



AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL

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December 6, 2010
By Email & U.S.P.S.

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The Honorable
Vincent Gray, Chairman
Council of the District of Columbia
Washington, DC 20004

Re: Bullying: Bill 18-770 and Bill 18-1057

Dear Chairman Gray:

The problem of bullying, especially in the District's schools, is real and pervasive. Witnesses at the public hearing on November 29th compellingly made the case for legislation. The ACLU of the Nation's Capital strongly supports the enactment of a statute that carefully defines the problem and requires the District's public schools, public charter schools, and other government agencies to address it vigorously.¹ It is in this spirit that we review the two bills before the Council and offer suggestions in three areas:

1. Immunity of School Employees

In Bill 18-770, sec. 5(a), a school employee who reports bullying is absolutely immunized from civil liability. We believe that an employee who knowingly makes a *false* report of bullying should not, for example, be immune from liability to the innocent person who may be harmed by the false report.

We would suggest that the following clause be added to the last sentence of section 5(a): "except if the school employee knowingly makes a false report."

¹ The ACLU's concern about bullying or harassment of students is long standing. In 2003, we developed a "Model Policy for Schools," which is available at http://www.aclu.org/print/lgbt-rights_hiv-aids/model-policy-schools.

2. Need for a Binding Definition of "Bullying-Harassment-Intimidation"

Both bills would allow individual schools and agencies to define "harassment, intimidation or bullying" more broadly than is provided in the legislation. As our third point makes clear, defining "bullying-harassment-intimidation" is no easy matter. The definition must be adequate to successfully delineate the problem without, at the same time, becoming an instrument for stifling freedom of speech. We understand that the two bills will be merged, and urge that the combined bill specify that its definition of "bullying-harassment-intimidation" be the binding definition.

3. Definition of "Bullying-Harassment-Intimidation"

The definition of "harassment, intimidation or bullying" in Bill 18-1057 is overbroad. Section 2(a) reads:

(1) "Harassment, intimidation or bullying" means any gesture or written, verbal or physical act, including electronic communication, that is reasonably perceived as being motivated either by **any actual or perceived characteristic**, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory handicap, or by **any other distinguishing characteristic** that:

(A) a reasonable person should know, under the circumstances, **will have the effect of harming a student** or damaging the student's property, or placing a student in reasonable fear of harm to his person or damage to his property; or

(B) has the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of a school, university, recreation facility, or library.²

As defined, "harassment, intimidation or bullying" would include any word or gesture that is motivated by "any actual or perceived characteristic" or "by any other distinguishing characteristic" that "a reasonable person should know will have the effect of harming a student." Since "harm" is not defined, it would include a mild case of hurt feelings in response to a comment about dress, hair style, etc.

Subsection 2(a)(1)(B) which prohibits speech that "has the effect of insulting or demeaning ..." creates a heckler's veto.³ Saying something with no

² Emphasis added.

³ A heckler is someone who attempts to prevent another from exercising her First Amendment rights to speak by shouting over her or by otherwise creating a disturbance. See *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (police are obliged to arrest the violent members of a crowd, not the speaker).

bad intent, but that has the effect of insulting in a way that causes disruption, would make the speaker a "bully." For example, if a Turkish student says, in a history class, that there was no Armenian genocide, he will be punished for that if it makes the Armenian students feel insulted and they stage a disruptive walkout. Similarly, if a black student says that he's owed reparations because all white people are benefiting from slavery, and some white students feel insulted at being equated with slave-owners, and create a disruption, the black student will be punished as a "bully."

In short, the definition of "harassment, intimidation or bullying" in Bill 18-1057 has unintended consequences and should not be used. Together with the Gay Lesbian and Straight Education Network (GLSEN) and the Gay and Lesbian Activists Alliance (GLAA), we have looked at how the statutes of other jurisdictions define the problem. Our three organizations believe that the Illinois statute⁴ provides an appropriate model for the District, which we have adapted as follows:

"Bullying, intimidation, or harassment" means any severe, persistent, or pervasive physical, electronic, or verbal act or conduct, including but not limited to that which is based on a student's actual or perceived race, color, ethnicity, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, place of residence or business, or any other distinguishing characteristic, or based on association with a person or group with any person with one or more of the actual or perceived characteristics listed above, directed toward a student or students that has or can be reasonably predicted to have the effect of one or more of the following:

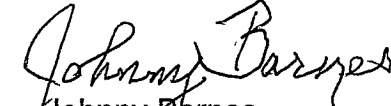
1) placing the student or students in reasonable fear of physical harm to the student's or students' person or property; 2) causing a substantially detrimental effect on the student's or students' physical or mental health; 3) substantially interfering with the student's or students' academic performance; or 4) substantially interfering with the student's or students' ability to participate in or benefit from the services, activities, or privileges provided by a school.

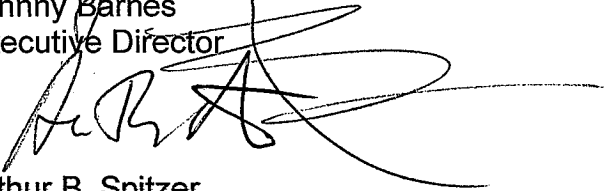
We would be pleased to work with Council staff and other stakeholders in merging the two bills under consideration. While the need to address the problem of bullying is urgent, the task of drafting a statute that is both effective and respectful of the First Amendment is complex. It deserves our best efforts.

⁴ 105 ILCS 5/27-23.7.

We appreciate your consideration of our views, and request that this letter be made part of the official record.

Sincerely,


Johnny Barnes
Executive Director



Arthur B. Spitzer
Legal Director



Stephen M. Block
Legislative Counsel

Cc: Councilmembers