U.S. COMMISSION ON CIVIL RIGHTS

EDITED

BRIEFING


FRIDAY, JULY 25, 2014

The Commission convened in Suite 1150 at 1331 Pennsylvania Avenue, Northwest, Washington, D.C. at 9:02 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman
ROBERTA ACHTENBERG, Commissioner
GAIL L. HERIOT, Commissioner
PETER KIRSANOW, Commissioner
DAVID KLADNEY, Commissioner
KAREN K. NARASAKI, Commissioner
PATRICIA TIMMONS-GOODSON, Commissioner
MICHAEL YAKI, Commissioner*

MARLENE SALLO, Staff Director

* Present via telephone
** Present via video teleconference
STAFF PRESENT:

PAMELA DUNSTON, Chief, ASCD
DORIS GILLIAM
ALFREDA GREENE
JENNIFER HEPLER, Parliamentarian
PETER MINARIK, Director, WRO*
DAVID MUSSATT, Director of RPCU*
LENORE OSTROWSKY, Acting Chief PAU, Atty Advisor
OREY SMITH, General Counsel
MICHELE YORKMAN, Director, IT

COMMISSIONER ASSISTANTS PRESENT:

ALEC DEULL
KENESHIA GRANT
CLARISSA MULDER
JUANA SILVERIO
ALISON SOMIN
KIMBERLY TOLHURST

INTERNS PRESENT:

MELISSA BROWER
JEFFREY JOSEPH, OSD
ELENA LOPEZ, OSD
T-A-B-L-E  O-F  C-O-N-T-E-N-T-S

I. Introductory Remarks by Chairman Castro .... 4

II. Issue Panel I - OCR/DOJ Guidance
   • Allison Randall ..........................7
   • Seth Galanter ..........................15
   • James Cadogan ..........................23

   Commissioners Questions ..........................30

III. Issue Panel II - OCR/DOJ Guidance
   • Ken Marcus ............................81
   • Greg Lukianoff ........................87

   Commissioners Questions ........................95

IV. Issue Panel III - OCR/DOJ Guidance
   • Chris Chapman ........................130
   • Catherine Hill .........................136

   Commissioners Questions ........................143

V. Issue Panel IV - Data on Sexual Harassment
   • Eugene Volokh ........................173
   • Ada Meloy .............................181
   • Anita Levy .............................188
   • Fatima Goss Graves ....................195

   Commissioners Questions ........................201

VI. Adjourn Briefing ..............................248
9:02 a.m.

I. INTRODUCTORY REMARKS BY CHAIRMAN CASTRO

CHAIRMAN CASTRO: Good morning, everyone. This meeting will come to order. I'm Chairman Martin Castro of the U.S. Commission on Civil Rights. I want to welcome everyone today to our briefing on the Sexual Harassment Policy at Educational Institutions by the U.S. Department of Education's Office on Civil Rights and the Civil Rights Division of the Department of Justice.

It is currently 9:03 a.m. on July 25th, 2014. And the purpose of this briefing is to examine these policies on sexual harassment as they impact those individuals who are students in primary, secondary and post-secondary education who are victims of harassment and also at the same time while protecting them looking at the importance of protecting the rights and due process of those individuals that have been accused and finding the balance.

And we're very fortunate to have today
esteemed panels that represent 11 distinguished
speakers who are going to provide us with a diverse
array of views on this topic. Speakers have been
divided between four panels. Panel I will consist
of Government officials discussing the Office for
Civil Rights and the Department of Justice's Policy
Guidance and Enforcement. Panel II will consist
of advocates and how they interpret the
Department's guidance and enforcement on the
Sexual Harassment Policy. Panel III is going to
discuss data that's available on the topic. And
Panel IV is going to conclude with advocacy
scholars and industry practitioners discussing
both the pros and cons of the Office for Civil
Rights and the Department of Justice's policies and
enforcement.

