



**Written Statement of the
American Civil Liberties Union**

Laura W. Murphy
Director, Washington Legislative Office

Ian S. Thompson
Legislative Representative

Before the U.S. Commission on Civil Rights

**“Briefing on Federal Enforcement of Civil Rights Laws to Protect Students Against
Bullying, Violence and Harassment”**

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On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we are writing to thank the Commission for holding this important briefing on federal enforcement of civil rights laws to protect students against bullying, violence and harassment, and are pleased to submit this written statement for the official briefing record.

Harassment in schools is a serious problem. Testimony from the U.S. Department of Education indicates that complaints alleging harassment due to race, national origin, disability, or sex increased 31% in the one year from 2009 to 2010. This rise is evidence of the importance of protecting *all* students in our schools, and makes this briefing particularly relevant and timely. We commend the Commission for its examination of this issue and are also pleased that the Commission has included students who are, or are perceived to be, lesbian, gay, bisexual, or transgender (LGBT) as part of the focus of this briefing. For purpose of the ACLU's statement, we will be focusing on LGBT harassment in schools.¹

Seth Walsh

The recent tragic deaths of young gay students from across the country underscore the fact that LGBT students are an especially vulnerable population in our nation's schools. Discrimination and harassment, even physical abuse, are often a part of these students' daily lives. To take but one example, 13-year-old Seth Walsh had endured years of anti-gay harassment at school when he hanged himself from a plum tree in his family's backyard in September 2010. Seth's mother, Wendy, had tried in vain for years to get school district officials in Tehachapi, California, to do something about the abuse her son was experiencing at school. When Seth was in the fifth grade, other students started calling him "gay." As he got older, the harassment became more frequent and severe. By seventh grade, taunts and verbal abuse were a constant occurrence. Students regularly called him "fag" and "queer." He was afraid to use the rest room or to be in the boys' locker room before gym class. Seth's mother and close friends reported that teachers and school administrators were aware that Seth was being harassed and, in some instances, participated in the harassment. One teacher allegedly called Seth "fruity" in front of an entire class.

Ms. Walsh's pleas to the school for help were often brushed aside. Seth had always been a good student, receiving A's and B's, but his grades dropped to failing as the harassment continued. Friends reported that he became depressed and withdrawn. A note Seth left upon his death

¹ We agree, as discussed in more detail below, that the Commission has a duty to consider LGBT discrimination under its current mandate, but we note that we are also actively pursuing legislative initiatives to amend the Commission's authorizing legislation to codify such a mandate.

expressed love for his family and close friends, and anger at the school "for bringing you this sorrow."

Seth died on September 28, 2010, after nine days on life support. On December 16, 2010, the ACLU sent a letter to Tehachapi Unified School District officials urging them to take immediate and affirmative steps to prevent this kind of tragedy from happening again. The U.S. Department of Education (DOE) is also investigating the district.

A National Problem in Need of a Federal Solution

Sadly, the abuse that Seth endured on a daily basis is an all-too-common reality in the lives of LGBT students in school districts from coast to coast. In a 2009 study of more than 7,000 LGBT middle and high school students entitled the *National School Climate Survey*, nine out of ten LGBT students reported experiencing harassment at their school within the past year based on their sexual orientation or gender identity, and two-thirds said they felt unsafe at school because of who they are.² Nearly one-third skipped at least one day of school within the previous month because of concerns for their safety.

The DOE has listed the effects of student-on-student harassment in school as including lowered academic achievement and aspirations; increased anxiety; loss of self-esteem and confidence; depression and post-traumatic stress; general deterioration of physical health; self-harm and suicidal thinking; feelings of alienation in the school environment, such as fear of other children; and absenteeism from school.³

The Student Non-Discrimination Act

Despite all of this, no federal statute explicitly protects students on the basis of actual or perceived sexual orientation or gender identity. Currently, students are explicitly protected against harassment based on race, color, national origin, sex, and disability under federal law. Senator Al Franken (D-MN) and Representative Jared Polis (D-CO) have sponsored legislation in Congress that could finally fill this gap in our civil rights laws – the Student Non-Discrimination Act. This legislation would establish a comprehensive federal prohibition against discrimination, including harassment, in K-12 public schools based on a student's actual or perceived sexual orientation or gender identity, providing lesbian, gay, bisexual and transgender

² GLSEN National School Climate Survey (2009).

³ Letter from Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education re: Harassment and Bullying (Oct. 26, 2010) (Background, Summary, and Fast Facts).

(LGBT) students with long overdue and much needed explicit federal protections. The legislation also protects students who associate with LGBT people, including students with LGBT parents and friends. Congress should pass this very important legislation to ensure that *all* of America's children have access to a safe and supportive learning environment.

Nearly fifty years of civil rights history clearly demonstrate that laws similar to the proposed Student Non-Discrimination Act are effective in preventing discrimination, including harassment, from occurring in the first place, as well as ensuring prompt and appropriate responses from schools when it does occur.

Existing Protections under Title IX and the Equal Protection Clause

Title IX of the Education Amendments of 1972, has proven particularly effective in affording LGBT students protections against discrimination, including harassment, on the basis of nonconformity with gender stereotypes. As DOE's Office for Civil Rights (OCR) October 2010 guidance on harassment and bullying made clear:

Title IX prohibits harassment of both male and female students regardless of the sex of the harasser – i.e., even if the harasser and the target are members of the same sex. It also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subject to harassment on the basis of their LGBT status, they may also...be subjected to forms of sex discrimination prohibited under Title IX.⁴

⁴ Letter from Russlyn Ali, Ass't Sec'y for Civil Rights, U.S. Department of Education re: Harassment and Bullying (Oct. 26, 2010).

