

United States Senate

WASHINGTON, DC 20510-2309

April 29, 2011

The Honorable Kimberly Tolhurst
Acting General Counsel
U.S. Commission on Civil Rights
624 9th St. NW
Washington, DC 20425

Dear Acting General Counsel Tolhurst and Commissioners:

Thank you for the opportunity to provide written comments to the Commission to aid in its analysis of harassment and discrimination against students based on their sexual orientation. I commend the Commission for looking into this critical civil rights issue.

As a member of the Senate Committee on Health, Education, Labor, and Pensions, I have closely followed this issue. In particular, I am deeply concerned about the unwelcoming and even dangerous school environment experienced by so many lesbian, gay, bisexual, and transgender (LGBT) students. It's very clear to me that additional protections for these students are needed. That is why I recently reintroduced in the Senate the Student Non-Discrimination Act, a bill to prohibit discrimination and harassment of students based on their sexual orientation or gender identity in public schools.

There is clear and overwhelming evidence that LGBT youth often face a hostile school environment as a result of inter-student bullying, harassment, and violence—sometimes with the implicit acceptance of school staff, or even their participation. According to the 2009 National School Climate Survey conducted by the Gay, Lesbian and Straight Education Network (GLSEN), over 84 percent of LGBT students have been verbally harassed, about 40 percent have been physically harassed, and nearly 20 percent have been physically assaulted at school in the past year. Furthermore, over 60 percent of LGBT students reported feeling unsafe at school. In fact, 30 percent said they had missed a day of school in the past month because they didn't feel safe. (By comparison, eight percent of all students nationally had skipped a day of school in the past month due to safety concerns.)¹

This harassment has consequences. It deprives LGBT youth of equal educational opportunities by increasing their likelihood of skipping school, underperforming academically,²

¹ Joseph G. Kosciw, Emily A. Greytak, Elizabeth M. Diaz & Mark Bartkiewicz, *The Gay, Lesbian and Straight Education Network, The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, xvi-xvii (2010), available at <http://www.glsen.org/cgi-bin/iowa/all/news/record/2624.html>.

² *Id.* at xvii.

and dropping out.³

And sometimes the harassment faced by LGBT students at school leads to the most devastating result a parent can imagine: suicide. Over the past few years, news reports have chronicled this horrifying problem across the country, including in my home state of Minnesota, where a gay teenager named Justin Aaberg took his life last year after being repeatedly bullied at school. Unfortunately, these are not isolated instances. According to information compiled by the Trevor Project, more than one-third of lesbian, gay, and bisexual youth report having attempted suicide.⁴

I am grateful that the U.S. Department of Education is paying attention to this problem as part of its Title IX enforcement duties. In schools that directly or indirectly receive any federal assistance,⁵ Title IX of the Education Amendments Act of 1972 prohibits discrimination based on sex or gender.⁶ Title IX has increased gender equity in education in many ways, from improving academic opportunities for women to increasing their participation in high school and college sports.⁷

I applaud the Departments of Education and Justice under President Obama for rightfully acknowledging that some of the discrimination faced by LGBT youth is based on gender stereotyping, and therefore prohibited under Title IX.⁸ For example, as some courts have acknowledged, this form of prohibited discrimination includes teasing a male student who is perceived to be gay for not conforming to norms of masculinity.⁹

³ Lambda Legal, *Facts: Gay and Lesbian Youth in Schools*, available at <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page-31991643.html> (last visited Apr. 20, 2011).

⁴ The Trevor Project, *Suicidal Signs and Facts*, available at <http://www.thetrevorproject.org/suicide-resources/suicidal-signs> (last visited Apr. 20, 2011) (citing AR D'Augelli, *Mental Health Problems Among Lesbian, Gay, and Bisexual Youths Ages 14-21*, 7 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 433-456 (2002)).

⁵ 20 U.S.C. § 1687 (2006).

⁶ 20 U.S.C. § 1681(a)(2006) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”).