During the briefing each panelist is
going to have seven minutes to speak. After the
panelists have made their presentations, we
Commissioners will have the opportunity to ask them
questions during an allotted period of time. I
will recognize the Commissioners and schedule when
they will ask questions and try to keep on track as best we can to maximize the opportunity for discussion to occur among the panelists and the Commissioners.

I'd like to ask everyone, Commissioners and panelists alike, to try to be as succinct as possible in your questions and answers so that we can move along and cover as much ground as possible. You panelists will notice there's a system of warning lights that we have set up. It's pretty much like a traffic light. When the light turns green, go. You've got seven minutes. When it's yellow, that's telling you you've got two minutes to go and start wrapping up. And red of course means stop. And I know that you will be mindful again of the other panelists' opportunity to have their seven minutes as well.

Again, I also ask my fellow Commissioners as we have in every briefing beforehand to be considerate of one another and try to ask one question. I know there will times be a need for follow up, but we want to give everyone
a chance to speak. And in a few minutes I think we'll be joined by some new Commissioners and we'll talk about that then, but we will have a very full panel of Commissioners who'll want to question our panelists today.

With those housekeeping matters out of the way, I want to proceed now with the first panel.

CHAIRMAN CASTRO: I'd like to briefly introduce them and then swear them in.

Our first panelist this morning is Allison Randall, Chief of Staff from the Office on Violence Against Women at the U.S. Department of Justice. Our second panelist is Seth Galanter, who is the Principal Deputy Assistant Secretary at the U.S. Department of Education's Office for Civil Rights. And our third panelist is James Cadogan, Senior Counselor to the Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice.

(Whereupon, the panelists were sworn.)

II. ISSUE PANEL I- OCR/DOJ GUIDANCE
CHAIRMAN CASTRO: Okay. Thank you.

Ms. Randall, you have seven minutes.

MS. RANDALL: Thank you.

CHAIRMAN CASTRO: Thank you.

MS. RANDALL: Thank you so much for inviting the Department of Education's Office on Civil Rights, the Department of Justice's Civil Rights Division and the Office on Violence Against Women to speak about our efforts to reduce the prevalence of sexual harassment, including sexual violence that can create hostile environments in elementary and secondary schools and institutions of higher education. It is critically important that we ensure safe, non-discriminatory learning environments for all students in a lawful manner.

We know that is a shared goal of all members of the Commission as well. We will discuss the work of our respective offices as well as our collective work as part of the White House Task Force to Protect Students from Sexual Assault.

The Office on Violence Against Women administers the Violence Against Women Act and we
give out about $400 million every year to address
domestic violence, dating violence, sexual assault
and stalking. And at the Office on Violence
Against Women I hear stories almost every day about
how sexual assault has marred a student's
experience in school. The best available research
indicates that nearly 20 percent of college women
and roughly 6 percent of college men are victims
of attempted or completed sexual assault.

And these assaults are not simply
misunderstandings or mistakes. They are crimes
and they are often committed by serial, violent
perpetrators. In one study, 63 percent of college
rapists reported committing repeat rapes,
averaging six each. These individuals committed
other crimes as well. Their level of violence was
nearly 10 times that of non-rapists and nearly 3.5
times that of single-act rapists. This portrait
of college perpetrators is consistent with data
about sex offenders in non-college settings.

Alcohol is often used to render
victims helpless as well as less credible.
Perpetrators frequently prey on women who are already incapacitated from drinking and may encourage them to drink more or may surreptitiously provide their victims with drugs or alcohol. In one study over 80 percent of college perpetrators reported raping women who were incapacitated because of drugs or alcohol.

These campus sexual assault predators may avoid the justice system by attacking acquaintances, picking women who will not be considered credible due to alcohol use or other factors, and by minimizing injuries again by plying their victims with alcohol rather than using physical force. And indeed, only two percent of victims who were raped while they were incapacitated reported the assault to law enforcement. Individuals who are uniquely vulnerable for other reasons such as people with disabilities and LGBTQ individuals are also disproportionately targeted by rapists.

