



March 3, 2015

Dear Senator:

RE: ACLU Urges Support and Co-Sponsorship of the Student Non-Discrimination Act (S. 439)

On behalf of the American Civil Liberties Union (ACLU), we write to urge you to support and cosponsor the Student Non-Discrimination Act (S. 439). For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law.

This legislation, introduced by Senator Al Franken (D-MN), would provide lesbian, gay, bisexual, and transgender ("LGBT") students with long overdue and much needed explicit federal protections by establishing a comprehensive prohibition against discrimination and harassment in all public elementary and secondary schools across the country based on a student's actual or perceived sexual orientation or gender identity.

There is a clear and compelling need for this legislation. Discrimination, harassment, and even physical abuse, are often part of LGBT students' daily lives at school. A nationwide 2013 survey of nearly 7,900 students between the ages of 13-21 found that 55.5% of LGBT students reported feeling unsafe at school because of their sexual orientation.¹ More than 30% of LGBT students reported missing at least one entire school day in the past month because they felt unsafe or uncomfortable.² More than 74% of LGBT students reported being verbally harassed (e.g. called names or threatened) in the past year because of their sexual orientation, and over 55% because of their gender expression.³ Nearly 57% of LGBT students who were harassed or assaulted in school did not report the incident to school staff, most commonly because they doubted that an effective intervention would occur or the situation could become even worse if they reported it.⁴ Even more

¹ The Gay, Lesbian & Straight Education Network, *2013 NATIONAL SCHOOL CLIMATE SURVEY* (Oct. 2014), http://www.glsen.org/sites/default/files/NSCS_ExecSumm_2013_DESIGN_FINAL.pdf.

² *Id.* at xvi.

³ *Id.* at xvii.

⁴ *Id.*

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

MICHAEL W. MACLEOD-BALL
ACTING DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

disturbingly, nearly 62% of students who did report an incident said that school staff did nothing in response.⁵

These sobering statistics are representative of intakes the ACLU's LGBT Project receives, including the following:

- California

A gay junior high student in Grass Valley was attacked at lunch by another boy because rumors were circulating that the gay student had a crush on the attacker. The other boy knocked the gay student down and shoved his face against the cement floor. The student reported that school administrators seemed more concerned about the rumors than about the physical assault.

- Indiana

A 16-year-old gay student in Jasper reported that one of his teachers muttered "faggot" under his breath every time the boy passed him in the hallway between classes. The student was too afraid of the teacher to report it to administrators.

A gay, Latino 10th grader in South Bend who had been harassed repeatedly and mercilessly by classmates reported that a school custodian, who was standing next to a security officer at the time, told the student that he had no reason to complain because, "Back home, you'd be killed for that." In another incident, the boy was called to the assistant principal's office because of a minor disagreement with another student, and the assistant principal instead focused on trying to get the student to tell him inappropriately intimate details about his personal life, saying, "We all have a dark side."

- Texas

A gay high school junior in Magnolia was physically attacked by a girl at lunch who repeatedly and loudly called him a "faggot" throughout the assault. The boy did not want to hit her back, so he kept backing away, but she pursued him all the way out of the cafeteria, into the hallway, and some distance down the hallway, shouting and slapping him repeatedly the whole way. Finally, a teacher pulled the girl off him. When he complained to administrators, they told him there was "no way of proving" what he said had happened, and that they could not act on one student's word against another's in spite of the fact that the assault went on for several minutes in front of dozens of witnesses and multiple security cameras.

When students began spreading a rumor that a 14-year-old girl in Queen City was a lesbian, two teachers confronted the girl, asking her if the rumors were true and warned her that "the Bible forbids it."

⁵ *Id.*

Gavin Grimm – One Transgender Student’s Experience with Discrimination

In December 2014, the ACLU and the ACLU of Virginia filed an administrative complaint on behalf of Gavin Grimm with the Department of Justice against the Gloucester County Public Schools for adopting a policy that segregates transgender students from using the same restrooms and locker rooms as their peers. Gavin is a sophomore and transgender boy who has been diagnosed with gender dysphoria. Consistent with recognized standards of care for transgender youth, Gavin’s medical and mental health professionals determined that living in accordance with his gender identity in every possible respect, including using the appropriate restroom, is essential for his treatment for gender dysphoria. Gavin had been using the boys’ restrooms at Gloucester High School since October 2014 without incident or complaints from his peers prior to the adoption of the discriminatory policy. To quote Gavin, he said, “I used the bathroom and left, just like any other student. Not once did an altercation occur in the restrooms.”⁶

The policy requires transgender students like Gavin to use facilities that are either inconsistent with their gender identity or to use an “alternative private facility.” While schools could act to address privacy concerns by making unisex restrooms more widely available to any student who is not comfortable using a communal restroom facility, it is discriminatory and deeply stigmatizing to require transgender students – and transgender students alone – to use such restrooms.

