide this Appendix to detail and explain their Charge 1 Proposal to amend both 16 V.S.A. §11 and §570. Additionally, for the Legislature's consideration the Submitted Organizations restate and explain here the objections they made to additional amendments promoted by some Working Group members in the course of the Working Group's meetings. It should be emphasized that understanding the various Vermont statutes and policies and their current impacts on schools is a complex but

[1] Meetings lasted, on average, approximately two hours in length.

necessary task in order to understand the impact of any proposed changes. Care has been taken in this submission to, as best as possible, provide a fulsome explanation of the existing statutes and policies so as to contextualize both the proposals made here and to explain the objections raised by the Submitting Members to other proposals raised in the Working Group.

Finally, the Submitting Members unequivocally advocate for schools free from harassment, prioritizing prevention and acknowledging the intricate growth of young individuals. Administrators should be supported in creating an environment promoting empathy, inclusivity, and respectful communication. Harassment in schools often reflects broader societal issues, making it a collective responsibility to prevent harm. By fostering a safe and supportive learning environment, we ensure that educators, parents, students, and communities contribute to the well-being of our youth and respect the complexities of their development.

II. Submitting Members' Legislative Recommendations

A. Proposed Amendments to Vermont Peer Harassment Statute 16 V.S.A. § 11(a)(26)(B)(i) To Explicitly Prohibit "Hostile Environment" Sexual Harassment

The current statutory prohibition against harassment of Vermont students, does not protect students explicitly from sexual harassment which creates a 'hostile environment." Rather, the prohibition of "sexual harassment/hostile environment" is found only within the State's Model Policy, and is arguably unsupported by statute. (Model Policy, Section IV.G(1)(Definitions)) Furthermore, in the Policy, "sexual harassment/hostile environment" is defined by use of the terms "*severe or pervasive*." In response to the concerns raised with the Working Group about how those terms have or could operate to restrict student protections, VSBA and the Network Against Domestic Violence ("Network") designee/representatives, were tasked by the Working Group to separately confer and provide a recommendation to Working Group members for their consideration, submitted a written proposal on December 18, 2023 ("December Proposal").

The Submitting Members endorse the December Proposal recommended amendment to 16 V.S.A. §11(a)(26)(B)(i). The Amendment would add a new subsection: (26)(B)(i)(b) which would: (1) explicitly provide statutory support for protections for students from "hostile environment" "sexual harassment" and (2) do so without incorporating the concepts or terms "severe, persistent or pervasive." A brief walk-through of the proposed Amendment follows immediately below.

1. Context: Existing Vermont Law and Vermont Agency of Education Policy

Vermont law currently prohibits harassment of students in Vermont schools as follows:

> 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."
>
> 16 V.S.A. § 11(a)(26)(A).

The law, often referred to as the "peer harassment statute" continues to identify a few explicit subcategories of harassment, including "sexual harassment." The statute, however, only prohibits <u>one</u> category or "type" of sexual harassment - that which is traditionally known to be "quid pro quo" conduct - where it satisfies the following definition:

> (i) Sexual harassment, which means conduct that includes unwelcome sexual advances, requests for sexual favors and other verbal, written, visual, or physical conduct of a sexual nature when one or both of the following occur:
>
> > (I) Submission to that conduct is made either explicitly or implicitly a term or condition of a student's education.
> >
> > (II) Submission to or rejection of such conduct by a student is used as a component of the basis for decisions affecting that student.
> >
> > Vermont's Peer Harassment Statute 16 V.S.A. §11(a)(26)(B)(i).

The statute does <u>not</u>, however, prohibit sexual harassment which could constitute a "hostile environment."