Sexual assault causes serious physical and psychological harm which frequently
interferes with the victim's access to education. More than half of all female victims of sexual assault sustain an injury. Victims on college campuses also suffer from a wide range of mental health problems after the assault, including depression, anxiety, post-traumatic stress disorder and drug and alcohol abuse. This hampers their ability to succeed in school and many survivors see their grades slip, they lose the energy for sports which in turn can cost them their scholarships. Others transfer schools, may drop out and struggle to complete the education they worked so hard to attain and some, too many, have even committed suicide.

Despite the scope and severity of sexual assault as well as the opportunity that we have to reduce a large number of assaults by addressing repeat perpetrators, schools often fail to respond effectively to sexual assault. Even the best intentioned university's adjudication and other processes frequently blame the victim rather than discipline the perpetrator. Researchers
have documented the profound negative effects that victim blaming or unsupportive responses from legal, medical or mental health professionals have on assault victims.

Our office has been inundated with victim accounts of rape and inadequate responses from college and university administrators. As part of the White House Task Force to Protect Students from Sexual Assault, we hosted 15 online listening sessions attended by hundreds of people, including representatives of many of the organizations here today. We also collected written comments totaling nearly 1,000 pages and the White House held more than a dozen in-person listening sessions.

The stories painted an alarming picture of the response to sexual violence on campus. As one commenter said, "It is not only the rape that causes the trauma to the victim. Schools can also compound the trauma by how they respond."

Another survivor reported, "I was not given any sort of help on campus. The most I got was a new
mattress for my bed." Another survivor who later transferred reported, "My rapist was found responsible for breaking four different conduct policies including the rule that equates to rape in Ohio law, but he was not expelled, not even suspended. I spent the next year-and-a-half terrified and paranoid on that campus."

The White House Task Force seeks to address the most pressing issues for survivors to better assist schools, local law enforcement and communities with sexual assault prevention and enforcement, and it builds on the great policy and enforcement work that the Departments of Education and Justice conduct on an ongoing basis. The administration understands that addressing sexual assault can be a large undertaking and that every school is unique, so the Task Force released new guidance and tools to help schools with these efforts: A check list for sexual misconduct policies, sample reporting and confidentiality protocols, a model climate survey, fact sheets on prevention and victim services. All these are
available on notalone.gov. The website gives students a clear explanation of their rights under Title IX and Title IV, along with a simple description of how to file a complaint with the Departments of Education and Justice and what they should expect throughout the process.

Fortunately, we are not starting from scratch. We know what works to reduce sexual violence and our office funds those proven strategies in cities, counties and states around the country, as well as on college and university campuses. We know that trained police and first responders, special prosecution units, victim advocates and sexual assault nurse examiners conducting forensic exams can improve evidence collection, victim outcomes and perpetrator accountability. Campus-based violence prevention programs have also been found to increase active bystander behavior - students intervening to stop or prevent a sexual assault.

Our campus program supports the successful strategies in a university setting.
The campus program distributes funds to institutions of higher education and grantees are required to strengthen their on-campus victim services, advocacy, security, investigation and disciplinary procedures, as well as implement evidence-informed bystander prevention programs.

Universities and colleges can also collaborate with local police, prosecutors and rape crisis centers to ensure the most effective responses to sexual assault.

CHAIRMAN CASTRO: Thank you, Ms. Randall.

MS. RANDALL: Thank you for inviting us to talk about our work.

CHAIRMAN CASTRO: Thank you. We'll have more opportunity to --

MS. RANDALL: No, that was the end of my remarks.

CHAIRMAN CASTRO: Okay. Great.

Mr. Galanter, proceed please.

MR. GALANTER: Mr. Chairman, Members of the Commission, thank you for the opportunity
on behalf of the Department of Education to testify today alongside my colleagues from the Department of Justice. The Office for Civil Rights at the Department of Education is responsible for administrative enforcement of Title IX against educational institutions that receive federal financial assistance from the Department.

