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POSITION ON PROPOSED LEGISLATION

BILL: HB 1114 Education-Prohibited Behavior on School Grounds & Property

FROM: Maryland Office of the Public Defender

POSITION: Favorable

DATE: March 8, 2023

The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on House Bill 1114. As public defenders, we represent children charged in juvenile and adult court, many for incidents that occurred at school. According to the Maryland Commission on the School-to-Prison Pipeline and Restorative Practices' December 2018 report, "[t]he most common arrests in school are simple assault...and the vague category of 'disorderly conduct,' which could be a temper tantrum, cursing, or talking back to a teacher. In other words, '**children develop arrest records for acting like children.**'"¹ These are the traumatic arrests and prosecutions that HB1114 would prevent. Maryland Education Code §26-101, which prohibits disruptions of school operations, is an unnecessary, overbroad, and likely unconstitutional statute that criminalizes children's behavior at school. This bill appropriately excludes students at their home school and students attending extracurricular events at another school from being charged with disturbing school operations. The type of conduct that is typically charged under this statute and can lead to a finding of involvement are typical of adolescent development. Passing this bill precludes kids from being prosecuted for being kids, and we urge a favorable report.

The History

The Court of Appeals summarized the history of the statute in *In re Jason W.*, 378 Md. 596 (2003) (Washington County):

¹ Maryland Commission on the School-to-Prison Pipeline and Restorative Practices, *Final Report and Collaborative Action Plan* at 26, available at <http://marylandpublicschools.org/stateboard/Documents/AAEEBB/CommissionSchoolPrisonPipeline.pdf>.

“In 1970, through the enactment of a new section 123A to Art. 27, the criminal provisions were strengthened, largely as the result of the recent outbreak of riots and organized disturbances on college campuses and in some of the secondary public schools. The broadening and focused application of trespass, disorderly conduct, or school disturbance laws was then a national phenomenon. See Sheldon R. Shapiro, *Participation of Student in Demonstration on or near Campus as Warranting Imposition of Criminal Liability for Breach of Peace, Disorderly Conduct, Trespass, Unlawful Assembly, or Similar Offense*, 32 ALR 3d 551 (1970). ...[C]ontemporary press reports reveal that the bill was a response to a wave of rioting, violent racial confrontations, and vandalism at high schools in Prince George's County and Annapolis.”

“When the 1970 Act was pending before the Legislature, some concern was expressed about its breadth. Debate in the Judiciary Committee of the House of Delegates was extensive, and the fear was raised that, if read literally, the Act “could be applied to a kindergarten pupil throwing a temper tantrum.” See Baltimore Sun, April 1, 1970 at C24, *supra*. Clearly, however, that was not its intent.”

The Cases

Despite the legislature’s concern at the time of enactment that Maryland Education Code §26-101 would be used against children for acting as children, it was passed. And soon the cases bore out that reality.

Jason W. was one such child, charged under the statute for graffiti-ing a wall. The Court of Appeals reversed, saying that the words “disturb or otherwise willfully prevent” cannot be read too broadly, because of the nature of schools:

“[a] typical public school deals on a daily basis with hundreds—perhaps thousands—of pupils in varying age ranges and with a variety of needs, problems, and abilities, scores of teachers, also with varying needs, problems, and abilities, and a host of other employees, visitors, and occasional trespassers. The “orderly conduct of the activities, administration, or classes” takes into account and includes within it conduct or circumstances that may momentarily divert attention from the planned classroom activity and that may require some intervention by a school official. Disruptions of one kind or another no doubt occur every day in the schools, most of which, we assume, are routinely dealt with in the school setting by principals, assistant principals, pupil personnel workers, guidance counselors, school psychologists, and others, as part of their jobs and as an aspect of school administration. Although, undoubtedly, some conduct is serious or disruptive enough to warrant not only school discipline but criminal, juvenile, or mental health intervention as well, there is a level of disturbance that is simply part of the school activity, that is intended to be dealt

with in the context of school administration, and that is necessarily outside the ambit of Education Code § 26–101(a).”

