



# The Student Non-Discrimination Act (SNDA): A Legal Analysis

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## Summary

Introduced in both the 111<sup>th</sup> and 112<sup>th</sup> Congress and again in the 113<sup>th</sup> (H.R. 1652), the Student Non-Discrimination Act (SNDA) would prohibit discrimination on the basis of actual or perceived sexual orientation or gender identity in public elementary and secondary schools. The stated purpose of the legislation is to ensure that students are free from discriminatory conduct such as harassment, bullying, intimidation, and violence. SNDA appears to be patterned on Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in federally funded education programs or activities, although SNDA does differ from Title IX in several important respects.

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## Introduction

Introduced in both the 111<sup>th</sup> and 112<sup>th</sup> Congress and again in the 113<sup>th</sup> (H.R. 1652), the Student Non-Discrimination Act (SNDA) would prohibit discrimination on the basis of actual or perceived sexual orientation or gender identity in public elementary and secondary schools. The stated purpose of the legislation is to ensure that students are free from discriminatory conduct such as harassment, bullying, intimidation, and violence. SNDA appears to be patterned on Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in federally funded education programs or activities,<sup>1</sup> although SNDA does differ from Title IX in several important respects.

This report begins by discussing current laws that prohibit discrimination in education, and continues with an analysis of the specific provisions contained in SNDA, including provisions relating to coverage, prohibited acts, and enforcement and remedies under the proposed legislation.

## Current Law

Under current law, no civil rights statute explicitly prohibits discrimination in schools on the basis of sexual orientation or gender identity, although there are several civil rights statutes that bar discrimination in education on other grounds. In addition to Title IX, the applicable federal civil rights statutes that currently prohibit discrimination in schools include Title VI of the Civil Rights Act of 1964 (CRA), which prohibits discrimination on the basis of race, color, or national origin in federally funded programs or activities;<sup>2</sup> Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in federally funded programs or activities;<sup>3</sup> Title II of the Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination on the basis of disability by state or local governments;<sup>4</sup> Title IV of the CRA, which bars discrimination in public schools on the basis of race, color, sex, religion, or national origin;<sup>5</sup> and the Equal Educational Opportunities Act, which prohibits states from denying equal educational opportunities based on race, color, sex, or national origin.<sup>6</sup> The last two statutes were largely designed to combat segregation in public schools.

Although none of these civil rights statutes explicitly prohibits discrimination on the basis of sexual orientation or gender identity, there may be instances in which such discrimination may also be a form of sex discrimination that violates Title IX.<sup>7</sup> In the employment context, the Supreme Court has recognized that sex discrimination may encompass same-sex sexual harassment, meaning that sex discrimination is prohibited even if the harasser and victim are

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<sup>1</sup> 20 U.S.C. §§1681 et seq.

<sup>2</sup> 42 U.S.C. §§2000d et seq.

<sup>3</sup> 29 U.S.C. §794.

<sup>4</sup> 42 U.S.C. §§12131 et seq.

<sup>5</sup> 42 U.S.C. §§2000c et seq.

<sup>6</sup> 20 U.S.C. §1703.

<sup>7</sup> See, e.g., *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809 (S.D. Iowa 2004).

members of the same sex.<sup>8</sup> The Court has also ruled that gender stereotyping is a form of discrimination on the basis of sex.<sup>9</sup> Therefore, if a student who is gay or transgender is being harassed because of a failure to conform to gender stereotypes, such harassment is prohibited by Title IX. It is important to note, however, that Title IX prohibits sexual orientation or gender identity discrimination only when it constitutes a form of sex discrimination.<sup>10</sup> Thus, the statute does not prohibit all forms of sexual orientation or gender identity discrimination or harassment of students,<sup>11</sup> and SNDA appears to be designed to fill this gap.

In 2010, the Department of Education (ED) issued guidance that discusses when student bullying or harassment may violate federal education anti-discrimination laws and that clarifies a school's obligation to combat such bullying or harassment.<sup>12</sup> The guidance includes a discussion of when bullying or harassment that targets lesbian, gay, bisexual, or transgender students may be a form of sex discrimination that violates Title IX.

## The Student Non-Discrimination Act

### Coverage

Like Title IX, SNDA would apply to public elementary and secondary schools, as defined in the Elementary and Secondary Education Act (ESEA).<sup>13</sup> Charter schools, which are considered to be public elementary and secondary schools under ESEA, would also be covered. However, unlike Title IX, which prohibits sex discrimination in all educational programs that receive federal funding, including institutions of higher education and vocational schools, SNDA's coverage would not extend beyond the elementary and secondary education level.