Title IX protects all persons, including students and faculty, from sex-based discrimination at covered schools, colleges and universities. OCR shares responsibility for enforcing Title IX with the Justice Department's Civil Rights Division, and we work closely together on investigations, resolution agreements and policy development to ensure strong, consistent enforcement of the law and to increase safe, nondiscriminatory learning environments for all students in a lawful manner.

Before discussing our policies, let me just add two more statistics to the ones that Ms. Randall noted. First, the Department collects, under the Jeanne Clery Disclosure of Campus
Security and Crime Statistics Act, reports from colleges of sexual offenses, among other things. In 2012 there were over 4,800 sex offenses reported to school officials on college campuses. And the National Center for Education Statistics, which collects similar numbers at the public school level, reported that in 2009-10 there were 600 incidents of rape or attempted rape reported and 3,600 incidents of sexual battery other than rape reported by public school officials.

And as we noted in our testimony, another NCES report reveals that in a survey of public school officials almost two-thirds of public schools in the country reported that student-on-student sexual harassment happened at least occasionally in their school during the 2009-10 school year and more than three percent of schools reported that it happened on a daily or weekly basis.

As we all know, sexual harassment, including sexual violence, can profoundly damage a student's physical and emotional well-being in
ways that deprive or limit their opportunity to an
education, and it is the effects on the educational
opportunities of this all-too-common
discriminatory harassment that implicates Title IX
and makes this a critical civil rights issue for
the Departments.

To be specific, we will find a school
violates Title IX when, first, sexual harassment
is sufficiently serious to limit or deny a
student's ability to participate in or benefit from
a school's educational program or activity; that
is, it creates a hostile environment. And second,
the school, upon actual or constructive notice,
fails to take prompt and effective action
reasonably calculated to end that sexual
harassment, eliminate the hostile environment,
prevent its recurrence and, as appropriate, remedy
its effects.

Under Title IX sexual harassment is
unwelcome conduct of a sexual nature and that can
include unwelcome sexual advances, requests for
sexual favors, other speech, non-verbal and
physical conduct of a sexual nature, including acts of sexual violence. In determining whether sexual harassment has created a hostile environment to which a school must respond, consistent with the Supreme Court's decision in Davis, we consider the conduct in question from both a subjective and an objective perspective. Specifically, the standards that our offices apply require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position considering all the circumstances.

The Departments recognize that educational institutions have legal obligations in addition to the legal obligation not to discriminate on the basis of sex. In particular, OCR has repeatedly acknowledged that students and employees have certain due process rights under the U.S. Constitution and may have additional rights under state law. OCR has consistently stated in its guidance on sexual harassment and sexual violence that the rights established under Title IX must be interpreted consistently with any
federally-guaranteed due process rights. Although hypotheticals can and do abound in this area, we have not encountered a situation where there has been an actual conflict between a school's Title IX obligations involving sexual harassment and a school’s other legal obligations, and we are not aware of any court that has found such an actual conflict.

Furthermore, OCR has repeatedly made it clear that Title IX and other civil rights laws it enforces are not intended to restrict the exercise of speech protected by the U.S. Constitution. OCR has consistently maintained that when schools work to prevent and to address discrimination and harassment, they must respect the free speech rights of students, faculty and other speakers.

Now it's true that sexually harassing conduct takes many forms including speech and written documents and statements. It is not enough to trigger a Title IX liability that a person finds a form of expression personally offensive.
Rather, to create a hostile environment that requires the school to respond in ways that eliminate and remedy the environment, the harassing conduct must be sufficiently serious to a reasonable person in that circumstance that it limits or denies a student's ability to participate or benefit from the school's program. In this regard we would like to note, and we're pleased that in 2012 this Commission's California Advisory Committee recognized that the standard OCR uses for determining what constitutes a hostile environment is protective of speech and actually encouraged the standard to be adopted by educational institutions.

