

LYNN, LYNN, BLACKMAN & MANITSKY, P.C.

TO: Rep. David Sharpe, Chair House Education Committee
Marjorie Zunder, Committee Assistant

FR: Heather T. Lynn, Panel Counsel, Vermont School Boards Insurance Trust

DA: April 12, 2016

RE: H. 830

SUMMARY:

My work in over fifteen years of legal counseling on bullying matters leads me to conclude that the work that is occurring around the state right now is comprehensive, far reaching and achieving results. Schools are endeavoring to address bullying in schools with the assistance and guidance of a detailed and sophisticated set of procedures put in place just last year. Comprehensive training and guidance have been provided throughout this school year to schools around the state by VSBIT and that work continues. At the same time, in order to achieve compliance most schools are finding it necessary to commit ever increasing hours of time from already overtaxed and existing positions - the very same positions that are needed to affect, day to day, positive change in the classroom environment of the kind that would reduce bullying in the first place. The focus thus far with all prior amendments had been on student-to-student behavior – and this has been appropriate an appropriate focus. The proposed changes, however, would add to this already full plate a new set of issues for investigation and response: adult to student “bullying” behaviors. This would defray already scarce resources, and would represent an unnecessary sacrifice given the already existing oversight provided by AOE (licensed educators), DCF (suspected abuse of minors) and Vermont State Board of Education Manual Rule 4500 (restraints of students).

I. The Current Bullying Law and Context For Proposed Changes

The legal issues confronted by Vermont’s public schools with respect to supporting and disciplining students forms the focus of my professional life. While I recognize my personal experience in defending and counseling Vermont public schools to be only a sampling of what is

Testimony of Heather T. Lynn, Esq.
Lynn, Lynn, Blackman & Manitsky, P.C. Burlington, Vermont
April 12, 2016, Vermont House of Representatives Education Committee

occurring around the state, I did want to share the changes I have seen in that practice in the past 15 years as they likely provide context for my comments here today. **Approximately fifteen years ago, when these laws were first being passed in the Legislature, the focus of the legal debates then centered on when and how a Vermont school could be held legally responsible for the conduct of essentially third party actors – their own students.** The Supreme Court decision in the case of *Washington v. Harwood Union High School* (2005) (in which I defended Harwood Union High School) as well as the Legislature’s action that same year, settled upon a standard requiring demonstration of “actual notice” of the conduct to the school before holding the school responsible for a student’s conduct and resultant damage which occurs *after* it receives notice. Thereafter, a school would be held responsible to the extent actual notice of the student’s harassing conduct could be proven, and the school’s response to that knowledge was deemed unreasonable.

In the decade since the focus has shifted to mandating the specific types of responses a school MUST engage in following notice of that conduct. Between 2012 and 2015 bullying requirements have been amended such that there are now identical requirements for schools to investigate both harassment and bullying allegations upon notice, with identical timelines for response as had previously been required only in cases of harassment. The 2015 AOE Model Policies and Procedures are the final culmination of that evolution. The procedures are uniformly applied to cases of alleged harassment, hazing and bullying, from initial notice all the way through to remedial measures. The 2015-2016 school year is the first school year of implementation of these Procedures and their accompanying uniform guidelines for intake of complaints, process for investigations and response (interim and remedial) to substantiated cases of harassment and bullying. The result is a sophisticated and complicated rubric of procedural requirements that all Vermont schools are required to follow in response to notice of inappropriate conduct that may rise to the level of bullying as well as harassment and/or hazing.

II. Meeting the Challenge of Compliance - Vermont School Boards Insurance Trust Efforts In HHB / Trainings and Tool Kit

VSBIT provided its input into the AOE Model Procedures rewrite in 2014-2015 in particular, with an eye to providing procedures that are as clear and as explicit as possible for administrators to follow and understand. This is especially important as **HHB laws and the resulting procedures are unique in that they take the prior general standard of review for administrators in their management and response to inappropriate student conduct (one that was informed by a general standard of “reasonableness” on the basis of the surrounding circumstances known to the school administrator at the time) and replaces it with comprehensive and mandatory time frames for response, documents to be created throughout the process (from initial notice of the inappropriate conduct to the issuance of a letter reporting on the outcome to the family of both the targeted student and offending**

Testimony of Heather T. Lynn, Esq.

Lynn, Lynn, Blackman & Manitsky, P.C. Burlington, Vermont

April 12, 2016, Vermont House of Representatives Education Committee

student), and mandatory supervision and support considerations throughout the investigation (from interim measures to remedial measures at the investigation's conclusion). These procedures represent a comprehensive regulatory approach to the management of student behaviors that are quite simply unique. Failure to comply with these requirements exposes schools to multiple layers of internal and external administrative and regulatory review (free upon request to families of targeted students), and can ultimately lead to litigation for money damages, in some cases with prevailing party attorneys' fees to the claimant.

