ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

MEMORANDUM

DATE: June 8, 2015

RE: Nevada's New Ant-Bullying Law (SB 504)

Introduction

Alliance Defending Freedom[1] was asked by Capitol Resource Institute to review Nevada's recently enacted anti-bullying law (SB 504) and provide our legal opinion.

As with most Americans, ADF recognizes the importance of students treating one another with civility and respect. Unfortunately, SB 504 amended Nevada's anti-bullying law will force school officials to make student bathrooms and shower facilities available to students who identify with a gender other than their biological gender. It will also broaden the anti-bullying law's scope at the cost of clarity, basic due process protections, and protecting students' right to free speech guaranteed by the First Amendment.

As explained below, the law is problematic for at least the following reasons:

I. SB 504 creates a new right in favor of transgender students to access the school bathrooms and shower rooms of their choice, thereby interfering with students' basic privacy rights and potentially putting their safety at risk.

II. SB 504 employs unconstitutionally vague definitions that will subject students, teachers, staff, and administrators to career-ending outcomes based on the subjective feelings of students without adequate due process protections and that violate the First Amendment.

We will address each issue below.

[1] Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for religious liberty. We regularly offer analysis of proposed laws and their effect on religious freedom.

15100 N. 90th Street Scottsdale, AZ 85260 Phone: (480) 444-0020 Fax: (480) 444-0028 AllianceDefendingFreedom.org

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I. SB 504 will require transgender students gain access to the bathrooms and shower rooms of their choice.

SB 504 confers a new right on students who do not conform with their gender. Specifically, it protects persons from being bullied because of their "gender identity;" that is, the gender with which one identifies, regardless of whether it is one's biological sex. "Bullying" includes students, teachers and school administrators "blocking access" to "any property or facility of a school."[2] "Property or facility of a school" includes "restrooms, " and "locker rooms," both of which must "be maintained in a safe and respectful manner" for all students. Thus, SB 504 will require schools to allow males who claim to identify as female to access the restrooms, locker rooms, and perhaps shower rooms, designated for females. And it will allow females who identify as male to access the facilities designated for males. Any school official or student who tries to prevent this from occurring, or expresses discomfort that it is occurring, will be guilty of bullying.[3]

But what about the rights of students who reasonably do not wish to shower or share the highly private settings of the locker room and bathroom with students of their opposite biological gender? If they express their natural and reasonable discomfort, they are "bullying" the transgender student. The obvious and entirely foreseeable consequence will be girls and boys who will stay silent and forego using the bathroom or refuse to take a shower after gym class. SB 504 does not recognize their right to a safe educational environment and they will be bullied by SB 504 into acquiescence.

II. SB 504 employs vague and overly broad definitions that violate the First Amendment guarantee of Free Speech and will subject students, teachers, staff, and administrators to career-ending outcomes based on the subjective feelings of students without adequate due process protections.

While SB 504 does not impose criminal sanctions, it subjects students to permanent expulsion and teachers and administrators to employment termination and loss of their licenses (and thus livelihood) if they "tolerate" or fail to immediately report an allegation of bullying. Rather than maintain the bright lines of Nevada's pre-SB 504 anti-bullying law, SB 504 ventures into the uncharted realm of punishing verbal and nonverbal behavior, including "gestures."

Vagueness in a law carrying severe sanctions may violate basic notions of due process when it fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits or when it may authorize and even encourage arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849 (1999).

[2] SB 504 at 5:17.
[3] SB 504 at 6:18-20.

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SB 504 redefines bullying to include verbal and nonverbal "gestures" that "interfere with a students' education environment or ability to participate in or benefit from services" or may involve "taunting, name-calling, belittling, use of put-downs or demeaning humor regarding race, color, national origin, ancestry, religious, gender identity or expression, sexual orientation, disability, or any other distinguishing characteristic or background of a person." The ordinary adolescent will likely be unable to understand when her comments constitute sanctionable "belittling" or "put-downs," much less when a sardonic jest touches on an undefined "distinguishing characteristic," until a student makes an allegation of bullying. But by then it's too late.

The lack of notice of what constitutes prohibited conduct is exacerbated by the subjective nature of the harm. "Nonverbal threats" that use "disrespectful gestures" is bullying. Spreading false rumors is bullying.