In creating the Model Policy for the Prevention of Harassment, Hazing and Bullying (2015) ("Model Policy") the Vermont Agency of Education ("AOE") expanded the protections with respect to sexual harassment for students beyond that provided by Vermont law. It prohibits sexually harassing behaviors directed towards students which could constitute <u>either</u> the current statutory definition of "quid pro quo" or, alternatively a prohibition for conduct occurring between students or non-employee third parties which constitute a "hostile environment." The policy definition, set forth immediately below, does so within the bold underlined italicized text:

> "…unwelcome conduct of a sexual nature, that includes sexual violence/sexual assault**,** sexual advances, requests for sexual favors, and other verbal, written visual or physical conduct of a sexual nature, and includes situations when one or both of the following occur:
>
> i. Submission to that conduct is made either explicitly or implicitly a term or condition of a student's education, academic status, or progress; or
>
> ii. Submission to or rejection of such conduct by a student is used as a component of the basis for decisions affecting that student.
>
> ***<u>Sexual harassment may ALSO include student-on-student conduct or conduct of a non-employee third party that creates a hostile environment. A hostile</u>***

environment exists where the harassing conduct is severe, persistent or pervasive so as to deny or limit the student's ability to participate in or benefit from the educational program on the basis of sex.

(Source: AOE 2015 Model Policy Part IV.G(1)(Definitions) (emphasis added to denote language that has no current direct statutory corollary in Vermont Statute)).

While AOE's Model Policy explicitly adds protections for students from sexual harassment which constitutes a "hostile environment" it in turn raises concerns for some members of the Working Group in that it (1) contains the terms "severe, persistent or pervasive;" and (2) is arguably unsupported by Vermont statute.

2. Recommended Statutory Change

Accordingly, the Submitting Members recommend[2] that 16 V.S.A. §11(a)(26)(B)(i) be amended to explicitly provide statutory protection for students from "hostile environment" sexual harassment from both students and school employees, and that it do so without reference to the terms "severe, persistent or pervasive,"

Specifically – the following statute would be amended to add §11(a)(26)(B)(i)***(b)***:

16 V.S.A. §11. Classifications and Definitions.

(a)

….

(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.

(26)(B) "Harassment" includes conduct that violates subdivision (A) of this subdivision (26) and constitutes one or more of the following:

(i) Sexual harassment, which means conduct that includes unwelcome sexual advances, requests for sexual favors and other verbal, written, visual, or physical conduct of a sexual nature and any of the following:

(a) When one or both of the following occur:

[2] At various points all members of the Working Group expressed support for this portion of the legislative recommendations, however at the Group's final meeting January 23, members of the HRC stated they could not support it.

(I) Submission to that conduct is made either explicitly or implicitly a term or condition of a student's education.

(II) Submission to or rejection of such conduct by a student is used as a component of the basis for decisions affecting that student.

(b) *A hostile environment is created. A hostile environment exists where the harassing conduct denies or limits the student's ability to participate in or benefit from the educational program on the basis of sex.*

The proposed addition of subsection (b) acts to codify protections already provided to Vermont students in Vermont schools from sexual harassment pursuant to the AOE's Model Policy since 2015. The proposed amendment, goes further, and excludes the language that exists in that policy as defining sexual harassment hostile environment with the use of the terms "*severe, persistent or pervasive.*"

B. Proposed Amendment 16 V.S.A. §570f to Remove "Severe or Pervasive" Standard For Civil Suit Claims against Vermont Schools for 'unlawful harassment."

The Submitting Members further endorse the December Proposal which additionally recommended amendments to 16 V.S.A. §570f to again eliminate the terms "severe" or "pervasive." A brief walk-through of the proposed Amendment follows immediately below.

1. Context: Existing Vermont Law

Vermont law currently provides a right of recovery for money damages through a civil action brought against a Vermont school for educational harm resulting from acts of harassment. Recovery, however, is limited to cases satisfying the standards as set forth in 16 V.S.A. §570f. That standard also contains the terms "severe and pervasive[3]." The statute, in its current form is set forth below in relevant part:

16 V.S.A. §570f. "Harassment; notice and response"

…

(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:

[3] The statute also contains the directly related multiple/single instances construct.

(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. (Emphasis added)

2. <u>Recommended Statutory Change</u>

The civil suit statute, as any negligence statute, requires civil litigants seeking recovery from a school for acts of harassment, to demonstrate the victim student suffered actionable harm. As the statute pertains to claims alleging a failure by a school to regulate and respond to conduct of minor students, harm is defined so as to recognize student First Amendment rights in these contexts.[4] Thus the statute currently requires proof that the peer harassment has *"substantially and adversely affected the targeted student's equal access to educational opportunities or benefits provided by the educational institution*." Nevertheless the statute contains the problematic, and arguably unnecessary terms of "severe" or "persistent" in defining that harm.

