

111TH CONGRESS
2D SESSION

S. 3390

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

MAY 20, 2010

Mr. FRANKEN (for himself, Ms. MIKULSKI, Mr. MERKLEY, Mrs. GILLIBRAND, Mr. KERRY, Mr. HARKIN, Mr. CASEY, Mrs. MURRAY, Mr. BINGAMAN, Mr. FEINGOLD, Mr. CARDIN, Mr. SANDERS, Ms. CANTWELL, Mr. BROWN of Ohio, Mr. DODD, Mr. BEGICH, Mr. DURBIN, Mr. LAUTENBERG, Mr. LEAHY, Mr. MENENDEZ, Mr. WHITEHOUSE, Mr. WYDEN, Mr. AKAKA, and Ms. KLOBUCHAR) 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-
5 discrimination Act of 2010”.

6 **SEC. 2. FINDINGS AND PURPOSES.**

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

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

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

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

21 (4) When left unchecked, discrimination, includ-
22 ing harassment, bullying, intimidation, and violence,
23 in schools based on sexual orientation or gender
24 identity can lead, and has led, to life-threatening vio-
25 lence and to suicide.

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

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

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

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

23 (2) to provide a comprehensive Federal prohibi-
24 tion of discrimination in public schools based on ac-

1 tual or perceived sexual orientation or gender iden-
 2 tity;

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

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

16 **SEC. 3. DEFINITIONS AND RULE.**

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

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

24 (2) GENDER IDENTITY.—The term “gender
 25 identity” means the gender-related identity, appear-

1 ance, or mannerisms or other gender-related charac-
 2 teristics of an individual, with or without regard to
 3 the individual's designated sex at birth.

4 (3) HARASSMENT.—The term “harassment”
 5 means conduct that is sufficiently severe, persistent,
 6 or pervasive to limit a student's ability to participate
 7 in or benefit from a program or activity of a public
 8 school or educational agency, or to create a hostile
 9 or abusive educational environment at a program or
 10 activity of a public school or educational agency, in-
 11 cluding acts of verbal, nonverbal, or physical aggres-
 12 sion, intimidation, or hostility, if such conduct is
 13 based on—

14 (A) a student's actual or perceived sexual
 15 orientation or gender identity; or

16 (B) the actual or perceived sexual orienta-
 17 tion or gender identity of a person with whom
 18 a student associates or has associated.

19 (4) PROGRAM OR ACTIVITY.—The terms “pro-
 20 gram or activity” and “program” have the same
 21 meanings given such terms as applied under section
 22 606 of the Civil Rights Act of 1964 (42 U.S.C.
 23 2000d–4a) to the operations of public entities under
 24 paragraph (2)(B) of such section.

1 (5) PUBLIC SCHOOL.—The term “public
2 school” means an elementary school (as the term is
3 defined in section 9101 of the Elementary and Sec-
4 ondary Education Act of 1965) that is a public insti-
5 tution, and a secondary school (as so defined) that
6 is a public institution.

7 (6) SEXUAL ORIENTATION.—The term “sexual
8 orientation” means homosexuality, heterosexuality,
9 or bisexuality.

10 (7) STUDENT.—The term “student” means an
11 individual who is enrolled in a public school or who,
12 regardless of official enrollment status, attends
13 classes or participates in the programs or activities
14 of a public school or educational agency.

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

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

19 (a) IN GENERAL.—No student shall, on the basis of
20 actual or perceived sexual orientation or gender identity
21 of such individual or of a person with whom the student
22 associates or has associated, be excluded from participa-
23 tion in, be denied the benefits of, or be subjected to dis-
24 crimination under any program or activity receiving Fed-
25 eral financial assistance.

1 (b) HARASSMENT.—For purposes of this Act, dis-
 2 crimination includes harassment of a student on the basis
 3 of actual or perceived sexual orientation or gender identity
 4 of such student or of a person with whom the student as-
 5 sociates or has associated.

6 (c) RETALIATION PROHIBITED.—

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

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

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

18 (B) any formal or informal report, whether
 19 oral or written, to any governmental entity, in-
 20 cluding public schools and educational agencies
 21 and employees of the public schools or edu-
 22 cational agencies, regarding conduct made un-
 23 lawful by this Act or reasonably believed to be
 24 made unlawful by this Act;

1 (C) participation in any investigation, pro-
2 ceeding, or hearing related to conduct made un-
3 lawful by this Act or reasonably believed to be
4 made unlawful by this Act; and

5 (D) assistance or encouragement provided
6 to any other person in the exercise or enjoy-
7 ment of any right granted or protected by this
8 Act,

9 if in the course of that expression, the person in-
10 volved does not purposefully provide information
11 known to be false to any public school or educational
12 agency or other governmental entity regarding con-
13 duct made unlawful, or reasonably believed to be
14 made unlawful, by this Act.

15 **SEC. 5. FEDERAL ADMINISTRATIVE ENFORCEMENT; RE-**
16 **PORT TO CONGRESSIONAL COMMITTEES.**

17 (a) REQUIREMENTS.—Each Federal department and
18 agency which is empowered to extend Federal financial as-
19 sistance to any education program or activity, by way of
20 grant, loan, or contract other than a contract of insurance
21 or guaranty, is authorized and directed to effectuate the
22 provisions of section 4 with respect to such program or
23 activity by issuing rules, regulations, or orders of general
24 applicability which shall be consistent with achievement of
25 the objectives of the statute authorizing the financial as-

1 sistance in connection with which the action is taken. No
2 such rule, regulation, or order shall become effective un-
3 less and until approved by the President.