### Prohibited Acts

If enacted, SNDA would prohibit discrimination on the basis of actual or perceived sexual orientation or gender identity in public elementary and secondary schools, as well as discrimination based on the sexual orientation or gender identity of a person with whom a student associates. Although such provisions regarding an individual's "perceived" status or association with a protected individual are without parallel in Title IX, the difference might be attributed to

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<sup>8</sup> *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

<sup>9</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>10</sup> For more information on how the courts have handled claims in the employment context that sexual orientation or gender identity discrimination constitutes unlawful sex discrimination, see CRS Report R40934, *Sexual Orientation and Gender Identity Discrimination in Employment: A Legal Analysis of the Employment Non-Discrimination Act (ENDA)*, by Jody Feder and Cynthia Brouger.

<sup>11</sup> For more information on sexual harassment in schools, see ED's policy guidance on the issue. U.S. Department of Education, *Office for Civil Rights*, Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, January 2001, <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#Guidance>. See also, United States Department of Education, *Office for Civil Rights*, Dear Colleague Letter, April 4, 2011, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>12</sup> United States Department of Education, *Office for Civil Rights*, Dear Colleague Letter, October 26, 2010, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

<sup>13</sup> 20 U.S.C. §7801.

the fact that an individual's sex, unlike sexual orientation or gender identity, is generally evident to the casual observer. Under SNDA, "sexual orientation" would be defined to mean homosexuality, heterosexuality, or bisexuality, while "gender identity" would be defined to mean the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.

Like Title IX, SNDA's prohibition against sex discrimination would extend to all education "programs or activities" operated by recipients of federal funds. As a result, the scope of SNDA could potentially be quite broad. Under Title IX, the prohibition against sex discrimination in education programs or activities has been interpreted to include discrimination on the basis of sex in student admissions, recruitment, scholarship awards and tuition assistance, housing, access to courses and other academic offerings, counseling, financial assistance, employment assistance to students, health and insurance benefits and services, athletics, and all aspects of education-related employment, including recruitment, hiring, promotion, tenure, demotion, transfer, layoff, termination, compensation, benefits, job assignments and classifications, leave, and training.<sup>14</sup> Presumably, SNDA's prohibition on sexual orientation or gender identity discrimination could be interpreted to cover a similarly broad range of education programs or activities.

In addition, SNDA would expressly prohibit harassment on the basis of actual or perceived sexual orientation of a student or of a person with whom the student associates or has associated. Such harassment would include conduct that is "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from a program or activity of a public school or educational agency, or to create a hostile or abusive educational environment ... including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility..." Although Title IX does not have an explicit prohibition against such harassment, the statute has been interpreted to prohibit such activity. Thus, SNDA's express prohibition against harassment appears to be patterned on the current legal standards for harassment under Title IX, as developed by the courts and implementing agencies. For more information on sexual harassment in the schools, see CRS Report RL33736, *Sexual Harassment: Developments in Federal Law*, by Jody Feder.

As is generally common under federal civil rights laws, SNDA would also prohibit retaliation against individuals who oppose conduct prohibited by the act. This prohibition appears to be patterned on the anti-retaliation provision in Title VII of the Civil Rights Act of 1964,<sup>15</sup> which prohibits employment discrimination on the basis of race, color, sex, national origin, and religion. Unlike Title VII and SNDA, Title IX does not contain an express statutory prohibition against retaliation. Nevertheless, the federal courts have interpreted Title IX to prohibit retaliatory conduct. In *Jackson v. Birmingham Board of Education*,<sup>16</sup> the Court held that Title IX not only encompasses retaliation claims, but also is available to individuals who complain about sex discrimination, even if such individuals themselves are not the direct victims of sex discrimination.<sup>17</sup> Reasoning that "Title IX's enforcement scheme would unravel" "if retaliation were not prohibited,"<sup>18</sup> the Court concluded that "when a funding recipient retaliates against a

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<sup>14</sup> 34 CFR §§106.31-106.56.

<sup>15</sup> 42 U.S.C. §2000e-3(a).

<sup>16</sup> 544 U.S. 167 (2005).

<sup>17</sup> *Id.* at 171.

<sup>18</sup> *Id.* at 180.

person because he complains of sex discrimination, this constitutes intentional discrimination on the basis of sex in violation of Title IX.”<sup>19</sup>

If enacted, SNDA would also specify that the legislation shall not be construed to invalidate or limit the rights, remedies, procedures, or legal standards under other federal, state, or local laws, and clarifies that the requirements of the act are in addition to those imposed by Title IX, Title VI, and ADA. Finally, SNDA would also state that nothing in the act shall be construed to alter legal standards or rights available under other federal laws that protect freedom of speech and expression, nor to affect legal standards and rights available to religious and other student groups under the First Amendment to the Constitution and the Equal Access Act.<sup>20</sup> For more on this provision, see CRS Report R42626, *Religious Discrimination in Public Schools: A Legal Analysis*, by Cynthia Brougher.