Accordingly, the Submitting Members endorse the December Proposal which recommended amendments to the civil suit statute of 16 V.S.A. §570f that would set a standard of proof for litigants that replaces consideration of "severe" or "pervasive" (depending on whether there were single or multiple instances, see strike-through language below), and replaces it with a single standard which otherwise retains a negligence standard. This negligence standard has been the law of Vermont since 2005.

16 V.S.A. §570f "Harassment; notice and response"

….

(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~~

[4] A more detailed exploration of these First Amendment protections and a school's duty to honor them is provided in Section 3 immediately following.

~~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.~~

When viewed from an objective standard of a similarly situated reasonable person, the targeted student's equal access to educational opportunities or benefits provided by the educational institution was substantially and adversely affected.

Contrary to concerns raised by the Commission this can only be used to dismiss lawsuits where either a litigant does not allege any harm, or after lengthy discovery (on average multiple years), a defendant could seek dismissal by demonstrating to the satisfaction of a court no reasonable jury would ever be able to find such harm proven.

3. The HRC Proposal to Amend 16 V.S.A. 570f

In contrast, the HRC Proposal submitted by the Human Rights Commission proposes to go further, and amend the civil suit statute by also removing any requirement that a litigant prove the harassing conduct "*substantially impact() (the victim) student's educational performance."* Such changes are objected to by the Submitting Members as (a) running afoul of Constitutionally guaranteed student protections; (b) altering the duty owed by schools from one of negligence; (c) incentivizing school responses at odds with other stated objectives of the Working Group such as encouraging schools to move *away* from punitive approaches; (d) resting on a misunderstanding on the current relationship between the civil suit standard and school's current duties to respond to conduct that merely "may" be harassment; and (e) as unnecessary to protect students from "emotional harm."

a. First Amendment Limitations on School Harassment Statutes

If enacted, the HRC Proposal would run headlong into legitimate constitutional challenges. Because "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[,]" the Legislature is compelled to consider the first amendment implications of the HRC Proposal. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969).

The proposed change would permit civil suits where complained-of conduct has the *purpose* of harassing based on a protected category, but cannot be shown to have had the *effect* of adversely impacting the victim's educational performance. To in turn avoid liability a putative defendant school would be compelled to focus solely on the motive of the student -or teacher -speaker, and not on the educational impact of such speech. In this way, schools would run afoul of statutory protections as the Supreme Court has emphatically declared, "*[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).

Indeed, as the Third Circuit held in a case overturning as unconstitutional a Pennsylvania school district anti-harassment policy, which case was recently cited by the Vermont District Court in the *Bloch* matter referenced below:

> Moreover, 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).

Second, because anti-harassment laws limit expressive speech, they are subject to strict scrutiny from the courts and pass constitutional muster only with the demonstration of a "legitimate" and "compelling" countervailing government interest—for schools, that interest is their educational mission. Saxe, 240 F.3d at 209. In other words, in order for a school's anti-harassment law to be constitutionally valid, it must be tied to preserving the school's educational mission, and must include language to that effect. *Id.* Removing the qualification that harassing conduct have a "substantial" impact on the educational mission opens the law up to overbreadth constitutional challenges. "[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chicago v. Morales*, 527 U.S. 41, 52, 119 S. Ct. 1849, 1857, 144 L. Ed. 2d 67 (1999) (citation omitted). In that vein, the 11th Circuit held that an 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). Here, even if the conduct were to have only a slight impact on the victim's education, it could still form the basis of a civil suit. A reviewing court might find that the statute's sweep is thus overly-broad and unconstitutional.

It must be emphasized that these concerns are not merely theoretical, that first amendment litigation challenges to existing harassment protections are not something reserved to the future. In late December Vermont's federal District Court issued a lengthy decision expressing doubt as to the constitutionality of Vermont's statutory definition of "harassment." The Court took aim at the portions of that definition which can be read to fail to require demonstration of educational impact and in so doing threaten First Amendment protections. In a December 2023 Order, the court, in assessing plaintiff's claim that the state HHB policies are overly-broad and thus unconstitutional, observed that the definition of 'harassment' includes speech that has a prohibited 'purpose' *even if the speech produces no impact*. The Court opined that in this respect,

> "the 'purpose or effect' clause of the policies is not as limited as Defendants suggest, but rather allows school officials to 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). The Court further expressed concern as to the fact that harassment is defined to "speak in terms of 'purpose *or* effect' and, contrary to Secretary Bouchey's argument, do not require the creation of 'an objectively negative *educational* environment,' but require only an 'objectively . . . offensive environment' regardless of where it takes place." *Id.* at n. 14. In other words, the Court found that Vermont's current statutory definition allows a school to focus on the speaker's motive rather than being limited to cases of speech with demonstrable effect on the learning environment. Thus the Court 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*." Order denying preliminary injunction at 44.