In addition to Title IX, LGBT students are protected against discrimination, including harassment, under the Equal Protection Clause of the Fourteenth Amendment. In March 2010, in a lawsuit originally filed by the New York Civil Liberties Union, the Justice Department reached an out-of-court settlement in the matter of *J.L. v. Mohawk Central Schools District*.⁵ The United States sought to join the lawsuit to address alleged violations of the Equal Protection Clause and Title IX, both of which prohibit discrimination based on sex, including discrimination based on gender stereotypes.

J.L., an openly-gay teenager, was the victim of severe and pervasive student-on-student harassment based on sex. He failed to conform to gender stereotypes in both behavior and appearance. He exhibited feminine mannerisms, dyed his hair, wore makeup and nail polish, and maintained predominately female friendships. The harassment against him went from derogatory name-calling to physical threats and violence. While the school district knew of the harassment, it was indifferent in its failure to take proper action by neither fully investigating the allegations nor following its own anti-harassment policies and procedures.

In her recent testimony before this Commission, Jocelyn Samuels, Senior Counsel to the Assistant Attorney General for the Civil Rights Division wrote:

While the jurisdiction of the Civil Rights Division does not currently extend to harassment based on sexual orientation, it does provide authority to investigate and seek redress in matters involving harassment based on sex, including sex stereotypes, of all students, including LGBT students. Based on this authority, the Division intervened in the case, which was resolved by a settlement agreement that requires the Mohawk Central School District to, among other things, retain expert consultants in the area of harassment and discrimination based on sex, gender identity, gender expression, and sexual orientation to review the District's policies and procedures and to conduct annual trainings; and develop and implement a comprehensive plan for disseminating

⁵ No. 09-CV-943 (N.D.N.Y. filed Jan. 14, 2010).

the District's harassment and discrimination policies and procedures.⁶

Because the denial of equal protection under the U. S. Constitution on the basis of sex, including on the basis of non-conformity with gender stereotypes, falls explicitly under the Commission's jurisdiction, it is within the Commission's mandate to include LGBT students in this briefing.

Title IX and the Equal Protection Clause protect all students from gender-based and sexual violence and harassment, including dating violence and sexual assault. Nonetheless, students' rights under these provisions are not always enforced. The ACLU has received reports of schools responding inappropriately to reports of sexual assault at school, including pressuring victims of sexual violence to transfer to alternative schools, forcing victims of sexual violence to "work it out" one-on-one with their attackers, and relying on archaic gender stereotypes to determine that a reported account of sexual violence was consensual. Under Title IX, schools must protect students' rights to an equal education, and may not rely on stereotypes or punish victims. The ACLU is pleased that the Commission is devoting a briefing to students' rights to be free from this kind of discrimination at school.

First Amendment Free Speech Concerns

Finally, it is important to address the claims of some that protections for students in public schools against discrimination, including harassment, are likely to run afoul of First Amendment free speech rights. It is certainly true that when students engage in private non-curricular expression at school, such as hallway conversation, they are entitled to the full protection of the Supreme Court's ruling in *Tinker v. Des Moines*.⁷ 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.

A school may not single out speech for disfavored treatment simply because it disagrees with the viewpoint expressed by the student. But when something about the speech other than its viewpoint becomes invasive of the rights of others, schools have the constitutional authority to act. As the U.S. Court of Appeals for the Third Circuit wrote in *Sypniewski v. Warren Hills Regional Board of Education*, "Students cannot hide behind the First Amendment to protect their

⁶ Testimony of Jocelyn Samuels, Senior Counselor to the Assistant Attorney General for the Civil Rights Division, to the U.S. Commission on Civil Rights re: Federal Enforcement of Civil Rights Laws to Protect Students Against Bullying, Violence and Harassment (May 13, 2011).

⁷ 393 U.S. 503 (1969).

‘right’ to abuse and intimidate other students at school”⁸ where that abuse or intimidation causes disruption in the school or deprives a fellow student of his or her equal access to educational opportunities.

Schools have wide latitude to take steps other than restricting speech to protect the rights of students who are undergoing harassment without violating the Constitution. A school may likewise require all students to conduct themselves in a manner that does not disrupt the educational mission of the school. What a school may not do, however, is restrict speech simply because others might disagree with the speaker’s message, even if that message is abhorrent to some or all others in the school.

Public schools should provide all students with a safe and supportive educational environment. As the ACLU writes in its model school harassment policy:

To prevent harassment in the first instance, staff members should teach – teach why harassment is wrong and teach that tolerance and respect are essential to a free society. In response to an act of harassment, staff members should intervene immediately to stop the harassment and, if appropriate, should punish the harassment promptly, consistently, and proportionately to the seriousness of the act. But the response should not end there; rather, staff members should deter future harassment with continuing lessons of tolerance and respect.⁹

Conclusion

The Commission is to be commended for specifically including LGBT students as part of the focus of the briefing. LGBT youth remain an extremely vulnerable population in our schools. More can and must be done to afford these students the explicit federal protections they have long needed. Congress should act swiftly by passing the Student Non-Discrimination Act. While explicit federal LGBT protections are critical and long overdue, LGBT students are protected under the Equal Protection Clause and Title IX of the Education Amendments of 1972. In addition, there is no constitutional basis to argue that protecting the rights of LGBT students

⁸ 307 F.3d 243, 264 (3d Cir. 2002).

⁹ ACLU, Model Anti-Harassment Policy, available at http://www.aclu.org/lgbt-rights_hiv-aids/model-policy-schools.

to benefit equally from educational opportunities extended to all students necessarily runs afoul of First Amendment free speech protections.

We thank the Commission for holding this briefing, and look forward to continued examinations of ways to ensure that the civil rights of *all* Americans, including those who are LGBT, are upheld and protected.