⁷ Title IX, *The History of Title IX*, available at <http://www.titleix.info/history/history-overview.aspx> (last visited Apr. 20, 2011). See also *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982); Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 120341 (March 13, 1997); Proposed Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66092 (November 2, 2000).

⁸ U.S. Dept. of Edu. Office of Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (“OCR’s Dear Colleague Letter”).

⁹ *Id.* See also, e.g., *Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp.2d 869 (N.D. Ohio 2003); *Montgomery v. Independent School District No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000) (finding that harassing a male student because his perceived sexual orientation did not conform

However, since Title IX can only protect LGBT students from bullying based on gender stereotyping, they lack its protection against bullying based on sexual orientation (as recently acknowledged by the Department of Education).¹⁰ Without Title IX protections, many victims of anti-LGBT bullying, harassment, and discrimination therefore remain without recourse.

This is a significant gap in protection for a group of students that currently faces severe harassment and discrimination in schools. Federal civil rights laws already protect students in public schools from harassment based on race, color, national origin, sex, disability, and religion. Title VI of the Civil Rights Act prohibits discrimination in schools based on race, color, or national origin. Title IX, as discussed earlier, prohibits discrimination in schools based on sex. Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, and the Individuals with Disabilities Education Act prohibit discrimination based on disabilities in schools. Similarly, the First Amendment, Title IV of the Civil Rights Act, and, in limited cases, Title VI prohibit certain types of discrimination based on religion. LGBT students, on the other hand, lack such explicit protections. This means, for example, that an act of bullying based on race that would be prohibited by civil rights laws may not be actionable when based on sexual orientation.

Equal protections are needed for LGBT youth, and they are especially warranted in the realm of education, which, according to the U.S. Supreme Court in *Brown v. Board of Education*, is arguably the most important governmental function. For parents of LGBT students, public schools are currently failing to meet their most fundamental obligation to them: to keep their children safe. To combat the urgent problem of anti-LGBT bullying, the government and public must strive to provide a safe and secure environment for all students, an environment in which all students have an opportunity to reach their academic potential without being held back by fear.

For this reason, I introduced the Student Non-Discrimination Act (SNDA). The Student Non-Discrimination Act would extend to LGBT students civil rights protections that are similar to those provided under Title IX. It would establish a comprehensive federal prohibition against discrimination and harassment in public schools based on actual or perceived sexual orientation or gender identity.

I originally introduced the Student Non-Discrimination Act in the last Congress, and recently reintroduced it this year as S. 555. Although it is a new bill, it has garnered the support of close to one-third of the Senate, with 31 cosponsors in addition to myself. The House companion bill, H.R. 998, currently has 128 cosponsors. The Student Non-Discrimination Act is

with norms of masculinity violated Title IX); *Theno v. Tonganoxie Unified School District*, 377 F. Supp. 2d 952 (D. Kansas 2005) (finding that subjecting a male student to teasing, name calling, and sexual gestures for four years – primarily because his perceived lack of masculinity and sexual orientation did not satisfy his peers’ gender stereotypes and expectations – amounted to actionable sex discrimination).

¹⁰ See OCR’s Dear Colleague Letter, *supra*.

within the jurisdiction of the Senate Committee on Health, Education, Labor, and Pensions, of which I am a member, and I am working with my colleagues on that committee to get the bill included in the reauthorization of the Elementary and Secondary Education Act (also known as No Child Left Behind).

Like Title IX, the SNDA would provide meaningful remedies (potential loss of federal funding and a private right of action) for discrimination in public schools. Fifty years of civil rights history shows that similar laws that contain such remedies are often effective in preventing discrimination from occurring in the first place. Like other civil rights laws, SNDA would prompt schools to avoid liability by taking proactive steps to prevent the discrimination and bullying of students protected by the bill.

Thank you for examining this critical education and civil rights issue. If I can provide any other information that may be useful to the Commission, please do not hesitate to contact me, or Stephanie Potter of my staff, at (202) 224-5641.