The HRC Proposal to amend to §570f and remove a need for litigants to demonstrate significant educational harm would 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 Constitutional law. In so doing it would create immediate liability for schools under the First Amendment. A school's ability to constitutionally regulate student speech turns on whether that speech could create a substantial disruption to the learning environment. Legislative action must account for and can not ignore First Amendment rights.

b. HRC Proposal Essentially Would Impose a Standard of Civil Liability Inappropriate to School Settings and Previously Rejected by the Vermont Supreme Court

Putting aside the Constitutional implications of the HRC Proposal of the Commission, such changes would essentially create a strict liability cause of action against schools—i.e. one lacking any requirement of measurable harm essential to negligence. Schools could be held liable for conduct that a) has no impact on the educational environment; or b) has only a de

minimis impact. Thus, schools will be held liable absent any demonstration of harm, which would untether the cause of action from a negligence standard. There is no evidence that opening up the litigation floodgates would somehow further the anti-harassment purpose. As the Vermont Supreme Court observed, in a decision explicitly rejecting a standard of school liability in a manner less expansive than that in the HRC Proposal, the importance of balancing "a student's right to be free of harassment in educational institutions" with "a school's opportunity to respond to alleged harassment before being subject to litigation." *Washington v. Pierce*, 2005 VT 125, ¶ 32, 179 Vt. 318, 331, 895 A.2d 173, 185 (2005). It is also worth noting that our neighbors in New Hampshire take the polar opposite approach of allowing school liability in the harassment context to exist only where it can be proven that the school engaged in "grossly negligent" behavior in failing to prevent harassment. N.H. Rev. Stat. Ann. § 193-F:9 (effective date July 30, 2021).

c. HRC Proposal Would Increase Punitive Responses

The proposed amendment 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. In so doing, by making Schools responsible for any and all harassment regardless of its educational impact on a student victim the HRC Proposal of the Commission would induce school responses at odds with other stated objectives of the HRC. The Group heard and agreed that it is desirable that school responses to harassment center less on punitive approaches. Increasing school liability for conduct of students or adults committed within a school, regardless of substantive educational actual impact, would in fact increase reliance on punitive responses by school systems. The Proposal, if adopted, incentivizes schools to discipline speech where no discernable interest of educational access is implicated.

d. HRC Proposal Rests on Continued Mistreatment of Civil Suit Statute Standards on Current Administrator Duties to Respond.

Fundamentally, the HRC Proposal to amend the civil suit standard to remove proof of educational impact fundamentally rests on a mis-understanding on the current relationship between the civil suit standard and school's current duties to respond to conduct that "may" be harassment. Proponents suggest that unless "educational impact" standard is removed (from a statute that relates to the standard of proof in a civil suit context), schools are not required to look into conduct where educational impact is not yet fully proven. In fact duties to respond are directly set by policies and procedures enacted as a result of an entirely separate section of the harassment statute, requiring that the harassment prevention policy required by subsection 570 shall include "a procedure for investigating reports of violations and complaints." 16 V.S.A. §570a(a)(3). The policy and procedure required by statute is in turn developed and promulgated by the Agency of Education.

Thus 16 V.S.A.§570 and 570a requires that all Vermont schools have adopted the Agency's Model Policies and Procedures for the Prevention of Harassment, Hazing and Bullying ("The Procedures"). The Policies define harassment consistent with Vermont statute (with the exception as previously discussed above of sexual harassment which creates a hostile environment, which the Agency added to the policy without a direct statutory corollary). The Procedures set forth Administrative responsibilities for enforcing the Policy. The Procedures impose mandatory duties of response upon Vermont schools and have been deemed enforceable regardless of whether they have been specifically adopted by a Vermont school.