Against this backdrop, VSBIT on behalf of its membership not only provided input into the procedures, but once they were issued in late May 2015, it committed significant resources to the development of the "Tool Kit." In fact, there are four kits – for administrators, designees/investigators, superintendents, and school boards. Each kit summarizes the duties imposed upon the respective audience by the Model Procedures and provides step-by-step guidance, model forms, model reports, and model letters for schools to use throughout the process mandated by the AOE Procedures. As its primary author I can tell you this took over fifty hours of time in preparation. The task of simply preparing a letter to a parent reporting out on the results of an HHB investigation, as someone who has worked on HHB issues for over fifteen years, and argued most of the superior court level and Supreme Court level cases on HHB matters, is not as simple as it may appear. In fact, in any given HHB case there are approximately fourteen different possible letters that may be required in the course of an investigation. Each letter must contain mandatory elements of disclosure and notice from the school to the relevant family as required by the Procedures. Despite the best efforts of all involved in updating the Procedures, their guidance carries one only so far. It is simply unrealistic to expect every administrator, even with the best of intentions in terms of compliance, to implement properly and appropriately all the provisions required by the Procedures. Recognizing this, VSBIT committed the resources to providing this Kit in order that all schools demonstrating good faith and best efforts, would have the ability to operate in compliance with the AOE Policies and Procedures.

That said, even with the Tool Kit and the updated Procedures, more work was required. Accordingly VSBIT provided free trainings for school districts around the state. Those trainings - approximately four hours in duration– cover the mandatory procedures and the tool kit elements necessary to keep a school within compliance. I have been providing these trainings throughout the school year, and continue to schedule those trainings throughout the spring and into next school year. While these sessions are as comprehensive as I can make them, the simple reality is that every case is unique. I have practiced in this area of law for over fifteen years, and as I tell my clients, I still learn new things about how to handle these cases *every* day. Simply approaching the task with good faith and procedures and tool kit in hand are not enough to ensure perfect outcomes and compliance. These are complicated cases and have at their center students (on both sides) with rights to receive a public education. The work continues.

III.HHB Procedures and Insufficient Resources

Testimony of Heather T. Lynn, Esq.

Lynn, Lynn, Blackman & Manitsky, P.C. Burlington, Vermont

April 12, 2016, Vermont House of Representatives Education Committee

If changes were to be made to the existing laws, rather than adding a whole new area for consideration and inquiry through amendments to the bullying statute (ie: adding consideration of teacher/staff/administrator to student interactions for investigation and scrutiny) I see a greater need than ever before to committing resources in Vermont schools – and by this I mean personnel – to identifying HHB issues (as already defined) and responding to them when they occur. To translate this into practical terms this means, not only freeing up time out of the school year for intense training sessions outlined already, but having enough staff and administrators available to commit the time necessary to address these cases when they arise in the comprehensive and detailed manner the procedures require. The time frames imposed on these cases are onerous (an investigation must begin within one business day from “notice” and be completed within five days of “notice”) and can necessitate in many instances that the person tasked with investigating “drop everything” and focus all of their “discretionary time” (to the extent they have it) to creating the necessary documentation, conducting student and staff interviews, contacting parents in person and in writing throughout the course of the investigation, and drafting a comprehensive report which details every step taken, every interview conducted with all information gleaned from the report, all documents reviewed (attendance, grades, prior discipline records), all factual conclusions reached, all policy conclusions reached, and all recommendations for remedial actions in cases of both HHB violations as well as any other inappropriate student conduct found. (By way of contrast, Title IX, the federal corollary, provides that schools and universities conclude similar investigations within at least thirty days (with additional time for good cause)). While these reports and investigations must be completed almost immediately, the findings and reports which support them serve as the focus of any appellate review conducted either internally by the superintendent, or at the school board level, or externally by independent reviewers, the Human Rights Commission, or indeed litigation. These reports are rarely less than fifteen pages and can number up to fifty pages long in certain cases. Again, they must be produced in a very short space of time, and must be accurate and comprehensive. In addition, there is also no guarantee that this will be the “only case” handled by any school investigator at any time.

In my conversations with clients and trainings conducted over the course of the current school year, what has become increasingly apparent to me is that the already scarce resources available to schools for the management and supervision of student behaviors in class and other settings (recess, gym, extra curricular activities) are increasingly being consumed by the need to respond to and investigate allegations of HHB. I asked for and received permission from the Chittenden South Supervisory Union to share the following by way of example of a District with more than the average resources, with positions committed to student behavior and how they are being used as part of the HHB procedures:

Charlotte - 1.0 (200 day) position; salaried; 397 students

Testimony of Heather T. Lynn, Esq.