Sincerely,

A handwritten signature in black ink, appearing to read "Al Franken". The signature is fluid and cursive, with a long horizontal stroke at the end.

Al Franken
United States Senator

112TH CONGRESS
1ST SESSION

S. 555

To end discrimination based on actual or perceived sexual orientation or gender identity in public schools, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 10, 2011

Mr. FRANKEN (for himself, Mr. HARKIN, Mr. KERRY, Mrs. MURRAY, Ms. KLOBUCHAR, Mr. MERKLEY, Mr. DURBIN, Mr. LAUTENBERG, Mr. BENNET, Mr. BLUMENTHAL, Mr. UDALL of Colorado, Ms. MIKULSKI, Mr. LEAHY, Mr. SANDERS, Mr. BINGAMAN, Mr. WHITEHOUSE, Mr. CARDIN, Mrs. BOXER, Mrs. GILLIBRAND, Mr. MENENDEZ, Mr. AKAKA, Mr. SCHUMER, Mr. WYDEN, Mr. BEGICH, Mr. CASEY, Ms. CANTWELL, Mr. BROWN of Ohio, Mrs. SHAHEEN, Mr. REED, and Mr. COONS) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To end discrimination based on actual or perceived sexual orientation or gender identity in public schools, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Student Non-Discrimi-
5 nation Act of 2011”.

1 **SEC. 2. FINDINGS AND PURPOSES.**

2 (a) FINDINGS.—The Congress finds the following:

3 (1) Public school students who are lesbian, gay,
4 bisexual, or transgender (referred to in this Act as
5 “LGBT”), or are perceived to be LGBT, or who as-
6 sociate with LGBT people, have been and are sub-
7 jected to pervasive discrimination, including harass-
8 ment, bullying, intimidation, and violence, and have
9 been deprived of equal educational opportunities, in
10 schools in every part of the Nation.

11 (2) While discrimination, including harassment,
12 bullying, intimidation, and violence, of any kind is
13 harmful to students and to the education system, ac-
14 tions that target students based on sexual orienta-
15 tion or gender identity represent a distinct and espe-
16 cially severe problem.

17 (3) Numerous social science studies dem-
18 onstrate that discrimination, including harassment,
19 bullying, intimidation, and violence, at school has
20 contributed to high rates of absenteeism, dropping
21 out, adverse health consequences, and academic
22 underachievement, among LGBT youth.

23 (4) When left unchecked, discrimination, includ-
24 ing harassment, bullying, intimidation, and violence,
25 in schools based on sexual orientation or gender

1 identity can lead, and has led, to life-threatening vio-
2 lence and to suicide.

3 (5) Public school students enjoy a variety of
4 constitutional rights, including rights to equal pro-
5 tection, privacy, and free expression, which are in-
6 fringed when school officials engage in or are indif-
7 ferent to discrimination, including harassment, bul-
8 lying, intimidation, and violence, on the basis of sex-
9 ual orientation or gender identity.

10 (6) While Federal statutory provisions expressly
11 address discrimination on the basis of race, color,
12 sex, religion, disability, and national origin, Federal
13 civil rights statutes do not expressly address dis-
14 crimination on the basis of sexual orientation or gen-
15 der identity. As a result, students and parents have
16 often had limited recourse to law for remedies for
17 discrimination on the basis of sexual orientation or
18 gender identity.