## **Enforcement and Remedies**

Under SNDA, each federal agency that provides federal financial assistance to education programs or activities would be responsible for ensuring compliance with the act by recipients of such assistance. As is generally standard with statutes that govern the provision of federal financial assistance, an agency would have the authority to terminate such assistance to recipients who fail to comply with the act’s requirements. However, SNDA, like Title IX,<sup>21</sup> would include a provision that limits termination of assistance to the particular entity that is out of compliance, as well as to the particular program in which noncompliance has been found. SNDA would also require federal agencies that terminate funding to file a report regarding the grounds for its actions.

In addition to enforcement by federal agencies, SNDA would provide a private right of action allowing individuals to sue in federal court for violations of the act. Individuals would not be required to exhaust administrative remedies before suing, and they would be entitled to appropriate relief, including, but not limited to, equitable relief, compensatory damages, cost of the action, and remedial action, as well as attorney’s fees.<sup>22</sup> The statutory language of Title IX does not expressly provide for similar rights and remedies. However, the statute has been interpreted to include such rights and remedies.

Indeed, in an early Title IX case, the Supreme Court held that the statute provides student victims with an avenue of judicial relief. In *Cannon v. University of Chicago*,<sup>23</sup> the Court ruled that an implied right of action exists under Title IX for student victims of sex discrimination who need not exhaust their administrative remedies before filing suit. In *Franklin v. Gwinnett County Public Schools*,<sup>24</sup> the Court held that damages were available to a student who had been sexually harassed by her teacher if she could prove that the school district had intentionally violated Title IX. After *Franklin*, the appropriate standard for measuring a school district’s liability for sexual harassment of a student by a teacher remained unsettled until the Supreme Court ruling in *Gebser*

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<sup>19</sup> *Id.* at 174 (internal quotations omitted).

<sup>20</sup> 20 U.S.C. §§4071 et seq.

<sup>21</sup> 20 U.S.C. §1682.

<sup>22</sup> 42 U.S.C. §1988(b).

<sup>23</sup> 441 U.S. 677 (1979).

<sup>24</sup> 503 U.S. 60 (1992).

*v. Lago Vista Independent School District*.<sup>25</sup> In *Gebser*, the Court determined that a school district will not be held liable under Title IX for a teacher’s sexual harassment of a student if the school district did not have actual notice of the harassment and did not exhibit deliberate indifference to the misconduct.<sup>26</sup> Likewise, *Davis v. Monroe County Board of Education*, decided in 1999, addressed the standard of liability that should be imposed on school districts to remedy student-on-student sexual harassment.<sup>27</sup> In *Davis*, the Court held where officials have “actual knowledge” of the harassment, where the “harasser is under the school’s disciplinary authority,” and where the harassment is so severe “that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school,” the district may be held liable for damages under Title IX.<sup>28</sup> For more information about judicial rulings related to Title IX, see CRS Report RL30253, *Sex Discrimination and the United States Supreme Court: Developments in the Law*, by Jody Feder.

In addition, SNDA would waive the states’ Eleventh Amendment immunity from suit for sexual orientation or gender identity discrimination within any state program or activity that receives federal financial assistance. The Eleventh Amendment provides states with immunity from claims brought under federal law in both federal and state courts.<sup>29</sup> Although Congress may waive the states’ sovereign immunity by “appropriate” legislation enacted pursuant to Section 5 of the Fourteenth Amendment,<sup>30</sup> the scope of congressional power to create a private right of action against the states for monetary damages has been substantially narrowed by a series of Supreme Court decisions.<sup>31</sup>

Taken together, these decisions restrict the ability of private individuals to take the states to court for federal civil rights violations. They may not, however, apply to states’ voluntary acceptance of federal benefits that are expressly conditioned on waiver of Eleventh Amendment immunity. “Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.”<sup>32</sup> Thus, when a statute enacted under the Spending Clause<sup>33</sup> conditions grants to the states upon an unambiguous waiver of Eleventh Amendment immunity, as SNDA proposes, at least one federal court has determined that “the condition is constitutionally permissible as long as it rests on the state’s voluntary and knowing acceptance of it.”<sup>34</sup> It is important to note, however, that this area of the law is relatively undeveloped and may evolve as more legal challenges arise.

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<sup>25</sup> 524 U.S. 274 (1998).

<sup>26</sup> *Id.*

<sup>27</sup> 526 U.S. 629 (1999).

<sup>28</sup> *Id.* at 650.

<sup>29</sup> U.S. Const. amend. XI.

<sup>30</sup> U.S. Const. amend. XIV.

<sup>31</sup> *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

<sup>32</sup> *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

<sup>33</sup> U.S. Const. art. I, §8, cl. 1.

<sup>34</sup> *Litman v. George Mason Univ.*, 186 F.3d 544, 555 (4<sup>th</sup> Cir. 1999). For more information on waiving state sovereign immunity, see CRS Report RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.



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