

PROPOSED STATUTORY CHANGES TO STUDENT PROTECTIONS

1. Proposed Amendments to Vermont Peer Harassment Statute To Explicitly Prohibit “Hostile Environment” Sexual Harassment

Current Law

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”¹ continues to identify a few explicit subcategories of harassment, including “sexual harassment.” The statute, however, only prohibits one category 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 not, 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 expanded 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 either the current statutory definition

¹ It is not, however, limited to the conduct of students, the statute also prohibits the conduct of school employees when directed towards students in Vermont schools.

of “quid pro quo” or, alternatively a prohibition for conduct occurring between students or non-employee third parties which constitute a “hostile environment” (see red text below):

“...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.

Sexual harassment may ALSO include student-on-student conduct or conduct of a non-employee third party that creates a hostile environment. A hostile 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.

AOE 2015 Model Policy Part IV.G(1).(Definitions). (RED/BOLD TEXT GOES BEYOND STATUTORY DEFINITION).

The red language denotes AOE’s additional protections for students from sexual harassment constituting a “hostile environment.” That definition, however, raises concerns for some members of the working group in that it (1) contains the terms “severe, persistent or pervasive”; (2) is unsupported by Vermont statute, and (3) does not clarify that it governs the conduct of school employees when directed towards students.

Summary of Working Group Discussion

Members of the Working Group on Student Protections From Harassment and Discrimination in Schools have considered the AOE’s Model Policy’s definition of sexual harassment and heard criticism and concerns raised with respect to its inclusion of the terms “severe, persistent or pervasive.” While there remains disagreement among members on the actual legal impact those terms have on the scope of the protection actually provided to Vermont students, it can be conceded that those terms - originally developed within the context of employment law to govern the conduct of adults in very different circumstances than an educational environment for students many if not most of whom are minors - may result in a misapplication and the unnecessary restriction of the protections intended by the AOE’s Model Policy. In such instances the language operates to reduce or eliminate protections intended for Vermont students by the Agency policy.

Additionally, the AOE’s Model Policy prohibition against “hostile environment” sexual harassment lacks statutory support.

Finally, the AOE’s Model Policy is vague as to whether it prohibits the conduct school employees - when directed towards students – with respect to “hostile environment” sexual harassment of students.

Proposed Statutory Change

Accordingly, it is proposed 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” - as follows (underlined text are additions):

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:

(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 amendment to 16 V.S.A. §11(a)(26) would codify protections applied and provided to students in Vermont schools from sexual harassment under the Model Policy since 2015. The amendment would further remove from the Model Policy’s sexual harassment

definition the distracting and unnecessary language of “*severe, persistent and pervasive*” which can result in the importation of employment law standards of conduct inappropriate to the protections intended for Vermont students. Finally, it clarifies that the conduct of staff and other school personnel, when directed at students, are covered by its prohibitions.

2. Proposed Amendment to the Standard Applied to Peer Harassment Civil Suit Claims under the Vermont Public Accommodations Act

Current Law

Vermont law currently provides students a right of recovery for damages through a civil action brought against their Vermont school for educational harm resulting from acts of harassment. Recovery, however, is limited to cases satisfying the standards set forth in 16 V.S.A. §570f.

16 V.S.A. §570f. “Harassment; notice and response” states in pertinent part:

...

(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. (Emphasis added)

Summary of Working Group Discussion

Members of the Working Group on Student Protections From Harassment and Discrimination in Schools have considered and heard concerns regarding the impact of the terms “so pervasive” and “so severe” and the use of single/multiple instances concepts on this standard of liability. Again, members were not in agreement on the legal impact of those terms. Nevertheless, the members agree their inclusion may have the unintended effect of unduly limiting and circumscribing protections aimed at students by importing concepts and limitations developed within the context of employment claims for adults. Removal of those terms and the conceptual

structure of single/multiple instances eliminates unnecessary restrictions on the intended protections for Vermont students.

Proposed Statutory Change

Accordingly, the Members can agree and propose that the statute be amended as follows to (new language underlined, removed language ~~struck~~).

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.

Summary

Combined these two statutory proposals will clarify and strengthen protections owed to Vermont students by Vermont schools under the harassment statute (16 V.S.A. §11(a)(26)), by:

- (1) Removing confusing and outdated concepts of ‘severe, persistent and pervasive’ - originally derived in employment settings - for both the peer harassment sexual harassment definition, and the civil suit statute (16 V.S.A. §570f(c));
- (2) Clarifying that those protections apply to adult-to-student behaviors; AND

- (3) Codifying in statute the protection for students from sexual harassment which creates a 'hostile environment.'