19 (b) PURPOSES.—The purposes of this Act are—

20 (1) to ensure that all students have access to
21 public education in a safe environment free from dis-
22 crimination, including harassment, bullying, intimi-
23 dation, and violence, on the basis of sexual orienta-
24 tion or gender identity;

1 (2) to provide a comprehensive Federal prohibi-
2 tion of discrimination in public schools based on ac-
3 tual or perceived sexual orientation or gender iden-
4 tity;

5 (3) to provide meaningful and effective rem-
6 edies for discrimination in public schools based on
7 actual or perceived sexual orientation or gender
8 identity;

9 (4) to invoke congressional powers, including
10 the power to enforce the 14th Amendment to the
11 Constitution and to provide for the general welfare
12 pursuant to section 8 of article I of the Constitution
13 and the power to make all laws necessary and proper
14 for the execution of the foregoing powers pursuant
15 to section 8 of article I of the Constitution, in order
16 to prohibit discrimination in public schools on the
17 basis of sexual orientation or gender identity; and

18 (5) to allow the Department of Education to ef-
19 fectively combat discrimination based on sexual ori-
20 entation or gender identity in public schools, through
21 regulation and enforcement, as the Department has
22 issued regulations under and enforced title IX of the
23 Education Amendments of 1972 and other non-
24 discrimination laws in a manner that effectively ad-
25 dresses discrimination.

1 **SEC. 3. DEFINITIONS AND RULE.**

2 (a) DEFINITIONS.—For purposes of this Act:

3 (1) EDUCATIONAL AGENCY.—The term “edu-
4 cational agency” means a local educational agency,
5 an educational service agency, and a State edu-
6 cational agency, as those terms are defined in sec-
7 tion 9101 of the Elementary and Secondary Edu-
8 cation Act of 1965 (20 U.S.C. 7801).

9 (2) GENDER IDENTITY.—The term “gender
10 identity” means the gender-related identity, appear-
11 ance, or mannerisms or other gender-related charac-
12 teristics of an individual, with or without regard to
13 the individual’s designated sex at birth.

14 (3) HARASSMENT.—The term “harassment”
15 means conduct that is sufficiently severe, persistent,
16 or pervasive to limit a student’s ability to participate
17 in or benefit from a program or activity of a public
18 school or educational agency, or to create a hostile
19 or abusive educational environment at a program or
20 activity of a public school or educational agency, in-
21 cluding acts of verbal, nonverbal, or physical aggres-
22 sion, intimidation, or hostility, if such conduct is
23 based on—

24 (A) a student’s actual or perceived sexual
25 orientation or gender identity; or

1 (B) the actual or perceived sexual orienta-
2 tion or gender identity of a person with whom
3 a student associates or has associated.

4 (4) PROGRAM OR ACTIVITY.—The terms “pro-
5 gram or activity” and “program” have the same
6 meanings given such terms as applied under section
7 606 of the Civil Rights Act of 1964 (42 U.S.C.
8 2000d–4a) to the operations of public entities under
9 paragraph (2)(B) of such section.

10 (5) PUBLIC SCHOOL.—The term “public
11 school” means an elementary school (as the term is
12 defined in section 9101 of the Elementary and Sec-
13 ondary Education Act of 1965) that is a public insti-
14 tution, and a secondary school (as so defined) that
15 is a public institution.

16 (6) SEXUAL ORIENTATION.—The term “sexual
17 orientation” means homosexuality, heterosexuality,
18 or bisexuality.

19 (7) STUDENT.—The term “student” means an
20 individual who is enrolled in a public school or who,
21 regardless of official enrollment status, attends
22 classes or participates in the programs or activities
23 of a public school or educational agency.

1 (b) RULE.—Consistent with Federal law, in this Act
2 the term “includes” means “includes but is not limited
3 to”.

4 **SEC. 4. PROHIBITION AGAINST DISCRIMINATION.**

5 (a) IN GENERAL.—No student shall, on the basis of
6 actual or perceived sexual orientation or gender identity
7 of such individual or of a person with whom the student
8 associates or has associated, be excluded from participa-
9 tion in, be denied the benefits of, or be subjected to dis-
10 crimination under any program or activity receiving Fed-
11 eral financial assistance.

12 (b) HARASSMENT.—For purposes of this Act, dis-
13 crimination includes harassment of a student on the basis
14 of actual or perceived sexual orientation or gender identity
15 of such student or of a person with whom the student as-
16 sociates or has associated.

