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Testimony Before the Ohio Senate Education Committee

House Bill 206
December 10, 2024

Advocates for Basic Legal Equality, Inc.
Good afternoon, Chairperson Brenner, Vice Chair O'Brien, Ranking Member Ingram, and members of the Ohio Senate Education Committee. Thank you for the opportunity to testify in opposition to House Bill 206 and its proposed endlessly extendable student expulsions. ABLE is a non-profit regional law firm that provides free legal assistance in civil matters to help individuals and groups living on low incomes in 32 counties in Western Ohio achieve self-reliance, equal justice, and economic opportunity.

ABLE's Meaningful and Appropriate Education practice group is dedicated to just and equitable education so children living on low incomes can learn, graduate, and have a better life and job in the future. ABLE is here to testify in opposition to House Bill 206 on behalf of the families and students we serve, including students with disabilities and their caregivers and low-income families, who would be disproportionately affected by this law.

ABLE opposes House Bill 206. House Bill 206 is fundamentally flawed and creates a variety of risks. Those risks include violations of core student rights, such as: freedom of speech (First Amendment);[1] due process and equal protection (Fourteenth Amendment);[2] rights against self-incrimination;[3] parent involvement in the child's education and health; freedom from disability discrimination in three laws: the Americans with Disabilities Act,[4] Individuals with Disabilities Education Act,[5] and Section 504 of the Rehabilitation Act;[6]; and freedom from other protected class discrimination.

ABLE is funded in part by:

OHIO ACCESS TO JUSTICE FOUNDATION

Mental Health & Recovery Services Board of Lucas County

COMMUNITY SHARES NORTHWEST OHIO

[1] U.S. Const. amend. I
[2] U.S. Const. amend. XIV. Fundamental due process requires notice and an opportunity to be heard *prior* to a decision to deprive a person of liberty or property rights. The opportunity to be heard gets more formal and trial-like the bigger or more important the deprivation. Public education is a property and liberty right. This, including Ohio's history of being found in violation of the US Constitution in seminal case *Goss v. Lopez*, 419 U.S. 565 (1975), is why Ohio law requires a hearing before any decision to expel a child for more than ten days. Ohio already has a permanent exclusion process, which is a narrowly tailored law with due process for the seriousness of the long deprivation of a child's rights to public schooling. It is narrowed to a set of the most serious situations where criminal processes have already resulted in findings of culpability, and only to older youth, considering the long timeframe of deprivation of education. It includes extra processes, including a hearing with right to bring an attorney, with a neutral state decisionmaker at the state before the decision to turn an already-long year expulsion into permanent exclusion. This bill contains *no* due process at multiple points of decision to deprive children of long periods of education.
[3] U.S. Const. amend. X
[4] Americans With Disabilities Act of 1990, 42 U.S.C. § 12101.
[5] Individuals with Disabilities Education Act, 20 U.S.C. § 1400
[6] Section 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794

Schools and the state of Ohio face risks of costly federal lawsuits from following this bill.

I appreciate much of the intent behind this bill. ABLE supports mental health support in schools. Many of our clients seek legal help specifically for ensuring that their children with social-emotional and/or developmental disorders receive mental health supports and counseling in school. ABLE also supports ensuring that students who may be at risk obtain assistance to help them, rather than just being expelled and forgotten. ABLE also generally supports the requirement for ongoing educational services during expulsions that this bill proposes—all expulsions, not just the ones in this bill.[7] While this bill seems to have ideals of using mental health supports to assist school safety, we believe that House Bill 206 does not accomplish these goals, and instead creates discretion without guardrails, which can and will be used against students who are most vulnerable and in need of the supports which this body wishes to provide.

Today I wish to discuss six major concerns with HB 206:

1. Vague terms, which open the door for school districts to perpetually expel many students under the "threat" and "significant harm" provisions;
2. Unchecked discretion in the hands of a Superintendent about conditions for the child's return to school, allowing for abuse and depriving of any due process;
3. Perpetual expulsion with no ability for fundamental due process, and no real standards for what sufficient rehabilitation is nor any limits or guardrails on new or contingent conditions;
4. Potential discriminatory consequences, including disparate impact on students with disabilities, low-income students, and minority students;
5. Conflicts with First Amendment law; and
6. Conflicts with federal disability rights laws.

