



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

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Before the United Nations Educational, Scientific and Cultural Organization (UNESCO)

**“The Problem of Homophobic Discrimination and Harassment in U.S. Public Schools and
a Model Legislative Solution”**

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On behalf of the American Civil Liberties Union (ACLU), a non-partisan not-for-profit organization with more than a half million members, countless additional activists and supporters, and fifty-three affiliates across the United States, we are writing to provide the United Nations Educational, Scientific and Cultural Organization (UNESCO) with information on discrimination, including harassment and bullying, of students who are or are thought to be lesbian, gay, bisexual, or transgender (LGBT). We are providing this information regarding LGBT discrimination in the United States and proposed model solutions to this problem as part of the United Nation's first-ever international consultation addressing homophobia in schools, which UNESCO has been tasked with leading.

The ACLU has long prioritized legal and legislative advocacy in the area of LGBT youth and schools. LGBT youth should have the freedom to be open (or not) about their identity and ideas in schools and other government facilities. No student should ever be afraid of being "gay in school." LGBT students must have the right to be safe and visible, and to have their identity embraced rather than denigrated or erased.

In addition to the ACLU's leading role in advocating for the Student Non-Discrimination Act, the organization has undertaken groundbreaking legal challenges in the area of LGBT youth and schools. At present, the ACLU is currently challenging – as part of an initiative called "Don't Filter Me" – the practice of some school districts in the U.S. of illegally censoring positive and affirming LGBT websites, including those that contain valuable anti-bullying information and other support for LGBT youth. By blocking access to LGBT websites, schools deny helpful information to gay-straight alliances (student-run extracurricular clubs that bring together LGBT and straight students to support each other and promote acceptance and are common in public school districts throughout the U.S.) and other support groups that could be vital for troubled LGBT youth who either do not have access to the internet at home or do not feel safe accessing such information on their home computers.

The Problem of LGBT Discrimination and Harassment in U.S. Schools

Discrimination, including harassment, of students who are lesbian, gay, bisexual or transgender, and those perceived to be, is a serious problem in public school districts across the United States. Despite this fact, no U.S. federal statute expressly protects students on the basis of actual or perceived sexual orientation or gender identity. Federal laws currently protect students on the basis of their race, color, sex, religion, disability and national origin. Now, there is legislation currently pending in the U.S. Congress – the Student Non-Discrimination Act (H.R. 998/S. 555) – that would establish a comprehensive federal prohibition against discrimination, including harassment, in public elementary and secondary schools based on a student's actual or perceived sexual orientation or gender identity, providing LGBT students with long overdue and much

needed express federal protections. The legislation also protects students who associate with LGBT people, including students with LGBT parents and friends. While we advocate for enactment of the Student Non-Discrimination Act in the U.S., we also urge organizations such as UNESCO to use it as a model solution for governments around the world that are interested in proactively protecting LGBT students in their schools.

Discrimination, harassment, and even physical abuse, are often part of LGBT students' daily lives at school. A 2009 study of more than 7,000 LGBT middle and high school students across the U.S. found that nine out of ten 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.¹ Nearly one-third skipped at least one day of school within the previous month because of concerns for their safety. Sadly, LGBT youth are also at a significantly increased risk for suicide related to mental health issues that often arise from poor treatment and discrimination in U.S. schools.²

These findings are in keeping with studies from the U.S. Department of Education. Effects of student-on-student harassment in school include 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.³

Seth Walsh – An Example of Severe Anti-Gay Harassment in U.S. Schools

Numerous tragic deaths of young gay students across the U.S. served to underscore the fact that LGBT students are an especially vulnerable population in schools. 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 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

¹ GLSEN National School Climate Survey 2009.

² Massachusetts Youth Risk Survey 2007; Grossman, A.H., D'Augelli, A.R. (2007). "Transgender youth and life threatening behaviors." *Suicide and Life Threatening Behavior*, 37(5): 527-537.

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).

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 and worsened. Friends reported that he became depressed and withdrawn. A note Seth left upon his death 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.

Soon after Seth's death, we urged Tehachapi Unified School District officials to take steps to prevent this kind of tragedy from happening again. In July 2011, the U.S. Departments of Education and Justice reached a settlement agreement with the Tehachapi Unified School District regarding an investigation into the school's failure to protect Seth from severe anti-gay harassment. The investigation found that:

Walsh suffered sexual and gender-based harassment by his peers. The investigation also found that Walsh was targeted for harassment for more than two school years because of his nonconformity with gender stereotypes, including his predominantly female friendships and stereotypically feminine mannerisms, speech and clothing. The departments determined that the harassment, which included ongoing and escalating verbal, physical and sexual harassment by other students at school, was sufficiently severe, pervasive and persistent to interfere with his educational opportunities. Despite having notice of the harassment, the district did not adequately investigate or otherwise respond to it. Based on the evidence gathered in the investigation, the departments concluded that the school district violated Title IX and Title IV.⁴

The Role of Federal Civil Rights Laws in Protecting Students

Nearly fifty years of U.S. civil rights history 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. These laws include Title VI of the Civil Rights Act

⁴ Departments of Justice and Education Reach Agreement with Tehachapi, Calif., Public Schools to Resolve Harassment Allegations (July 1, 2011), available at – <http://www.ed.gov/news/press-releases/departments-justice-and-education-reach-agreement-tehachapi-calif-public-schools>

of 1964, which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex; and Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability.

