

Constitutional debate over cyberbullying bill continues in House

By: Heather Cobun Daily Record Legal Affairs Writer ◉ March 28, 2018

Two bills pending in the General Assembly banning cyberbullying and revenge porn have broad support but have been opposed by the ACLU of Maryland over First Amendment concerns.

“Good intentions do not make a bill constitutional,” David Rocah, the organization’s senior staff attorney, told the House Judiciary Committee on Tuesday.

Both bills have cleared the Senate and are sponsored by Sen. Robert A. “Bobby” Zirkin, chair of the Senate Judicial Proceedings Committee

Senate Bill 726 would expand “Grace’s Law,” a 2013 statute making it a crime to engage in a continuous course of online bullying, to include a one-time bullying incident that the perpetrator knows is likely to be shared or reposted multiple times as well as a course of conduct intended to intimidate, tormentor harass a minor.



While sitting in a Senate Judicial Proceedings committee meeting in Annapolis, Christine McComas, held a picture of her daughter Grace, a teen who committed suicide after being bullied online. An anti bullying law was passed about 7 years ago called Grace’s Law and a new measure seeks to expand its reach. (Bryan Sears)

The law is named for Grace K. McComas, a Woodbine teenager who killed herself in 2012 after being repeatedly bullied on social media sites.

“This problem is getting worse, not better,” Zirkin said at Tuesday’s hearing. “States have moved way ahead of us in trying to get their hands around what to do with all these online threats to children.”

Zirkin said the speech must be made with intent and continue after receiving a reasonable warning. It must also cause the minor substantial emotional distress or place them in reasonable fear.

But Rocah and the ACLU have repeatedly told lawmakers in both chambers the bill also criminalizes protected speech, citing a person who accuses a classmate of sexual assault or bigotry.

“There are times when a person lawfully intends to intimidate and torment, such as when they are revealing misconduct with the torment,” he said. “There’s lots of things that people legitimately and lawfully say and should be allowed to say that cause emotional distress.”

Rocah said he was bullied in grade school and when he bullied one of his classmates in retaliation he was the only one punished.

“What happened here, what happened to Grace, was an act of violence,” she said.

Del. Vanessa E. Atterbeary, D-Howard, said the problem facing the legislators is there are constitutional arguments but they are there to protect people, particularly children.

“It sounds to me like you’re entire argument is no speech should be made a crime,” she said to Rocah. “At some point in time, you have to hold people accountable, particularly when you are talking about children.”

Baltimore County State’s Attorney Scott D. Shellenberger said the bill is built to address modern bullying and does not criminalized protected speech.

“This is past just speech,” he said. “This is past just talking. It is tantamount to yelling ‘Fire!’ in a crowded theater because the intent is for something to happen.”

Injunctive relief

A related bill authorizes a victim of cyberbullying or their parent to bring a private cause of action for injunctive relief against an alleged bully.

Senate Bill 725 does not require the plaintiff to plead or prove immediate, substantial and irreparable harm to obtain the relief, which Del. Kathleen M. Dumais, D-Montgomery, said “(throws) our normal rules of injunctions somewhat out the window.”

Zirkin said the speed of dissemination and the “incredible degree of harm that can literally come from one push of a button” lead to the decision to allow a petitioner to obtain relief early as the potential harm starts.

Dumais and Del. Susan K. McComas, R-Harford, both suggested the protective order process might be more appropriate for the bill’s goals; Zirkin conceded “either mechanism could work.”

The ACLU opposed the bill based on similar constitutional concerns about the effect on free speech.

Revenge porn

The ACLU partially opposes another bill that expands the law against “revenge porn,” saying the changes would make the statute “a general prohibition on nudity.”

Current law prohibits intentionally causing serious emotional distress by intentionally putting a photo or video of a person “with his or her intimate parts exposed or while engaged in an act of sexual contact” on the internet.

Senate Bill 769 would prohibit knowing distribution of a visual representation of someone exposed or engaged in sexual activity with the intent to harm, harass, intimidate, threaten or coerce them.

Rocah said the 2014 law, which the ACLU provided input on, adequately balances the privacy rights of individuals with the First Amendment but the proposed bill “jettisons all those provisions.” He said the bill would prohibit images of news value from being shared, such as photos of the prisoner abuse at Abu Ghraib and the lewd photo sent by former congressman Anthony Weiner.

Shellenberger said the common situation seen by prosecutors is an individual in a consensual relationship records a sexual encounter with their partner who then threatens to share it with family and friends after the relationship ends. If the threat does not involve placing the photo or video on the internet, the law does not cover it.

“It updates our currently out-of-date (bill) because it’s limited to placing on the internet,” he said.

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