



March 12, 2012

The Honorable Barack Obama
President of the United States
White House
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Dear President Obama:

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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 request that your administration publicly support and endorse the Student Non-Discrimination Act (S. 555/H.R. 998). The ACLU recently joined a letter with dozens of national and state organizations committed to ensuring that all students are able to pursue an education unhindered by discrimination and harassment urging your administration to take this important step.

The Student Non-Discrimination Act 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 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. LGBT youth are also at a significantly increased risk for suicide related to

¹ GLSEN National School Climate Survey 2009.

mental health issues that often arise from poor treatment and discrimination in U.S. schools.²

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 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.

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.

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. 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.

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 your administration to support and endorse the Student Non-Discrimination Act (S. 555/H.R. 998). As the coalition of national and state organizations wrote in its recent letter, it would provide critical momentum and be a clarion call for equality in our schools and better protections for vulnerable children. It is the next big step the administration can and should take in the ongoing federal effort to ensure that all students have access to an education unhindered by discrimination and harassment.

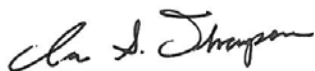
Sincerely,



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Michael W. Macleod-Ball
Chief of Staff/First Amendment Counsel



Ian S. Thompson
Legislative Representative