In so doing, the Procedures do not limit Administrative (or Staff) duties to address potential harassment to only those cases where harassment can ultimately be proven to have occurred, and satisfy all elements of harassment as defined in §11a(26)(A). Rather, the Procedures in two sections clearly impose affirmative duties upon staff and administrators to respond when in receipt of information about conduct that falls well below that standard:

> AOE 2015 Model Procedures Section IIB states with respect to all employees:
>
> *Any school employee who **overhears or directly receives information** about conduct that might constitute hazing, harassment and/or bullying shall immediately report the information to a designated employee and immediately complete a Student Conduct Form (emphasis in original).*

Trainings offered to Vermont educators[5] by VSBIT on implementation of these procedures strongly emphasize that in determining whether conduct "might" be "harassment" employees are not to wait for their subjective belief that all elements of that definition have been met, but to act under this Section upon receipt from any source of information of any conduct that "may" be "based on or motivated by a protected category."

> AOE 2015 Model Procedures Section III.A. states with respect to all Building Administrators:
>
> Unless special circumstances are present and documented, such as reports to the Department for Children and Families ("DCF") or the police, the school administrator shall, no later than one school day after Notice to a designated employee, initiate or cause to be initiated, an investigation of the allegations, which the school administrator reasonably believes may constitute harassment, hazing or bullying.

This requires Administrators to act on information they receive from any employee and to assess whether they posses reasonable belief of conduct that, again, does not absolutely meet the harassment definition in §11a(26)(A), but to consider merely whether they have reasonable belief of conduct satisfying a far lower standard, conduct that "may" constitute harassment. VSBIT trains Vermont School Administrators that in order to comply with the legally mandated

[5] VSBIT has for several years offered a three part series on HHB responsibilities in the Fall and Spring, with each session lasting approximately three hours, with all new material in each session.

procedures they should not wait for subjective proof of all elements of the harassment definition in §11a(26)(A) before launching investigations, and are shown how in many cases of harassment, such elements may not be fully understood until an investigation has been pursued. To suggest that Administrators have no duty to act until "substantial" educational harm is demonstrated ignores the current state of law and procedures governing Vermont schools. 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 "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.*

e. HRC Proposal is unnecessary to protect students from "emotional harm"

Related to the above, it has been suggested that the HRC Proposal is necessary to protect students targeted by harassment in cases of emotional harm. Such a potential scenario is already acknowledged and protected under the current definition of harassment in §11a(26)(A). That definition prohibits conduct that has a substantial impact on student educational performance or student access to education. Emotional impacts impair students access and/or performance even when they attend school and continue to succeed academically - through distractibility, dysregulation, anxiety, etc. Removing the damages component from the civil suit statute does not operate to limit Administrator responses compelled by the definition in §11a(26)(A) or its enacting AOE Policy and Procedures. The statute plays no role in Administrator and staff responsibilities - that, again, is governed by the state mandated Policy and Procedures under §570 and §570a.

3.The HRC Proposal to Amend 16 V.S.A. §11a(26)(A) to add "subsection (C)" qualifying the definition of harassment.

Finally, the HRC Proposal recommends amending the definition of harassment to add an the following additional subsection (C):

(C) Notwithstanding any judicial precedent to the contrary, the conduct described in this subdivision (a)(26) need not be severe or pervasive to constitute harassment. In determining whether conduct constitutes harassment:

The determination shall be made on the basis of the record as a whole, according to the totality of the circumstances, and a single incident may constitute harassment. Incidents that may be harassment shall be considered in aggregate with varying types of conduct and conduct based on multiple characteristics viewed in totality rather than in isolation.

(iii) Conduct may constitute unlawful harassment, regardless of whether:
(I) the complaining student is the person being harassed;

(II) the complaining student acquiesced or otherwise submitted to or participated in the conduct;
(III) the conduct is also experienced by others outside the protected class involved in the conduct;
(IV) the complaining student was able to continue the student's education or access to school resources despite the conduct;
(V) the conduct resulted in a physical or psychological injury;
(VI) the conduct occurred outside the complaining student's school.
(iv) Behavior that a reasonable person with the same protected characteristic would consider to be a petty slight or trivial inconvenience shall not constitute harassment pursuant to this subdivision (a)(26).

a. Substantive Objections

1. Duplicative And Unnecessary Amendments Carry Risks of Confusion and Additional Burdens To the Field

Substantively the proposed amendment to (a)(26) seeks to add new factors to the definition of illegal harassment set forth 26(A) with proposed section (C) that are at best moot and unnecessary under current law or contradictory and would likely result in inconsistent application statewide. It is, for example, 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 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.