Despite this explanation that the statute was not meant to be used for the thousands of instances that momentarily disrupt the school day that are part of the administration of education, cases since *Jason W.* continue to revolve around the prosecution of run-of-the-mill school disruption:

- *In re J.W.*, 2021 WL 943806 (Charles County): A 17 year old came into a classroom looking for a folder, and when he was upset that he could not find it said jokingly “I’m going to blow up the classroom.” He was disciplined at school and prosecuted for disturbing school activities and threats of mass violence. The courts found that this was a joking and exaggerated “sophomoric attempt at humor” and not even perceived to be a true threat by the witnesses, and therefore not a crime.
- *In re N.H.*, 2018 WL 3602960 (Wicomico County): A high school girl who was convicted of disturbing school activities and making threats on school property for saying to a girl who she accused of previously stealing her cell phone “I’m going to take [your phone] because you stole mine, you’re dead and going to pay.”
- *In re Ryan H.*, 2016 WL 3220636 (Wicomico County): A 17 year old junior who was hit with an orange by another student, and the two fought. Ryan was taken to the principal’s office and became agitated and upset, and said he “would F up” the principal. The principal and another teacher testified that they did not believe these were real threats, but a manifestation of Ryan’s adolescent frustration.
- *In re A.S.*, 2016 WL 3002470 (Wicomico County): A middle school student who was found involved of disrupting school operations for a school fight, which was reversed.
- *In re Micah M.*, 2016 WL 1733272 (Wicomico County): A 15 year old boy where the principal asked Micah at least three times to take the hood of his sweatshirt off of his head. Micah refused, yelling and cursing at the principal and school resource officer. Micah walked away from the adults, and was charged with disorderly conduct and disrupting school operations. The appellate court reversed, saying “This situation, therefore, was a school administrative response, and the State failed to produce sufficient evidence to demonstrate that Appellant disturbed the normal operation of the school.”

- *In re Terrelle A.*, 2016 WL 689004 (Wicomico County): a 14 year old boy prosecuted for cursing at the assistant principal in the hallway while students were changing classes. The appellate court reversed.
- *In re Qoyasha D.*, 2015 WL 5944257 (Wicomico County): a 14 year old boy who had a special education plan (IEP) for an emotional disability, who was prosecuted for disrupting school activities for walking out of class without permission, which is a behavior noted in his IEP. Qoyasha was pepper sprayed and handcuffed by the school police officer.

And anecdotally, Public Defenders across the state continue to see this statute abused, and used to pull children into the school to prison pipeline just for being kids:

- Baltimore County public defenders see kids charged for disturbing school operations for cursing in the hallways; accidentally hitting a staff member with a belt when ordered to take it off in a non-public school; a fourth grader taking a cupcake from a girl's birthday tray when she wouldn't give him one; a special education teacher pressing charges against a kid who threw an empty plastic trashcan during school ruckus that "almost" hit her. Over 90% of these students are Black, and a substantial percentage have IEPs or 504 plans.
- In Wicomico and Dorchester counties, veteran public defenders see students of color and students with disabilities disproportionately charged with this offense. Most of the students with disabilities have a behavior plan which the schools are not implementing at the time of the alleged offense, giving rise to the "disruption" in the first place.
- In Queen Anne's, Kent, and Caroline counties, our public defenders see this charge with kids who are struggling in school behaviorally or are students of color.
- In Anne Arundel County, children have been prosecuted for disturbing school operations for throwing a gummy bear at another student, tossing a water bottle at a trash can but accidentally hitting a teacher, and throwing Cheerios in the classroom.
- In Charles County a 9th grade Black special education student was charged with Disturbing School Operations and Disorderly Conduct for roaming the school halls instead of remaining in the office, and using profanity while filming the principal and school police officer following him. He was physically pushed by the officer, handcuffed, and prosecuted despite DJS closing the case.

Notably, in February 2023, the United States Court of Appeals for the Fourth Circuit affirmed a holding by the United States District Court of South Carolina that South Carolina's disturbing

school operations law was unconstitutionally vague as applied to students in *Carolina Youth Action Project; D.S. by and through Ford v. Wilson*, -- F.4th --, 2023 WL 2147305 (4th Cir. Feb. 22, 2023). The court noted that “the terms ‘disorderly,’ ‘boisterous,’ ‘obscene,’ and ‘profane’ do not explain the law’s scope or limit the discretion of those charged with enforcing it. ... Based solely on the dictionary definitions of the statutory terms—particularly disorderly and boisterous—it is hard to escape the conclusion that any person passing a schoolyard during recess is likely witnessing a large-scale crime scene.” The court went further to say “unless South Carolina intended to criminalize many childish shenanigans...the vagueness that dooms the disorderly conduct law is not ‘uncertainty about the normal meaning’ of the law’s terms but what acts of adolescent mischief are ‘covered by the law and what are not.’ ...Lacking any meaningful standards, the record confirms that officers deploy a glorified smell test to determine whether a student’s disorder is disorderly enough to be criminal.” Maryland’s disturbing school operations statute contains the same deficits as South Carolina’s statute. It is incumbent upon this body to ensure that we do not continue to enforce an unconstitutional statute against our students by passing this bill.