First, House Bill 206 includes a variety of vague terms regarding who may be expelled for the long and possibly permanent period in the bill. The risk of broad and vague terms is that, while some districts may use this bill's power for long and infinitely extendable expulsions sparingly, others may use it frequently.

Our experience is that the broad language in the bill will be used to expel many students. Data reported by school districts supports this concern. In current Ohio law, similar language to four of the five student behaviors in HB 206 can be used to justify suspension or expulsion of pre-k through 3rd grade students, O.R.C. 3313.668(B)(1)(a) [the behaviors described in 3313.66(B)(2)-(5), mirrored in HB206]. Over 3000 kindergarteners through third graders were suspended/expelled for those described behaviors, in only one year.[8] Specifically, the provision allowing these endlessly extendable expulsions for actions that cause either harm to persons or property is broad, since schools are not criminal law experts. We have seen these provisions used in situations resembling: a young child unintentionally hitting another person in the eye when

[7] ABLE notes that alternative programs have their own set of concerns and need additional standards. Over the years, ABLE has represented students who were assaulted, traumatized, and/or received only monitoring from non-teachers in alternative classrooms.

[8] Formerly found at https://education.ohio.gov/getattachment/Topics/Student-Supports/Creating-Caring-Communities/2018-19-Pk-3-suspension-and-expulsion-data.xlsx.aspx. ODEW may have moved the file.

throwing a soft shoe, or breaking another person's computer or phone by throwing it. HB 206 adds an untested and vague "threats" provision that creates a dangerous amount of discretion in schools. The broad language in this bill opens the door for tens of thousands of children of all ages to be expelled for an entire year and then unlimited extensions of that expulsion.

Second, due to lack of standards about conditions for return in this bill, every Superintendent would have unfettered discretion about when children can return. The district would have the ability to force a parent to put their child through any form of service that the district finds appropriate. The district could coerce self-incrimination or waiver of in-school or out-of-school civil or Constitutional rights as a condition of return. The district could impose a costly, far away, or long-waitlisted therapy as a condition of return, with no obligation to help the child receive it. The bill contains no due process about these conditions for a parent to even be heard about such problems.

Third, at the next point of decision, the bill gives complete discretion, with no standards for what "sufficient rehabilitation" means. It allows for additional 90-day expulsions without due process and with unfair ability to constantly move the goal posts. The bill contains no limits on the number of extensions, so it would allow a district to expel a student permanently, as long as the district sent notice of the expulsion continuing every ninety days. This Bill includes no review or oversight of the Superintendent's additional 90-day expulsion extensions for the child.

Brand new, "contingent conditions" can be set once the initial full-school year expulsion period has expired, even if the original conditions were fully accomplished. A child could be determined to have met all conditions for reinstatement announced upon expulsion, but unrelated additional contingent conditions could be imposed for the rest of the student's academic career. Contingencies imposed a year after the expulsion offend principles of fair notice and justice -- in effect changing the rules at the end. It enables abuse, including potential for targeting and profiling of the child throughout all the remaining years a child will be in school.

In ABLE's experience, schools will take the option allowed in Bill 206 to make contingent conditions last for the remainder of the child's years in school. They are likely to impose impossible no-mistake standards as contingent conditions. A child's kindergarten or third-grade mistake will be able to be held against the child for over a decade. Any additional minor infraction or mistake after the initial 180-day expulsion could enable a school to put the child back in expulsion indefinitely. Again, without any due process of law before that deprivation.