Like all other federal civil rights statutes that apply to public schools, the Student Non-Discrimination Act will prompt schools to adopt nondiscrimination and anti-harassment policies, including important training, monitoring, and reporting programs. Moreover, the remedy for a violation, like remedies for violations of other federal civil rights statutes, can include the adoption of policies and practices that would proactively prevent future discrimination, including harassment and bullying.

While it is true that there is currently no U.S. federal civil rights statute that explicitly protects students on the basis of actual or perceived sexual orientation or gender identity, LGBT students are not without legal protections. 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. The U.S. Department of Education's Office for Civil Rights provided guidance on harassment and bullying to U. S. schools in October 2010:

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.⁵

One of the purposes of this guidance letter to schools was to explain how student misconduct that may be seen as simply an act of bullying may also trigger responsibilities for the school under one or more of the federal anti-discrimination statutes discussed above.

In addition to Title IX, LGBT students are protected against discrimination, including harassment, under the Equal Protection Clause of the Fourteenth Amendment in the Constitution. In March 2010, in a lawsuit originally filed by the New York Civil Liberties Union (a state affiliate of the ACLU), the Justice Department reached an out-of-court settlement in the matter of *J.L. v. Mohawk Central Schools District*.⁶ 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.

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.

Protecting Students While Upholding Freedom of Speech

⁵ Letter from Russlyn Ali, Ass't Sec'y for Civil Rights, U.S. Department of Education re: Harassment and Bullying (Oct. 26, 2010).

⁶ No. 09-CV-943 (N.D.N.Y. filed Jan. 14, 2010).

The ACLU is a unique organization in that we are committed to both defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee to everyone in this country, including First Amendment rights under the U.S. Constitution to freedom of speech, association and assembly; freedom of the press, and freedom of religion. In addition, we also work to extend rights to segments of the population that have traditionally been denied their rights, including people of color; women, immigrant, lesbians, gay men, bisexuals and transgender people; prisoners; and people with disabilities.

Some contend that protections for students in public schools against discrimination, including harassment and bullying, are likely to run afoul of First Amendment free speech rights. However, when carefully crafted, non-discrimination and anti-harassment policies can both protect students from abuse while also preserving core free speech rights.

Specifically with respect to the Student Non-Discrimination Act, the ACLU believes that the harassment definition in the legislation is consistent with protections for the speech of public school students under the First Amendment of the Constitution. 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 come within the First Amendment protections for student speech.

Even in those instances when harassment may take the form of purely expressive conduct or speech by another student, 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” the educational program. We understand this to mean that student speech may be actionable only where it is so severe, persistent, or pervasive conduct so as to cause a material interference with the student’s equal participation in or benefit from the educational program. 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 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.

The ACLU also is confident that, in applying the harassment definition in this legislation, U.S. courts will apply the same objectivity standard that courts have applied in harassment cases brought under Title IX and other civil rights statutes. The ACLU expects 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. Courts in other countries may not have similar speech protections to inform their construction of such legislation and, accordingly, to the extent this legislative concept is used as a model elsewhere, it should be adapted to provide for equivalent speech protections while also protecting the educational rights of those who are targets of harassment.

In addition to the Student Non-Discrimination Act, U.S. public schools should currently be acting to 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.⁷

The ACLU believes that it is very important for schools to develop and publicize rules that clearly explain how harassment can be reported and how reports of harassment will be handled. In some cases, schools are required to do so by U.S. federal law. These rules should require staff to report harassment to a designated school official; should prohibit retaliation against anyone who reports harassment; and, to the extent possible, should protect the confidentiality of anyone who is involved in a report of harassment.

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, including harassment, of students on the basis of their sexual orientation or gender identity has no place in U.S. public elementary and secondary schools. Additionally, it can also serve as a model solution to governments around the world that are interested in acting to protect LGBT students from discrimination, including harassment and bullying, in their schools.

⁷ ACLU, Model Anti-Harassment Policy, available at – http://www.aclu.org/lgbt-rights_hiv-aids/model-policy-schools.

In addition to the ACLU, the Student Non-Discrimination Act is supported by the following U.S. national organizations:

Advocates for Youth
American Association of University Women (AAUW)
American Counseling Association
American Federation of Teachers
American Humanist Association
American Psychological Association (APA)
Amnesty International USA
Asian Pacific American Labor Alliance, AFL-CIO
Association of Flight Attendants – CWA
Bazelon Center for Mental Health Law
Center for American Progress Action Fund
CenterLink: The Community of LGBT Centers
Child Welfare League of America
Communications Workers of America (CWA)
Courage Campaign
CREDO Action
Disciples Justice Action Network
Episcopal Church
Family Equality Council
Friends Committee on National Legislation
Gay, Lesbian and Straight Education Network
Gay & Lesbian Advocates & Defenders (GLAD)
Gay-Straight Alliance Network
Human Rights Campaign
Human Rights Watch
Immigration Equality Action Fund
Interfaith Alliance
Lambda Legal
NAACP
National Asian Pacific American Women’s Forum
National Association of Human Rights Workers
National Association of School Psychologists
National Center for Lesbian Rights
National Council of Jewish Women
National Black Justice Coalition (NBJC)
National Center for Transgender Equality

National Education Association
National Gay and Lesbian Task Force Action Fund
National Women's Law Center
Parents, Families and Friends of Lesbians and Gays (PFLAG) National
People For the American Way
SEIU
Sexuality Information and Education Council of the U.S. (SIECUS)
Southern Poverty Law Center
The Trevor Project
Transgender Law Center
Unitarian Universalist Association
United Church of Christ, Justice and Witness Ministries
United Methodist Church, General Board of Church and Society
Woodhull Freedom Foundation