Over decades of work in this area, OCR has investigated and resolved hundreds of sexual harassment cases, issued policy guidance and provided technical assistance. Our work begins with the recognition that each school has a responsibility for creating a non-discriminatory learning environment and that each school is different. There is no universal one-size-fits-all...
policy and the Department makes no effort to mandate a single approach. Schools' policies will vary in detail, specificity and components reflecting different culture, state and local legal requirements, their size, and their administrative structure.

In this regard we've made efforts to be more transparent about our various resolution agreements. All our agreements on sexual violence, sexual harassment and other areas are now being posted on our website. Institutions that are looking to come into compliance or to stay in compliance with Title IX will see a wide variety of ways that other institutions have worked with the Department to reach that goal.

I would also note we've been continuing to issue guidance on this area and follow-up guidance as questions have arisen. We first issued guidance in 1997, building on racial harassment guidance in 2001, and additional guidance in 2010. Most recently in 2014, April of this year, we issued a question and answer document
about Title IX that not only addressed sexual violence, but touched on many of the issues we're talking about today including First Amendment and due process rights.

CHAIRMAN CASTRO: Thank you, Mr. Galanter. I appreciate it.

We now move on to Mr. Cadogan.

MR. CADOGAN: Morning.

CHAIRMAN CASTRO: Good morning.

MR. CADOGAN: And thank you for the opportunity to participate in this briefing.

As previously mentioned, equal access to educational opportunities is a civil rights issue, one that the Department of Justice takes very seriously. All parties that respond to reports of sexual assault, be they educational institutions, police or prosecutors, need to respond promptly and fairly to such reports and maintain public safety. The responses must be non-discriminatory and should encourage survivors to report and seek help, not dissuade them from coming forward.
Despite its prevalence, sexual assault remains one of the most underreported serious crimes today. This is because too often survivors are afraid to report sexual assaults not only to school administrators, but also to campus law enforcement, community law enforcement or prosecutors' offices out of fear of biased treatment that denies victims access to fair and impartial resolutions and that can traumatize and re-traumatize survivors.

To reverse this trend of under-reporting, survivors of sexual assault must believe their reports will be taken seriously and will be handled without bias or stereotypes throughout the entire process. That means from the time the survivor first reports an assault through any subsequent law enforcement investigation or prosecution. We need to ensure that schools, their Title IX coordinators, their campus police and local law enforcement are all considered safe and effective sources of help so that all students are protected and that survivors
of sexual assault are treated with dignity and respect and have equal access to education and justice.

The Justice Department is focused on a holistic approach to ensuring non-discriminatory educational environments including prompt, fair, and effective responses to reports of campus sexual assault. The Department conducts investigations of schools in a thorough and comprehensive manner. If we find non-compliance, the Department seeks the voluntary cooperation of the school and works hard to design resolutions that will help the school meet its obligations in a timely manner, bring meaningful relief to survivors, and create lasting change that improves the climate on campus for all students. This holistic approach is illustrated by the Department's work in Missoula, Montana.

In May of 2012, the Department of Justice opened a four-pronged investigation into allegations that the University of Montana-Missoula, the university's campus police, the Missoula Police Department and the Missoula
County Attorney's Office discriminated against women by failing to adequately respond to reports of sexual assault. The investigation of the University of Montana was conducted jointly with OCR. The Department engaged in these investigations of unlawful gender discrimination using the full breadth of its enforcement authorities. That is Title IX, Title IV, the Violent Crime Control and Law Enforcement Act of 1994, and the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968.

The Department did so because it knew that if one or more of these entities were not meeting their civil rights obligations, this likely was negatively impacting the willingness of women in Missoula to report sexual assault and the ability of the other entities to respond effectively to such reports. Experience has shown that coordinated and informed community responses to sexual assault are more likely to produce better outcomes.
Our comprehensive investigation resulted in detailed findings of non-compliance. While we won't share all of them today, we want to highlight some that DOJ and OCR made regarding the University of Montana that are relevant to today's discussion.

