



March 18, 2014

Dear Senator:

RE: ACLU Urges Support and Co-Sponsorship of the Student Non-Discrimination Act (S. 1088)

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 write to urge you to support and cosponsor the Student Non-Discrimination Act (S. 1088). This legislation, which was 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 2011 survey of more than 8,500 students between the ages of 13-20 found that eight out of ten LGBT students reported experiencing harassment at their school within the past year based on their sexual orientation.¹ Six in ten LGBT students reported feeling unsafe at school because of their sexual orientation.² Transgender students experienced more hostile climates than their non-transgender peers, with eight in ten reporting feeling unsafe at school because of their gender expression.³ The effect of a hostile school climate on LGBT students has a direct and negative impact on the student’s education. Nearly a third of LGBT students reported skipping at least once, and three in ten reported missing at least one entire day of school in the past month because of safety concerns.⁴

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

- California

¹ Joseph G. Kosciw *et al.*, GLSEN, The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, and Transgender Youth in Our Nation’s Schools (2012), available at <http://glsen.org/nscls>.

² *Id.*

³ *Id.*

⁴ *Id.*

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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 hard 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.”

Issak Wolfe – One Transgender Student’s Experience with Discrimination

On April 26, 2013, the ACLU and the ACLU of Pennsylvania sent a letter to the Red Lion Area School District on behalf of a male transgender student, Issak Wolfe, who was denied the opportunity to run for prom king by his school’s principal.⁵ Issak’s classmates and most of his teachers supported and respected his male gender identity, and he had received repeated assurances that his name would appear on the prom king side of the ballot. However, when the ballot was released, Issak was dismayed and embarrassed to discover that he was listed as a candidate for prom queen and referred to by the female name he was assigned at birth instead of

⁵ Letter from Molly Tack-Hooper, ACLU of Pennsylvania to Dr. Scott A. Deisley, Superintendent, Red Lion Area Sch. Dist. (April 26, 2013) *available at* http://www.aclupa.org/download_file/view_inline/1024/701/.

by his male name. He later learned from administrators that the decision was made by his principal because he “didn’t feel comfortable” with Issak running for prom king. This refusal to respect Issak’s gender identity caused him needless pain and embarrassment in front of his classmates.

While Issak was allowed to wear a black cap and gown at his graduation, instead of the yellow cap and gown mandated for girls, the school continued to disrespect his gender identity by refusing to allow him to use his male name in the ceremony. The school district also refused to adopt a non-discrimination policy to protect transgender students like Issak from future pain and humiliation.

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.

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; lesbians, gay men, bisexuals, and transgender people; prisoners; and people with disabilities.

Some opponents of anti-harassment legislation contend that protections for students in public schools against discrimination 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 come within the 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 or interfere with 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 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 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. 1088).

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office



Ian S. Thompson
Legislative Representative