17 (c) RETALIATION PROHIBITED.—

18 (1) PROHIBITION.—No person shall be excluded
19 from participation in, be denied the benefits of, or
20 be subjected to discrimination, retaliation, or re-
21 prisal under any program or activity receiving Fed-
22 eral financial assistance based on the person’s oppo-
23 sition to conduct made unlawful by this Act.

1 (2) DEFINITION.—For purposes of this sub-
2 section, “opposition to conduct made unlawful by
3 this Act” includes—

4 (A) opposition to conduct reasonably be-
5 lieved to be made unlawful by this Act;

6 (B) any formal or informal report, whether
7 oral or written, to any governmental entity, in-
8 cluding public schools and educational agencies
9 and employees of the public schools or edu-
10 cational agencies, regarding conduct made un-
11 lawful by this Act or reasonably believed to be
12 made unlawful by this Act;

13 (C) participation in any investigation, pro-
14 ceeding, or hearing related to conduct made un-
15 lawful by this Act or reasonably believed to be
16 made unlawful by this Act; and

17 (D) assistance or encouragement provided
18 to any other person in the exercise or enjoy-
19 ment of any right granted or protected by this
20 Act,

21 if in the course of that expression, the person in-
22 volved does not purposefully provide information
23 known to be false to any public school or educational
24 agency or other governmental entity regarding con-

1 duct made unlawful, or reasonably believed to be
2 made unlawful, by this Act.

3 **SEC. 5. FEDERAL ADMINISTRATIVE ENFORCEMENT; RE-**
4 **PORT TO CONGRESSIONAL COMMITTEES.**

5 (a) **REQUIREMENTS.**—Each Federal department and
6 agency which is empowered to extend Federal financial as-
7 sistance to any education program or activity, by way of
8 grant, loan, or contract other than a contract of insurance
9 or guaranty, is authorized and directed to effectuate the
10 provisions of section 4 with respect to such program or
11 activity by issuing rules, regulations, or orders of general
12 applicability which shall be consistent with achievement of
13 the objectives of the statute authorizing the financial as-
14 sistance in connection with which the action is taken. No
15 such rule, regulation, or order shall become effective un-
16 less and until approved by the President.

17 (b) **ENFORCEMENT.**—Compliance with any require-
18 ment adopted pursuant to this section may be effected—

19 (1) by the termination of or refusal to grant or
20 to continue assistance under such program or activ-
21 ity to any recipient as to whom there has been an
22 express finding on the record, after opportunity for
23 hearing, of a failure to comply with such require-
24 ment, but such termination or refusal shall be lim-
25 ited to the particular political entity, or part thereof,

1 or other recipient as to whom such a finding has
2 been made, and shall be limited in its effect to the
3 particular program, or part thereof, in which such
4 noncompliance has been so found; or

5 (2) by any other means authorized by law,
6 except that no such action shall be taken until the depart-
7 ment or agency concerned has advised the appropriate per-
8 son or persons of the failure to comply with the require-
9 ment and has determined that compliance cannot be se-
10 cured by voluntary means.

11 (c) REPORTS.—In the case of any action terminating,
12 or refusing to grant or continue, assistance because of fail-
13 ure to comply with a requirement imposed pursuant to this
14 section, the head of the Federal department or agency
15 shall file with the committees of the House of Representa-
16 tives and Senate having legislative jurisdiction over the
17 program or activity involved a full written report of the
18 circumstances and the grounds for such action. No such
19 action shall become effective until 30 days have elapsed
20 after the filing of such report.

21 **SEC. 6. CAUSE OF ACTION.**

22 (a) CAUSE OF ACTION.—Subject to subsection (c), an
23 aggrieved individual may bring an action in a court of
24 competent jurisdiction, asserting a violation of this Act.
25 Aggrieved individuals may be awarded all appropriate re-

1 lief, including equitable relief, compensatory damages, and
2 costs of the action.