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

6 (1) by the termination of or refusal to grant or
7 to continue assistance under such program or activ-
8 ity to any recipient as to whom there has been an
9 express finding on the record, after opportunity for
10 hearing, of a failure to comply with such require-
11 ment, but such termination or refusal shall be lim-
12 ited to the particular political entity, or part thereof,
13 or other recipient as to whom such a finding has
14 been made, and shall be limited in its effect to the
15 particular program, or part thereof, in which such
16 noncompliance has been so found; or

17 (2) by any other means authorized by law,
18 except that no such action shall be taken until the depart-
19 ment or agency concerned has advised the appropriate per-
20 son or persons of the failure to comply with the require-
21 ment and has determined that compliance cannot be se-
22 cured by voluntary means.

23 (c) REPORTS.—In the case of any action terminating,
24 or refusing to grant or continue, assistance because of fail-
25 ure to comply with a requirement imposed pursuant to this

1 section, the head of the Federal department or agency
2 shall file with the committees of the House of Representa-
3 tives and Senate having legislative jurisdiction over the
4 program or activity involved a full written report of the
5 circumstances and the grounds for such action. No such
6 action shall become effective until 30 days have elapsed
7 after the filing of such report.

8 **SEC. 6. CAUSE OF ACTION.**

9 (a) CAUSE OF ACTION.—Subject to subsection (c), an
10 aggrieved individual may bring an action in a court of
11 competent jurisdiction, asserting a violation of this Act.
12 Aggrieved individuals may be awarded all appropriate re-
13 lief, including equitable relief, compensatory damages, and
14 costs of the action.

15 (b) RULE OF CONSTRUCTION.—This section shall not
16 be construed to preclude an aggrieved individual from ob-
17 taining remedies under any other provision of law or to
18 require such individual to exhaust any administrative com-
19 plaint process or notice of claim requirement before seek-
20 ing redress under this section.

21 (c) STATUTE OF LIMITATIONS.—For actions brought
22 pursuant to this section, the statute of limitations period
23 shall be determined in accordance with section 1658(a) of
24 title 28, United States Code. The tolling of any such limi-
25 tations period shall be determined in accordance with the

1 law governing actions under section 1979 of the Revised
2 Statutes (42 U.S.C. 1983) in the State in which the action
3 is brought.

4 **SEC. 7. STATE IMMUNITY.**

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

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

13 (c) REMEDIES.—In a suit against a State for a viola-
14 tion of this Act, remedies (including remedies both at law
15 and in equity) are available for such a violation to the
16 same extent as such remedies are available for such a vio-
17 lation in the suit against any public or private entity other
18 than a State.

19 **SEC. 8. ATTORNEY’S FEES.**

20 Section 722(b) of the Revised Statutes (42 U.S.C.
21 1988(b)) is amended by inserting “the Student Non-
22 discrimination Act of 2010,” after “Religious Land Use
23 and Institutionalized Persons Act of 2000,”.

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

2 (a) FEDERAL AND STATE NONDISCRIMINATION
3 LAWS.—Nothing in this Act shall be construed to pre-
4 empt, invalidate, or limit rights, remedies, procedures, or
5 legal standards available to victims of discrimination or
6 retaliation, under any other Federal law or law of a State
7 or political subdivision of a State, including title VI of the
8 Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title
9 IX of the Education Amendments of 1972 (20 U.S.C.
10 1681 et seq.), section 504 of the Rehabilitation Act of
11 1973 (29 U.S.C. 794), the Americans with Disabilities Act
12 of 1990 (42 U.S.C. 12101 et seq.), or section 1979 of the
13 Revised Statutes (42 U.S.C. 1983). The obligations im-
14 posed by this Act are in addition to those imposed by title
15 VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et
16 seq.), title IX of the Education Amendments of 1972 (20
17 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act
18 of 1973 (29 U.S.C. 794), the Americans with Disabilities
19 Act of 1990 (42 U.S.C. 12101 et seq.), and section 1979
20 of the Revised Statutes (42 U.S.C. 1983).

21 (b) FREE SPEECH AND EXPRESSION LAWS AND RE-
22 LIGIOUS STUDENT GROUPS.—Nothing in this Act shall be
23 construed to alter legal standards regarding, or affect the
24 rights available to individuals or groups under, other Fed-
25 eral laws that establish protections for freedom of speech
26 and expression, such as legal standards and rights avail-

1 able to religious and other student groups under the First
2 Amendment and the Equal Access Act (20 U.S.C. 4071
3 et seq.).

4 **SEC. 10. SEVERABILITY.**

5 If any provision of this Act, or any application of such
6 provision to any person or circumstance, is held to be un-
7 constitutional, the remainder of this Act, and the applica-
8 tion of the provision to any other person or circumstance
9 shall not be impacted.

10 **SEC. 11. EFFECTIVE DATE.**

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

○