In short, under this new definition of bullying, even one word that one feels interferes with his academic performance can label another child a bully, a stigma that could follow her for the rest of her academic life.

Further, the expansive definition of bullying surely violates students' right to Free Speech protected by First Amendment. Students do not give up their basic civil rights under the First Amendment when they pass through the school house door.[4] SB 504 plainly prohibits protected speech and expressive behavior. Construing a vague and overbroad school antiharassment regulation intended to stop discrimination, one court stated:

> By prohibiting disparaging speech directed at a person's "values," the [antiharassment] Policy strikes at the heart of moral and political discourse-the lifeblood of constitutional self government (and democratic education) and the core concern of the *First Amendment.* ... No court or legislature has ever suggested that unwelcome speech directed at another's "values" may be prohibited under the rubric of antidiscrimination.[5]

In other words, simply because SB 504 purports to punish verbal and nonverbal gestures that a student may regard as discriminatory or unwelcome, does not suspend First Amendment guarantees. Anti-bullying statutes like SB 504 cannot proscribe actions "based on a pupil's actual or perceived characteristics" that include protected speech, such as "teasing someone because they are obese, skinny, tall, short, wear eyeglasses, or speak with a high or low pitched voice."[6]

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[4] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

[5] *Saxe v. State Coll. Area Sch. Dist*., 240 F.3d 200, 217 (3rd Cir. 2001) (citing *Texas v. Johnson*, 491 U.S. 397, 408-09, invalidating school district's anti-harassment policy.). *Accord , Bowler v. Town of Hudson*, 514 F. Supp. 2d 168 (Mass. 2007) (holding school officials violated students' First Amendment rights by taking down posters advertising a conservative club.)

[6] John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 Clev. St. L. Rev. 85, (2011) *available at* http://engagedscholarship.csuohio.edu/clevstlrev/vol59/iss1/5 (last viewed, June 8, 2015)

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Furthermore, SB 504 will chill the religious rights of students. For example, a Mormon student who, because of her religious convictions, expresses her support of marriage between one man and one woman, or states that she believes a child does better when raised in a home headed by a father and a mother, may be "perceived" as expressing a "putdown" of another student's sexual orientation, requiring a mandatory investigation, followed by potential sanctions. The threat of investigation alone will deter students from expressing any view that may be perceived as an insult to the groups who receive special protection under SB 504.

And then consider the dilemma this vague and overly broad definition places on teachers, staff and principals required to report any act of bullying on the same day they learn of the allegation. If a teacher doesn't report it immediately, he is subject to sanction. If he "tolerates" it, he is subject to dismissal. With such a hair-trigger duty to report, any prudent school employee, even when unsure if a comment has crossed the line from adolescent sarcasm to a sanctionable "put-down," will immediately report the incident rather than expose himself to a career ending demotion or dismissal.

For example, if a seventh-grader calls another student a "loser" on the baseball field, he potentially is guilty of bullying. The coach who hears the comment will be legally compelled to report it, and the school must investigate it. Or when a ninth grade girl reports that a classmate made a derogatory fashion comment and she feels uncomfortable going to the English class she shares with the "bully," school officials must immediately report the incident and it must be investigated.

SB 504 is so breathtakingly vague and punitive that teachers, students and administrators will clearly over-report alleged "bullying," however subjective, trivial, and unsubstantiated.

The due process infirmities do not end with the rush to report alleged bullying. The investigation process is truncated and guarantees a rush to judgment in many cases. Every investigation must be completed within no more than two days, or three if necessary, and the report, including any determination of guilt, must be released to all involved students and their parents no later than 24 hours after completion. So, within 72 hours of a complaint of bullying, a child's future could be decided. While the child has a right to an appeal to the Nevada State Department of Education, it is a hollow right. Such an appeal would take months and even if the finding of guilt were overturned, by that time the damage to the student's reputation and academic environment would likely be irreparable.

Conclusion

SB 504 is poorly-conceived and lacks the indicia of well-worked legislation that balances the interests of students to a civil educational environment with those whose free speech and due process rights should be protected. It also created a new right for transgender students to

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demand the bathroom and shower room of their choice without regard to the reasonable and common sense concerns of students who deserve to feel secure and comfortable in their educational environment.

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