First, the reported incidents of rape or sexual assault were sufficiently serious that they interfered with or limited female students' abilities to participate in or benefit from the school's program. As a result, students faced a hostile environment. They could not engage in or complete their academic work. They experienced negative mental health consequences including thoughts of suicide. They felt unsafe on campus and some even left the university.

Second, the university did not take effective action to fully eliminate the sexually hostile environment, prevent its recurrence and remedy its effects.

Third, the university's sexual harassment and assault policies did not provide
clear notice of the conduct prohibited by the university or clear direction about where and how to file complaints.

Fourth, the university's grievance procedures did not ensure prompt and equitable resolution of complaints of sex-based harassment.

And lastly, the individuals investigating sexual assault and harassment complaints and those coordinating the university's Title IX efforts did not receive adequate training.

In addition, DOJ's investigation found that the university's Office of Public Safety and the Missoula Police Department, the law enforcement agencies responsible for the additional response to incidents of sexual assault, failed to do so appropriately and that their policies and training related to sexual assault response were insufficient.

Further, DOJ's investigation determined that these deficiencies in responding to sexual assaults were in large part due to reliance on gender-based stereotypes. DOJ also
found it necessary to assess the propriety of the practices of the Missoula County Attorney's Office, the law enforcement agency with primary responsibility for prosecuting sexual assault cases in Missoula County.

With regard to the Missoula County Attorney's Office DOJ found that sexual assaults of adult women were given low priority and there was insufficient training to effectively and impartially investigate and prosecute these cases.

Working cooperatively throughout with university president Royce Engstrom, DOJ and the Office for Civil Rights were able to resolve these findings through a voluntary agreement with the University of Montana.

DOJ also entered into ground-breaking agreements with the university's Office of Public Safety, the Missoula Police Department, and the county attorney's office. We commend each of these entities for recognizing the structural changes needed to ensure a non-discriminatory response to reports of sexual assault and for
working collaboratively with the Justice Department to comprehensively integrate law enforcement, community, and school-based responses to sexual assault. The agreements put in place common-sense reform that responded to our investigative findings in a straightforward and effective manner. The agreements also require all four entities to develop or revise their sexual assault policies and procedures to encourage reporting and deliver effective and fair responses.

We appreciate the chance to testify today.

CHAIRMAN CASTRO: Thank you. We appreciate your testimony.

COMMISSIONERS QUESTIONS

We're now going to open it up for questions from our Commissioners. I would ask Commissioners to identify to me that you want to ask a question, and as I have in the past, we'll set up a list of who's going to ask questions when.

So I see Commissioner Kirsanow. I'm
going to take the privilege of asking the first
question and then we'll go to Commissioner
Kirsanow.

COMMISSIONER YAKI: And Commissioner
Yaki would like to ask a question as well.

CHAIRMAN CASTRO: And, Commissioner
Yaki, you're on the list, too.

Each of you has mentioned, I believe --
I know that two of you -- I don't know -- I don't
remember if Ms. Randall mentioned in her testimony
the issue of the creation of a hostile environment.
Later in one of the other panels Ken Marcus, our
former staff director who is here, in his written
remarks talks about the Montana agreement being one
that actually lowers the bar from a hostile
environment to any unwelcome conduct.

Could you speak to that issue? Is
that what the Department was trying to accomplish
there as to create a situation where you did not
need to meet a hostile environment standard?

MR. CADOGAN: Thank you for the
question, Commissioner. That's not what the
CHAIRMAN CASTRO: Okay. Anybody else want to add to that?

MR. GALANTER: On behalf of the Department of Education I agree completely. As you see both from the complete letters of findings, the agreement and the policy that Montana actually implemented in result of the agreement, a hostile environment is required to find a violation. What the agreement required was—based on these findings—that a lot of people weren't reporting things—there was a problem. They didn't trust the system. They didn't respect the system. And the system, the way it was written, said if you're going to come to us, you have to have a severe pervasive — you have to be able — we're open if you can show us a hostile environment must be created in order to trigger a liability under Title IX and Title IV.

