



December 8, 2011

Dear Senator:

**RE: ACLU Urges Support and Co-Sponsorship of the Student Non-Discrimination Act (S. 555)**

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. 555). This legislation, which was introduced earlier this year by Senator Al Franken (D-MN) and currently has the support of over one-third of the Senate, would provide lesbian, gay, bisexual and transgender (“LGBT”) students, and those perceived to be, 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 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.<sup>1</sup> Nearly one-third skipped at least one day of school within the previous month because of concerns for their safety. 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 schools.<sup>2</sup>

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

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<sup>1</sup> GLSEN National School Climate Survey 2009.

<sup>2</sup> 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.

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alienation in the school environment, such as fear of other children; and absenteeism.<sup>3</sup>

### **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 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, the ACLU 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,

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<sup>3</sup> 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).

the departments concluded that the school district violated Title IX and Title IV.<sup>4</sup>

While federal laws currently protect students on the basis of their race, color, sex, religion, disability or national origin, no federal statute explicitly protects students on the basis of actual or perceived sexual orientation or gender identity. The Student Non-Discrimination Act would do just that. In addition, nearly fifty years of civil rights history clearly demonstrate that laws similar to the proposed 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, including harassment and bullying, 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 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

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<sup>4</sup> 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>

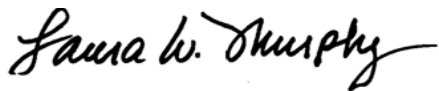
participation in or benefit from the educational program. By its definition, the legislation would not – as it cannot consistent with the Constitution – encompass speech that is merely offensive or that causes nothing more than hurt feelings. The legislation thus properly balances the competing speech 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. 555).

Sincerely,



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Legislative Chief of Staff/First Amendment Counsel



Ian S. Thompson  
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