Lynn, Lynn, Blackman & Manitsky, P.C. Burlington, Vermont

April 12, 2016, Vermont House of Representatives Education Committee

Hinesburg - 2.0 (200 day) positions; salaried; 525 students

Shelburne - 2.0 (200 day) positions; salaried; 725 students

Williston Central - 2.0 (196 day positions); hourly; 719 students

Allen Brook (Williston) - 1.0 (196 day position); hourly; 351 students

These Student Behavior System Supervisors are compensated roughly in the range of \$32,000 to \$50,000 . **While traditionally these positions would have focused on both responding to student behaviors and providing referrals for individual student behavior issues (reactive) combined with providing proactive positive behavior supports (staff and student training, and culture building), a significant portion of their work time is now committed and moving towards investigations. I am told that this can only decrease the very efforts schools can make to be proactive and build better climates that could prevent HHB in the first place, and has impacts on general student behavior issues (reactive).** Beyond that, we are finding (as the state is as a whole), students are arriving at school with challenges we did not even see 10 years ago. The number of paraprofessionals we now have assisting students with behavior issues continues to increase. They are not necessarily students on IEPs. It is just a level of aggression and other behavior management issues that are more and more difficult on top of increasing HHB regulations. It is not just our core student behavior staff that is impacted. As behavior staff time and resources are diverted to investigations, other staff must step into the void to address ongoing behavioral challenges in schools. Despite this, guidance counselors, administrators and many others are spending more and more time on investigations and interventions as a result of the procedures put in place over the past 15 years. When they do, they are not spending time than building positive systems, and are losing the time they were once able to spend in this area to manage HHB issues. My own law practice reflects these trends. Whereas only a year ago I would have divided my time as 80% devoted to the counseling and litigation of student disability matters, with 20% devoted to HHB matters, today that is reversed. Today I spent at least 80% of my time counseling and training administrators and staff around the state on how to respond to HHB matters.

III. Summary

In short Vermont schools are committing tremendous amounts of resources to both train personnel on the existing procedures, and to implement them. Vermont schools are taking their responsibilities as imposed by the AOE Procedures seriously. It is simply inaccurate as some apparently have suggested that without further legislative action Vermont schools have the “option” only to choose to respond to the challenges posed by student bullying. Vermont schools have mandatory responses already imposed and in place by virtue of the laws already on the books and the 2015 Policies and Procedures. **The response to these requirements has already claimed scarce resources and time and has produced more investigations and responses state-wide than ever before.**

The proposed changes to the bullying statute, however, would add to the already full plate of designees and investigators the topic of adult-to-student behaviors for investigation as a

Testimony of Heather T. Lynn, Esq.

Lynn, Lynn, Blackman & Manitsky, P.C. Burlington, Vermont

April 12, 2016, Vermont House of Representatives Education Committee

possible violation of the “bullying” policy prohibition. This will defray resources away from the focus on student-on-student behaviors - defeating the gains of the last 15 years. There simply is no need to make this sacrifice. The conduct of adults in Vermont schools is already subject to monitoring by Vermont AOE for licensed educators, and via the mandatory reporting law for suspected child abuse to Vermont DCF. State Board of Education Manual Rule 4500 saw a comprehensive overhaul several years ago and addresses inappropriate physical restraint of students in Vermont Schools. To add to the definition of “bullying” a new area of scrutiny for interactions between any and all school staff and students for investigation and response by Vermont public school designees and administrator/investigators, is unnecessary and inappropriate.

Vermont schools do not need further or additional regulations, methods of oversight, or targets for investigation. The rubric that has been developed is comprehensive and being implemented with increasing success.

Heather T. Lynn, Esq.

Biography: Heather Lynn is a lifelong Vermonter, practicing attorney, and managing partner of Lynn, Lynn, Blackman & Manitsky, P.C., a Burlington based firm of 10 attorneys. Her practice exclusively is that of counseling Vermont school districts in matters of student discipline, harassment, hazing, bullying and retaliation, as well as programming and support for students with disabilities. She has served as legal partner to the Vermont School Boards Insurance Trust for over 15 years. She lives in her Vermont hometown in Chittenden County and has had three sons attend Vermont public schools, with one still in high school. Her husband and law partner, Pietro Lynn, Esq., also represents Vermont school districts around the state.

Testimony of Heather T. Lynn, Esq.

Lynn, Lynn, Blackman & Manitsky, P.C. Burlington, Vermont

April 12, 2016, Vermont House of Representatives Education Committee