The Data

The data from the Maryland State Department of Education and the Department of Juvenile Services supports what we know from these individual cases: students of color and students with disabilities are disproportionately arrested and charged under §26-101.

The disparities for non-white children begin with school-based arrests based on §26-101: despite representing only 33% of students enrolled in Maryland’s public schools,² 57% of students arrested for disruption in the 2018-2019 school year were Black.³ Similarly, 69% of children arrested for making threats to adults were non-white students, as were 55% of those arrested for threats to other students.⁴ Children with disabilities are also disproportionately charged: students with Individual

² Maryland State Department of Education, *Maryland Public School Enrollment by Race/Ethnicity and Gender and Number of Schools September 30, 2019*, available at <http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20192020Student/2020EnrollRelease.pdf>.

³ Maryland State Department of Education, *Maryland Public Schools Arrest Data: School Year 2018-19*, available at <http://marylandpublicschools.org/stateboard/Documents/2020/0623/MarylandPublicSchoolsArrestData20182019.pdf>.

⁴ *Id.*

Education Programs (IEP), one of two special education classifications, are only 12% of the student population in Maryland yet they receive 23% of school-based arrests.⁵

The data from the 2019-2020 school year is just as bleak, even though the school year was significantly disrupted by the start of the COVID-19 pandemic: 54% of students arrested for disruption were Black; 75% of students arrested for threats to adults were Black; and 52% of students arrested for threats to other students were Black.⁶ In Fiscal Year 2020, the Department of Juvenile Services (DJS) received 1,259 such referrals, with 82% of those referred for an intake hearing being youth of color.⁷ In Fiscal Year 2022, DJS received 836 such referrals, with 84% of those referred for an intake hearing being youth of color.⁸ Even as the overall number of referrals decreases, the racial disparities remain the same.

§26-101 is also disparately applied across the state, thus subjecting children attending one school to arrest for normal adolescent behavior while those attending schools in a neighboring district can continue to behave like children. From the Department of Juvenile Services’ 2022 data, these counties accounted for a disproportionately large percentage of referrals for disturbing school activities⁹:

County/Jurisdiction	% of Youth Population Age 11-17	% of All Referrals for Disturbing School Op.
Anne Arundel County	9.3%	19%
Baltimore County	13.8%	19.8%
St. Mary’s County	2.03%	10.4%
Eastern Shore	7.36% **Wicomico County: 1.93%	30.8% **15.4%

⁵ Id.

⁶ Maryland State Department of Education, *Maryland Public Schools Arrest Data: School Year 2019-20*, available at <https://marylandpublicschools.org/about/Documents/DSFSS/SSSP/StudentArrest/MarylandPublicSchoolsArrestDataSY20192020.pdf>

⁷ Maryland Department of Juvenile Services, *Data Resource Guide Fiscal Year 2020* at 252, available at https://djs.maryland.gov/Documents/DRG/Data_Resource_Guide_FY2020.pdf.

⁸ Maryland Department of Juvenile Services, *Data Resource Guide Fiscal Year 2022* at 242, available at https://djs.maryland.gov/Documents/DRG/Data_Resource_Guide_FY2022.pdf

⁹ See *Data Resource Guide FY 2022*, at 230, 242-45.

Use of the Criminal Code

Disturbing school operations is a vague catch-all term that, because of its vagueness, is disproportionately used to criminalize students of color and students with disabilities for typical adolescent behavior. However, when conduct arises to criminal behavior, youth can still be charged with any relevant part of the criminal code. Though not an exhaustive list, some examples include:

- A school fight can be charged as assault, a crime under Md. Crim. § 3-203;
- A student who commits a sexual offense against another student can be charged under any relevant charge under Md. Crim. § 3-301 *et seq.*, the chapter of the criminal code on sexual crimes;
- A student who makes a bomb threat or threatens other violence at school could be charged with Md. Crim. § 3-1001, threats of crimes of violence; and
- A student who possesses a firearm at school can be prosecuted for possession of a handgun under Title 4 of the Maryland Criminal Law, and pursuant to Md. Crim. § 4-102 for possession of a Deadly Weapon on School Grounds.

As it stands now, Maryland Education Code §26-101 is often used as a vague catchall charge for kids being kids, when there is no actual crime being committed. An important part of learning – especially for students with disabilities – is making mistakes and learning from those experiences. While the behavior of a student may be disruptive, and children will say things while frustrated, these are all normal adolescent behaviors. We urge the committee to end this punitive practice of criminalizing kids for being kids by ensuring that students can no longer be prosecuted under Maryland Education Code §26-101.

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For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report on HB 1114.

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