Local police department and the campus safety force all are consistent with that standard. A hostile environment was created in order to trigger a liability under Title IX and Title IV.
environment.”

What we said was, no, you have to be open to complaints of people who say I've been subject to unwelcome sexual conduct. And then it's your responsibility, Montana, to figure out whether there's a hostile environment or not. But the obligation to respond to the hostile environment, or the obligation to act on the complaint only occurs if a hostile environment was found.

Now, many institutions -- and this will be -- let me just add one thing.

CHAIRMAN CASTRO: Sure.

MR. GALANter: Many institutions find it useful to collect this kind of information as warning signs, because sometimes a lot of things that individually aren't going to rise to the level of a hostile environment together will become a hostile environment. And so knowing about these things, even if you aren't acting on any particular complaint, is particularly useful, and many schools have done that.
CHAIRMAN CASTRO: Okay. Thank you.

Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Thank you.

I want to thank the panelists. This is very informative. I appreciate your testimony.

CHAIRMAN CASTRO: I'm sorry. Hold on. You have to press your mic button.

COMMISSIONER KIRSANOW: Yes, okay.

Again, I want to thank the panelists for your testimony. It was very informative. And I want to thank the staff for getting a splendid panel.

Two very narrow questions for Mr. Cadogan. If you know, who has primary law enforcement jurisdiction over campus assaults or rapes? Is it the campus police? Is it the community-based police? Who has primary jurisdiction for investigating that matter and taking all law enforcement actions?

MR. CADOGAN: In the law enforcement context I don't know and will have to get back to you. All I can say is that for the purposes of Title IX and Title IV DOJ has an obligation to
ensure that universities are meeting the standards laid out in those statutes. So the criminal context is different if there happens to be criminal conduct that arises out of an incident of sexual assault, sexual harassment or sex-based violence, but our focus is on making sure that universities live up to their responsibilities under the statute in the administrative side.

COMMISSIONER KIRSANOW: Okay. Thank you.

And for Ms. Randall, you mentioned an instance in which a victim said that her rapist had not been expelled, and that was peculiar from a lot of perspectives, but was this person convicted? Was he being prosecuted? What were the circumstances, if you know?

MS. RANDALL: Based on what I remember from the written comments that this victim submitted, she raised a -- filed a complaint on campus which many survivors do, to use the campus sexual assault process, go to campus police for assistance. And I don't recall, but we'd be happy
to provide you all with follow-up information to see if she had also contacted local police. Unfortunately, we hear all too often that someone may be found responsible for very serious violations of the Student Conduct Code and that there may be very little disciplinary action.

COMMISSIONER KIRSANOW: Okay. Thank you.

Thank you, Mr. Chair.

CHAIRMAN CASTRO: Before I move on to Commissioner Yaki, I want to pause the briefing briefly. And we'll get the time back on the clock. But yesterday evening President Obama announced the appointment of two new Commissioners to the Commission. And just minutes ago they were sworn in downstairs, so I would like to invite our new Commissioners to join us here at the panel. And as they do that, I will briefly introduce them, give you their background.

Commissioner Karen Narasaki is an independent civil and human rights consultant. She was previously the president and executive
director of the Asian American Justice Center. She was also the Washington representative for the Japanese American Citizens League and was a corporate attorney at Perkins Coie. 

She began her career as a law clerk for Judge Harry Pregerson at the U.S. Court of Appeals for the 9th Circuit. She's currently chair of the Asian American Diversity Advisory Council for Comcast NBCU, co-chair of the Asian American Advisory Council for Nielsen. She also manages the Shelby Response Fund for Public Interest Projects and she's served on a number of boards and commissions including vice-chair of the Leadership Conference on Civil and Human Rights, Chair of the Rights Working Group. She was a board member, or is a board member of Common Cause, the Lawyers' Committee for Civil Rights Under Law Independence Sector and the National Immigration Law Center. She received her B.A. from Yale College and her J.D. from the University of California-Los Angeles.

Welcome, Commissioner.