So while it may appear that the creation of duplicative law would do no harm, school administrators and staff are flooded yearly with new legal mandates and requirements. 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.

A review of the Submitting Member's position with respect to each element of the HRC Proposal's offered amendment to 16 V.S.A. §11a(26)(A) to add a new Section (C) is set forth as follows -

> **The proposal to amend the definition to require determinations *"be made on the basis of the record as a whole, according to the totality of the circumstances, and a single incident may constitute harassment. Incidents that may be harassment shall be considered in aggregate with varying types of conduct and conduct based on multiple characteristics 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 Students[1], 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*."

Proposed Additional 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.

Proposed Additional 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 determine whether conduct constitutes "harassment." As previously explained above the analysis imposed by 11(a)(26)(A) 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.

Proposed Additional 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.

Proposed Additional Section (C)(iii)(IV) (stating that conduct may constitute unlawful harassment regardless of whether "*the complaining student 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 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 many cases will place the school in the untenable position of acting in conflict with First Amendment protections - as stated above.

Proposed Additional 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.

Proposed Additional 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 does not limit a school's duty to respond based on the location 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 either have intended or actual impact the student's on school access or performance, or objectively creates an intimidating, hostile or offensive environment. Thus the location of the behavior is immaterial to a determination of harassment under current law.

APPENDIX F

VERMONT LEGAL AID

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To: Committees of Jurisdiction
From: Cammie M. Naylor, Staff Attorney, Disability Law Project at Vermont Legal Aid
Date: January 26, 2024
Re: Working Group on Student Protections from Harassment and Discriminations in Schools – Disability Law Project Position on Eliminating the Severe or Pervasive Standard.

BACKGROUND

In June 2023, Act 80 (previously S.103) brought much needed protections from harassment to the workplace for employees by making changes to Title 21 of the Vermont Statutes and the Vermont Fair Housing and Public Accommodations Act.

Before its passage, the House General Committee proposed changes to S.103. Their changes were referred to the House Education Committee. These evolved into the Working Group on Student Protections from Harassment and Discrimination in School [hereinafter the Working Group] to ensure the legislature took time to understand the issues and hear from all viewpoints before making changes to Title 16 comparable to those made to Title 21 and the VFHPA. Those proposed changes can be found on pages 11-14 of this document. DLP offered testimony to the House Education Committee on May 03, 2023, to indicate our support for the House General changes to Title 16. We continue to support those changes.

Below is the Disability Law Project's position on the Working Group's Charge 1: Eliminating the severe or pervasive standard for harassment and discrimination for students in educational institutions. The Working Group could not come to consensus on this charge. For all other legislative charges, the Disability Law Project joins with the Working Group's Report.

RECOMMENDED CHANGES

The DLP supports changes to Title 16 that do the following:

1. Amend the definition of Harassment within Title 16 to disentangle educational performance from whether harassment occurs.
2. Include additional definitional criteria that clearly state a child need not prove harassment was severe or pervasive and identifies factors to consider whether harassment occurred.
3. Amend the current civil liability standard to remove the criteria a plaintiff shows the harassment they experienced was either severe or pervasive. Thereby allowing a child or their parents to file or submit a complaint where they can show they were harassed.

REASONS FOR RECOMMENDATIONS

Definition of Harassment under Title 16

Currently, for conduct to meet the definition of harassment, the purpose or effect of the behavior must objectively and substantially undermine or interfere with a student's educational performance or access to school. 16 V.S.A. §11(a)(26)(A).

This definition ties whether a child was harassed not how they are harmed, or whether they feel like they cannot safely be at school, but whether their grades and attendance are impacted. Under this definition, resilience and individual drive hurt a child's ability to show they were harassed. This definition is unreasonable. Students should not have to see their grades fall, or not be able to go to school for the harassment the experience to be real, and for a school and district to be responsible for addressing the unwanted behaviors. It is important to note that Title 16 refers to not just student on student harassment but any behavior, within or impacting the educational environment, targeted at a child that meets the definition of harassment.

