



House Education Committee-House Bill 2464
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Good morning. My name is Sean Fields, and I am Senior Associate Counsel for the Pennsylvania School Boards Association (PSBA). I would like thank the committee for providing PSBA with the opportunity to give testimony on House Bill 2464. Today, I would like to provide this committee with PSBA's perspective on measures that are currently in place to effectively deal with bullying and harassment, as well as how this bill might impact public schools in their current efforts to deal with these issues.

On behalf of public school districts, intermediate units, and career-tech schools across Pennsylvania, PSBA has consistently recognized and promoted the importance of student safety and the need to create a positive school climate by effectively dealing with bullying and harassment in public schools. PSBA provided extensive input into the last amendments to Section 1303.1-A¹ of the Pennsylvania Public School Code prior to the passage of Act 61 of 2008. Act 61 was an important effort in providing school entities with a clear set of policy requirements balanced with other concerns. The Act 61 changes reflected the importance of possible legal challenges to school district policies as well as practical considerations regarding how the statute and school policies would be implemented.

¹ 24 P.S. 13-1303.1-A

Additional efforts by PSBA have included the development of “Ten Questions a Public School Entity Should Be Asking About Bullying Prevention,” a document intended to prompt public school entities to perform an informal assessment of how they are dealing with bullying and harassment issues in their respective schools. The document challenges school entities to consider how they identify bullying problems, training options for school employees at every level, and the implementation of prevention and investigation measures related to bullying. Further efforts to address these issues have included PSBA’s participation in a joint presentation at the 2011 Safe Schools Conference along with representatives from the Pennsylvania Human Relations Commission, the Office for Civil Rights of the U.S. Department of Education, (OCR), and the Pennsylvania Parent Information and Resource Center. While PSBA continues to support efforts to effectively deal with bullying and harassment in public schools, PSBA has specific concerns with the current version of House Bill 2464 that are summarized below.

Section 1303.1-A(a) of House Bill 2464 would expand the scope of requirements for schools to encompass not only “bullying” as currently defined in Section 1303.1-A, but other categories including “harassment”, “intimidation”, and “cyberbullying.” While these terms are linked together in one definition, none of the terms are specifically defined by the bill and raise other potential issues. “Harassment”, is a term that means something specific in the context of existing federal law that currently addresses many instances of bullying. Although “bullying” is not specifically addressed in federal law, the Office for Civil Rights (OCR) of the U.S. Department of Education, issued a “Dear Colleague Letter” on October 26, 2011, reminding public schools that bullying that rises

to the level of discriminatory harassment is illegal discrimination. Therefore, public schools have a legal obligation to address conduct that rises to the level of illegal discrimination under federal law.

Title VI of the Civil Rights Act of 1964² prohibits discrimination on the basis of race, color, and national origin. Title IX of the Education Amendments of 1972³ prohibits discrimination on the basis of sex. Title II of the Americans With Disabilities Act of 1992⁴ and Section 504 of the Rehabilitation Act of 1973⁵ prohibit discrimination on the basis of an individual’s disability status. The “Dear Colleague” letter also summarizes existing federal case law that supports the proposition that public school entities may violate a student’s civil rights under federal law when peer harassment based on race, color, national origin, sex or disability is sufficiently serious that it creates a hostile environment and where such harassment is encouraged, tolerated, not adequately addressed or ignored by school employees. Under federal law, a hostile environment is created when conduct is “sufficiently severe, pervasive, or persistent” so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school when such harassment is based on race, color, national origin or disability⁶. Therefore, federal law currently sets legal standards for how school districts must respond to incidents of discriminatory conduct that would apply to many

² 42 U.S.C. §2000d *et seq.*

³ 20 U.S.C. §1681 *et seq.*

⁴ 42 U.S.C. §12131 *et seq.*

⁵ 29 U.S.C. §12131 *et seq.*

⁶ 34 C.F.R. parts 100, 104, and 106.

instances of bullying under Pennsylvania law. The kind of discrimination described in this paragraph is also covered under the Pennsylvania Human Relations Act⁷.

“Intimidation” is also included in the scope of House Bill 2464 but is not specifically defined. One potential problem with the inclusion of this term is the issue of determining what type of conduct would rise to the level of intimidation. While the current definition of “bullying” in Section 1303.1-A of the School Code is a very specific definition, it is unclear how “intimidation” would fit within a school entity’s bullying policy due to the vagueness and possible different interpretations of the term. Such problems would make identification and enforcement problematic at the school level.

Section 1303.1-A(a) of House Bill 2464 would also mandate a newly created legal duty for school officials to “ensure a bullying policy is implemented.” This would result in increased liability exposure for school entities and specifically the designated school staff person who would be responsible for ensuring such implementation. Because the successful implementation of any policy requires the cooperative efforts of the entire school community, PSBA objects to this provision because of the enhanced liability that it would create.