Fourth, this bill has a high chance of disproportionately impacting students with disabilities, students in poverty, males, and students of minority race – with devastatingly years-long loss of learning. The concerns previously listed also carry the possibility that some conditions may be impossible for a child to complete, such as conditions that require unaffordable services. This concern, along with the vagueness of what behaviors can result in endless expulsion, carries with it a risk of disparate impact, for children with disabilities, children without means, and minority children. The statistics about disparate impact of suspension and expulsion on children with disabilities, children with economic disadvantage, and children who are Black, Indigenous, or a

person of color are well-established in over a decade of Ohio data and research.[9] This bill has no safeguards or accountability against such disparate use of its provisions, and includes no provisions to help remedy them. Research indicates actions can remedy these disparities – for example limiting individual discretion (by clear objective standards in law and by including monitoring and corrective actions by an outside perspective) and improving training opportunities for teachers and administrators.[10]

First Amendment free expression rights directly conflict with the threats provision in this Bill. The U.S. Supreme Court has recently detailed both the threat exception to First Amendment protections and student social media use outside of school. The U.S. Supreme Court rejected a reasonableness standard for the "true threats" doctrine, opting instead for a subjective standard that the student must "consciously disregarded a substantial risk that [one's] communications would be viewed as threatening violence." *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023). Furthermore, the U.S. Supreme Court recently considered student social media posts outside of school that targeted school. *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2043, 210 L. Ed. 2d 403 (2021). The Court decided that the First Amendment of the United States Constitution limits schools' ability to regulate speech outside of school to certain circumstances, including "serious or severe" bullying or harassment and threats aimed at individual teachers or students. HB 206 does not meet either constitutional threshold. The bill will allow schools to commit violations of students' constitutional rights, leading to costly federal lawsuits.

Sixth, this bill's requirement for mental health assessments as a required condition for reinstatement will make Section 504 of Rehabilitation Act and the Individuals with Disabilities Education Act apply. Both laws cover children between ages 3 and 21 suspected of having disability. Requiring psychological assessment associated with certain behaviors is legally sufficient to show suspicion of disability. This bill would thus trigger all protections afforded to students and require the school to follow the procedures required in federal and state special education law. Federal and state law requirements would override this bill and could significantly increase the burden on school districts to evaluate the students and unnecessarily overburden school staff.

Finally, this bill conflicts with other aspects of federal special education law and Section 504, which already has procedures in place to respond to student behavior and establishes limits on the amount of time a student with disabilities can be out of school for expulsions. In this instance, every student with a disability is subject to a "manifestation determination review" by the district within ten days to determine if the action leading to discipline was a manifestation of their disability. *See* 34 CFR §300.530(e). Students then have ongoing rights to educational placement in the least restrictive environment, i.e., with non-disabled peers whenever possible.

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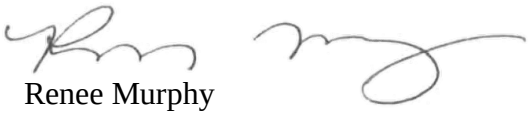
[9] Children's Defense Fund. https://www.childrensdefense.org/wp-content/uploads/sites/6/2021/06/The-State-of-School-Discipline-in-Ohio-6.9.2021-Final.pdf and https://www.childrensdefense.org/wp-content/uploads/2024/03/2024-State-of-School-Discipline-in-Ohio.pdf

[10] *See, e.g.*, Education Commission for the States. (2018). Policy Snapshot: Alternative_School_Discipline_Strategies.pdf (ecs.org). . *See also*, Child Trends. (2022). By Using Vague Language to Define Misconduct, Many States Put Children at Risk for Unfair Disciplinary Action - Child Trends – ChildTrends

Any expulsion law requiring assessment should also connect students to services; however mental health services in schools and across the state are strained. Supporting student mental health when they exhibit problematic or violent behavior is essential, but when set as a condition for school reinstatement, they could function as a barrier more than essential support. According to NAMI Ohio, nearly 52% of Ohioans aged 12 -17 do not receive needed depression treatment.[2] Furthermore, nearly 2.5 million Ohioans live in a community that does not have enough mental health professionals to serve their area. Less than 30% of mental health need is met in Ohio, and in schools each counselor serves, on average 403 students.[11] With one in five students affected by mental health challenges, service shortages are apparent.

For all these reasons, HB 206 is fundamentally flawed, and should not become law in Ohio. ABLE urges you to vote no. Thank you again for the opportunity to testify in opposition to HB 206.

Respectfully submitted,



Renee Murphy
Managing Attorney, Meaningful and Appropriate Education

[11] https://www.nami.org/wp-content/uploads/2023/07/OhioStateFactSheet.pdf