3 (b) **RULE OF CONSTRUCTION.**—This section shall not
4 be construed to preclude an aggrieved individual from ob-
5 taining remedies under any other provision of law or to
6 require such individual to exhaust any administrative com-
7 plaint process or notice of claim requirement before seek-
8 ing redress under this section.

9 (c) **STATUTE OF LIMITATIONS.**—For actions brought
10 pursuant to this section, the statute of limitations period
11 shall be determined in accordance with section 1658(a) of
12 title 28, United States Code. The tolling of any such limi-
13 tations period shall be determined in accordance with the
14 law governing actions under section 1979 of the Revised
15 Statutes (42 U.S.C. 1983) in the State in which the action
16 is brought.

17 **SEC. 7. STATE IMMUNITY.**

18 (a) **STATE IMMUNITY.**—A State shall not be immune
19 under the 11th Amendment to the Constitution from suit
20 in Federal court for a violation of this Act.

21 (b) **WAIVER.**—A State’s receipt or use of Federal fi-
22 nancial assistance for any program or activity of a State
23 shall constitute a waiver of sovereign immunity, under the
24 11th Amendment or otherwise, to a suit brought by an
25 aggrieved individual for a violation of section 4.

1 (c) REMEDIES.—In a suit against a State for a viola-
 2 tion of this Act, remedies (including remedies both at law
 3 and in equity) are available for such a violation to the
 4 same extent as such remedies are available for such a vio-
 5 lation in the suit against any public or private entity other
 6 than a State.

7 **SEC. 8. ATTORNEY'S FEES.**

8 Section 722(b) of the Revised Statutes (42 U.S.C.
 9 1988(b)) is amended by inserting “the Student Non-Dis-
 10 crimination Act of 2011,” after “Religious Land Use and
 11 Institutionalized Persons Act of 2000,”.

12 **SEC. 9. EFFECT ON OTHER LAWS.**

13 (a) FEDERAL AND STATE NONDISCRIMINATION
 14 LAWS.—Nothing in this Act shall be construed to pre-
 15 empt, invalidate, or limit rights, remedies, procedures, or
 16 legal standards available to victims of discrimination or
 17 retaliation, under any other Federal law or law of a State
 18 or political subdivision of a State, including title VI of the
 19 Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title
 20 IX of the Education Amendments of 1972 (20 U.S.C.
 21 1681 et seq.), section 504 of the Rehabilitation Act of
 22 1973 (29 U.S.C. 794), the Americans with Disabilities Act
 23 of 1990 (42 U.S.C. 12101 et seq.), or section 1979 of the
 24 Revised Statutes (42 U.S.C. 1983). The obligations im-
 25 posed by this Act are in addition to those imposed by title

1 VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et
2 seq.), title IX of the Education Amendments of 1972 (20
3 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act
4 of 1973 (29 U.S.C. 794), the Americans with Disabilities
5 Act of 1990 (42 U.S.C. 12101 et seq.), and section 1979
6 of the Revised Statutes (42 U.S.C. 1983).

7 (b) FREE SPEECH AND EXPRESSION LAWS AND RE-
8 LIGIOUS STUDENT GROUPS.—Nothing in this Act shall be
9 construed to alter legal standards regarding, or affect the
10 rights available to individuals or groups under, other Fed-
11 eral laws that establish protections for freedom of speech
12 and expression, such as legal standards and rights avail-
13 able to religious and other student groups under the First
14 Amendment and the Equal Access Act (20 U.S.C. 4071
15 et seq.).

16 **SEC. 10. SEVERABILITY.**

17 If any provision of this Act, or any application of such
18 provision to any person or circumstance, is held to be un-
19 constitutional, the remainder of this Act, and the applica-
20 tion of the provision to any other person or circumstance
21 shall not be impacted.

1 **SEC. 11. EFFECTIVE DATE.**

2 This Act shall take effect 60 days after the date of
3 enactment of this Act and shall not apply to conduct oc-
4 ccurring before the effective date of this Act.

○