Additional liability concerns are raised by proposed language appearing in Section 13-1303.1-A(5) of the bill. That section would require the policy of each school entity to contain, “A statement that no student shall be subjected to harassment, intimidation, bullying, or cyberbullying in any public educational institution . . .” While the goal of any school entity when dealing with bullying or harassment should be to have policies and procedures in place to prevent, identify, and effectively deal with such

⁷ 43 P.S. § 951 *et. seq.*

incidents when they occur, even the most proactive school entity would not be able to ensure there would never be a single incident of bullying or harassment. Therefore, requiring school entities to adopt such a statement in their policies would increase the likelihood of litigation against those school entities regardless of the effectiveness of the entity in preventing, investigating, and responding to allegations of bullying or harassment.

Additionally, proposed language in Section 1303.1-A(a) of the bill would require a school entity to involve students, parents, administrators, school staff, school volunteers, community representatives and local law enforcement agencies in the process of adopting the policy. While PSBA promotes the value of community engagement in the reduction of bullying and harassment, the specific adoption of policy is the legal responsibility of the elected board of that school entity. Elected boards of school districts, intermediate units, and vocational technical schools adopt policies against a background of a number of different factors including legal requirements, financial constraints, and general school operations. Moreover, the requirement appears to be inconsistent with the section of the bill that requires the Pennsylvania Department of Education to develop a model policy on these issues.

The bill also proposes language in Section 1303.1-A (1) (viii) that would require a statement in a school entity's policy that the policy is applicable to electronic communications, whether or not the act originated on school property or school equipment. This is problematic because the authority of public school entities is limited to the adoption and enforcement of rules pertaining to students while students are under

the supervision of school officials⁸. There are Pennsylvania appellate court decisions, most notably, *J.S. v. Bethlehem Area School District*, that support the proposition that a school district may discipline a student for off campus conduct if there is a sufficient nexus or connection between the conduct and the school. Because of the limits of a school entity's scope of authority, Section 1303.1-A of the school code currently provides school entities with the discretion to regulate cyberbullying but carefully defines bullying in a manner that was drafted to address the constraints of such authority including how such regulation may implicate issues involving student expression under the First Amendment.

One of the current issues facing public school entities in Pennsylvania is the question of whether public schools still have the authority to discipline students for cyberbullying that is created during non-school hours, without the use of the equipment or a server owned and operated by the school entity. In the cases of *Layshock v. Hermitage Area School District*⁹ and *J.S. v. Blue Mountain S.D.*¹⁰, the 3rd Circuit of the U.S. Court of Appeals held that public school districts are not permitted to discipline students for electronic speech that ridicules a school administrator even if that speech is lewd, vulgar or offensive under the standard set forth in the *Bethel School District v. Fraser*¹¹ by the U.S. Supreme Court. Although the cases involved students who subjected school administrators to ridicule, they create real concern about how the 3rd Circuit would decide similar cases involving electronic speech where a student targets another student. While PSBA and many school solicitors in Pennsylvania take the position that electronic

⁸ 24 P.S. §5-510.

⁹ *Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205 (3rd Cir. 2011).

¹⁰ *J.S. v. Blue Mountain School Dist*, 650 F.3d 915 (3rd Cir. 2011).

¹¹ *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (U.S. 1986).

speech targeting another student in the form of harassment is not protected speech and may be subject to school discipline, such a result in the federal courts is uncertain at this point in time. Therefore, school entities should be provided with the discretion to decide whether to discipline students for electronic speech created off-campus after considering the possible legal issues involved and consulting with the school entity's solicitor.

Section 1303.1-A (2) of House Bill 2464 contains various requirements for school entities to report incidents of bullying, intimidation, or harassment. In considering the enactment of these reporting requirements it is important to note that some of the requirements are currently covered in the Section 13-1303-A¹². That section requires the chief school administrator or a school entity to include a number of criminal incidents in a required annual report to the Office of Safe Schools. Moreover public school entities are required to enter into a memorandum of understanding (MOU) with local law enforcement agencies regarding the reporting of criminal incidents. The enactment of additional reporting requirements should take into account the consideration of those incidents public school entities are already required to report under the existing provisions of Section 13-1303-A in order to avoid unnecessary duplication and confusion about specific reporting requirements.

In closing, while PSBA respects the intent of the committee to aggressively combat bullying and harassment in public schools, PSBA is concerned with many of the proposed changes to Section 1303.1-A for the reasons provided today. Once again, I would like to thank the committee for providing PSBA with the opportunity to provide testimony on this important issue. We look forward to working with the committee to

¹² 24 P.S. §13-1303-A

further address the issue of bullying and harassment in our schools. At this time, I would be happy to take any questions the members of the committee may have.