ACLU Maryland

DAVID ROCAH
SENIOR STAFF ATTORNEY

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SB 725 - Bullying, Cyberbullying, Harassment, and Intimidation - Civil Relief and School Response

OPPOSE

The American Civil Liberties Union of Maryland (ACLU) opposes SB 725, which is a companion bill to (and builds off of) SB 726, a bill we also oppose as an unconstitutionally overbroad regulation of speech on the internet.

Injunction Provisions

SB 725 add a proposed § 3-2102, p.3, lines 14-31, to the Courts and Judicial Proceedings Article, which authorizes alleged victims of cyberbullying to obtain temporary, preliminary, and final injunctions against conduct that is claimed to violate Crim. L. §§ 3-805 and 3-809. While we do not object in principle to injunctions against speech that is determined, following a full trial, to be illegal and constitutionally unprotected, there are multiple problems with this provision.

First, to the extent SB 726 and SB 769 pass and thus change what speech is deemed illegal in Crim. L. §§ 3-805 and 3-809, in ways that we believe violate the First Amendment, this bill incorporates all of those same constitutional infirmities (as detailed in our testimony on those respective bills).

In addition, by authorizing courts to grant temporary and preliminary injunctions against speech alleged to violate Crim. L. §§ 3-805 and 3-809, § 3-2102 separately violates the First Amendment, because courts may not issue injunctions against allegedly illegal speech until there has been a final determination on the merits that the speech is, in fact, illegal and constitutionally unprotected. *E.g. Universal Amusement Corp. v. Vance*, 445 U.S. 308 (1980) (statute allowing judge to preliminarily enjoin allegedly obscene speech based on showing of probable success on the merits is unconstitutional prior restraint on speech); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993) (stressing that an injunction of charitable solicitation was permitted only "after a final adjudication on the merits that the speech is unprotected").

The proposed § 3-2103, p.3, line 32 – p.4, line 20 compounds this problem. It says that a temporary restraining order may be issued based solely on a likelihood of success, and specifically says that the plaintiff need not show that any harm will result if the injunction is not issued. This not only makes no sense, since the entire purpose of temporary restraining orders is to preserve the status quo to prevent irreparable harm to a plaintiff, it compounds the First Amendment problem by allowing judges to prohibit speech that isn't even likely to cause anyone any harm. The provision also tells judges that need not explain why they are acting without even an opportunity for the defendant to be heard (which is required for every other temporary restraining order under the Maryland Rules),

AMERICAN CIVIL LIBERTIES UNION OF MARYLAND

MAIN OFFICE
& MAILING ADDRESS
3600 CLIPPER MILL ROAD
SUITE 350
BALTIMORE, MD 21211
T/410-889-8555
or 240-274-5295
F/410-366-7838

WWW.ACLU-MD.ORG

which is an invitation to abuse, and will prevent appellate review of the propriety entering a temporary restraining order.

The proposed § 3-2104, p.4, lines 21-27, authorizes both preliminary and final injunctions against speech that violates Crim. L. §§ 3-805 and 3-809. As noted above, preliminary injunctions against allegedly illegal speech prior to a final adjudication on the merits violate the First Amendment.

Immunity Provisions

The proposed Cts. & Jud. Proc. § 5-643, p.4, line 28 – p.5, line 11, and proposed Educ. § 7-303.1, p.5, line 13 – p.6, line 4, irrationally creates a special immunity provision protecting all school officials who investigate or report to law enforcement acts of alleged cyberbullying or assault. Such officials are immune from any liability under state law, even if they acted improperly or illegally, unless the plaintiff can show that they acted in bad faith (which means something more than simply acting illegally). There is no such immunity for actions school officials take to investigate or report any other allegedly illegal behavior. And the immunity would exist even if the plaintiff could show significant race disparities in which students were reported to law enforcement, and which students were dealt with within the school disciplinary process. Indeed, discrimination claims based on those disparities would be largely foreclosed. This is totally unjustifiable and unnecessary, and will serve only to insulate bad conduct from judicial review, and further exacerbate race disparities in the education system.

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Altered Definition of Harassment

The bill amends Educ. § 7-424, p.6, line 28 – p.7, line 26, where "bullying, harassment, or intimidation" are defined. The existing Educ. § 7-424 was carefully drafted to ensure that the definition of those terms does not violate students' First Amendment rights. This bill jettisons that careful drafting. For example, on p. 7, line 18, the bill removes the requirement that the communication "substantially disrupt" the orderly operation of the school. But the requirement of "substantial disruption" comes from the Court's decision in *Tinker v. Des Moines Indep. Sch. Dist.,* 393 U.S. 503 (1969), which made clear that students do not lose their First Amendment rights at the schoolhouse door. The Court made clear that "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.* at 509 (citation omitted). Similarly, the bill changes the definition of a hostile educational environment," p.7, lines 4-6, as one that "substantially" interferes with a student's educational benefits, etc. But the "substantial interference" requirement comes from the analogous concept in employment discrimination law, and seeks to differentiate the illegal conduct from conduct that has only the slightest effects. The bill also removes the requirement that the conduct "seriously" intimidate, p. 7, line 14, and tautologically adds "harassing" to the definition of harassment. Finally, the bill includes within the definition of harassment "descriptions" of sexual activity by students (as opposed to simply depictions, namely pictures, which is presumably

the intent). The net effect is to significantly broaden the scope of speech that can be considered harassment, etc., in ways that would allow a student's demand that another student "check their privilege" or statement to another student about their own or another's sexual activity to be (improperly) classified as harassment.

For the foregoing reasons we urge an unfavorable report.

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