Civil Liability Standard

Under 16 V.S.A. §570f(c), a child or their parents can bring a lawsuit to court, or a claim of harassment to the Vermont Human Right's Commission, if they can show

the harassment was severe or pervasive. Pervasive means conduct that over multiple incidents continue over time and alter the educational environment. Severe means, potentially, but rarely, even a single incident that alters the educational environment. In addition, the child or their parents must show the incidents, when viewed from the perspective of a reasonable person impacted the child's equal access to opportunities or benefits provided by an educational institution.

The current effect of these two sections of Title 16 prevents students who experience harassment at school from holding their schools accountable for failing to stop or allowing harassment to continue.

With the changes to Title 21 and passage of Act 80, teachers are better protected from harassment in their workplace than the children they teach even if the teacher and the student are subject to the exact same behavior by the exact same person.

Children and their families do not want to have to file HRC complaints or lawsuits. They want their schools to take their safety seriously, to make and implement safety plans that protect them from harassment without impacting their schedules or ability to participate fully in classes, and in school activities and events. Civil liability is a stick to encourage schools to do this. Carrots, such as AOE provided training and support on a variety of school climate topics are also important.

When schools do not act, children should not have to fail in school, or be so impacted they cannot walk through the front door, to show that a district is liable to them. This is true whether the harassment is based on any protected class status, not just students who are also protected by Title IX in federal law.

RESPONSE TO REASONS FOR OPPOSITION TO CHANGES

The DLP is aware of at least two objections to the proposal. First, other stakeholders in the Working Group viewed these proposed changes as creating a strict liability standard for when schools can be held accountable for their students' harassing peers. Second, they shared concerns about possible first amendment challenges based on regulating student conduct.

"Strict Liability" Standard

Strict liability would only exist if the **only** thing a student had to prove was that the harassment occurred.

However, amending Title 16 to remove reference to "substantial" and "educational performance" still requires a plaintiff student to prove that the purpose or effect of the harassing incidents objectively undermined and detracted from or interfered with their education and educational access. The student still must prove not just that harassment occurred, but they experienced harm because of the harassment. Amending the definition and removing the severe or pervasive standard makes it possible for students who experienced harassment to state a claim for which relief can be granted. This is a standard in the court rules where, if not met, the case can be dismissed without reaching the merits. So, this change merely allows a complaint to survive a motion to dismiss, or in the HRC complaint context, to be considered for investigation.

First Amendment

Another concern raised by stakeholders is that it would put Districts at risk of lawsuits arguing their harassment investigation and response practices violate the harassing student's first amendment rights. The concern, as we understand it, is that the change we support would require schools to regulate students' speech and conduct beyond existing exemptions to the First Amendment, making schools responsible for student conduct in the same way they are for employees without similar abilities/rights to manage that behavior. If accurate, it is important to note that Title 21 and Act 80 protect school staff from harassment that is not severe or pervasive, including student conduct. Therefore, districts are already responsible for regulating student conduct to protect their staff, so it is unclear why this concern arises when we take steps to protect our children in comparable ways. Furthermore, Constitutional law precedent allows schools to regulate student speech that materially disrupts classwork or involves substantial disorder or invasion of the rights of others. Therefore, in an instance where another student's education and educational access is interfered with, a school has a responsibility, as a public entity, to ensure equal access and equal protection. DLP attorneys are not First Amendment scholars, nor are school professionals. The DLP encourages the Committees of Jurisdiction to take testimony from constitutional experts.

CONCLUSION

We support these changes to Title 16 as essential and also recognize that change is incremental. The DLP would also support proposed language to include hostile environment within the Title 16 definition of sexual harassment. This change would statutorily codify protections that already exist within the Agency of Education's Model Policy on Hazing, Harassment, and Bullying. The DLP supports this amendment. The DLP would also support any changes to Title 16 that removed the requirement tying harassment to educational performance.

We appreciate any changes consistent with the recommendations of the Working Group. The DLP is particularly invested in the Working Group Charge 3: Recommendation 3 as it relates to differentiated response for disability- related behavior.

The DLP would welcome an opportunity to greater discuss with the committee.