Sadly, Gavin’s experience is consistent with findings in the 2013 survey previously referenced in this letter. Nearly 60% of transgender students reported being required to use restrooms and locker rooms that were inconsistent with their gender identity.⁷ Again, quoting Gavin, he said, “I am boy, and it is important to me to live life like other boys do...”⁸

Filling a Gap in Our Civil Rights Laws

While federal laws currently protect students on the basis of race, color, sex, disability, and national origin, no federal statute explicitly protects students on the basis of sexual orientation or gender identity. The Student Non-Discrimination Act would do just that, and fill an unacceptable gap in our civil rights laws that leave LGBT students vulnerable to discrimination and harassment.

Fifty years of civil rights history demonstrate that laws similar to the Student Non-Discrimination Act are effective in preventing discrimination and harassment from occurring in the first place by prompting schools to take proactive steps to ensure a safe and supportive learning environment for all students who are in their care.

⁶ Gavin Grimm, *I’m a Boy, so Why Won’t My School Allow Me to Use the Boys’ Bathroom?* ACLU BLOG (Dec. 22, 2014, 2:44 PM), <https://www.aclu.org/blog/lgbt-rights/im-boy-so-why-wont-my-school-allow-me-use-boys-bathroom>.

⁷ 2013 National School Climate Survey, *supra* note 1, at xviii.

⁸ Grimm, *supra* note 6.

Protecting Students While Upholding Freedom of Speech

The ACLU is a unique organization in that it is committed to defending and preserving the sometimes conflicting individual rights and liberties that the Constitution and laws of the United States guarantee to everyone in this country. We vigorously support an expansive view of First Amendment rights, under the U.S. Constitution, to freedom of speech, association and assembly; freedom of the press; and freedom of religion. But we also work to extend rights to segments of the population that have traditionally been denied their rights, including people of color; women; immigrants; LGBT people; prisoners; and people with disabilities.

Some opponents of anti-harassment legislation contend that protections against discrimination for students in public schools are likely to run afoul of First Amendment free speech rights. Others who might support such legislation assert that speech can be restricted in order to provide adequate protection to all students. When carefully crafted, non-discrimination and anti-harassment policies can both protect students from abuse while also preserving core free speech rights.

The harassment definition in the Student Non-Discrimination Act is consistent with protections for the speech of public school students under the First Amendment. A school may restrict student speech only where the school has a specific fear of substantial disruption of the educational environment or intrusion upon the rights of others. Harassing conduct that does not take the form of speech, and harassment carried out by teachers or staff – all of which is encompassed by the legislative definition within the Student Non-Discrimination Act – does not fall within First Amendment protections for student speech.

But in those instances when harassment takes the form of purely expressive conduct, the legislation proscribes only such conduct that is “sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from a program or activity of a public school or educational agency.” We understand this to mean that student speech may be actionable only where it is so severe, persistent, or pervasive as to cause a material interference with the student’s equal participation in or benefit from the educational program or activity. By its definition, the legislation would not – as it cannot consistent with the Constitution – encompass speech that is merely offensive or that causes nothing more than hurt feelings. The legislation thus properly balances the competing speech and equal protection rights at issue. This standard is particularly appropriate because the government has a compelling interest in ensuring that students will not have their educational opportunities limited because of sexual orientation or gender identity.

In applying the harassment definition in this legislation, U.S. courts will apply the same objective standard that courts have applied in harassment cases brought under Title IX and other civil rights statutes. We anticipate that courts will limit liability to those instances in which the conduct would be considered harassment from the perspective of a reasonable person with the victim’s known, objective characteristics, including their sexual orientation or gender identity.


Conclusion

The Student Non-Discrimination Act would have a profound impact in improving the lives of LGBT students in the U.S. by ensuring that discrimination and harassment of students on the basis of their sexual orientation or gender identity has no place in our country's public elementary and secondary schools. It would do so in a way that preserves the right of all students to speak freely and the right of all students to benefit equally from the educational programs offered. We urge you to support and cosponsor the Student Non-Discrimination Act (S. 439).

Sincerely,



Michael W. Macleod-Ball
Acting Director, Washington Legislative Office



Ian S. Thompson
Legislative Representative