COMMISSIONER NARASAKI: Thank you,
Mr. Chair.

CHAIRMAN CASTRO: Thank you. We also have our second Commissioner, Justice Patricia Timmons-Goodson. Justice Goodson was formerly an associate justice of the Supreme Court of North Carolina. She also served as an associate justice of the North Carolina Court of Appeals and a district court judge for the 12th District of North Carolina.

Prior to her appointment to the district court, Justice Timmons-Goodson was a staff attorney at Lumbee River Legal Services from 1983 to '84. She was also assistant district attorney for the 12th Prosecutorial District of North Carolina and began her career as district manager for the U.S. Census Bureau.

Justice Timmons has served on several leadership positions including the American Bar Association. She's a member of the Guilford College Board of Trustees and the Advisory Committee of the North Carolina Judicial College.

Justice Timmons-Goodson received her
B.A. and J.D. from the University of North Carolina
at Chapel Hill and her L.L.M. from Duke University
School of Law.

And we are extremely pleased to have
both of you with us today and for the next six years.
So, welcome.

(Applause)

CHAIRMAN CASTRO: With that, we will
resume our briefing. And, Commissioner Yaki, you
have the floor.

COMMISSIONERS QUESTIONS

COMMISSIONER YAKI: Thank you very
much. And welcome new Commissioners, especially
Commissioner Narasaki who I've known for many, many
years in leadership in the Asian American
community.

I wanted to ask the federal officials
sort of a 30,000-foot question, because I've been
concerned about the fact that there have been a
number of reports, most notably Senator
McCaskill's survey on sexual assaults and how
higher education institutions have handled them.
And her survey, however informal, showed that 41 percent of the schools have not conducted a similar investigation in the past five years, 21 percent in the private institutions have conducted fewer investigations than the number of incidences they actually reported to the Department of Education. Many provide no sexual assault response training at all for faculty or staff and 31 percent do not provide any sexual assault training at all for their students. There is an absence of talent for Title IX coordinators. And compounding that is the most recent -- I won't call it an attempt, but information release by the American Council on Education basically are warning colleges and universities from complying with the survey because of questions of legal liability.

I'm just wondering how the Departments of Education or Justice when faced with this kind of institutional resistance to inquiries from Congress. (Inaudible)

How do you deal with some of the results that the McCaskill survey showed and how
do you intend to deal with what appears to be institutional reluctance, would be a nice way to put it, institutional intransigence would be a better way to put it, are these universities and colleges from getting their act together when it comes to issues of sexual assault and sexual harassment on campuses?

CHAIRMAN CASTRO: Who would like to answer that?

MR. GALANTER: This is from the Department of Education perspective. I appreciate the breadth of the question and there is a lot in there. The first is clearly one thing it's training. Schools have to be providing training to faculty, staff and students. The Title IX coordinator, which every school is required to have, is a good resource for that. We are collecting at both -- now for the first time in this administration at both the K-12 level and the higher ed level we'll be collecting Title IX coordinator names and contact information. There will be a national database available so that
people can -- so they can learn from each other and they can be contacted about training opportunities.

I would also note in addition that at the higher education level apart from a civil rights perspective Congress recently passed amendments to the Clery Act that require schools to report about training of both students and faculty. There are notices of proposed rulemaking available now for comment on those issues that will take effect that people should be commenting on.

I would also say just the last point from OCR's perspective that we see a lot of institutions taking this seriously. We had a conference recently at Tufts. Fifty schools came to hear what they could do, those schools that aren't taking it seriously. The administration was sending a lot of signals that the time for delay is over. We're going to use all our tools, our enforcement tools as well as our policy tools to get people to take their civil rights obligations seriously.
COMMISSIONER YAKI: Well, just a quick follow up. What are the types of tools, levers, sanctions that the Department has at its disposal to ensure basic compliance with these requirements?

MR. GALANTER: And I don't want to preclude my friends from Department of Justice from answering, but from a Department of Education's perspective we have three primary tools. The first is data collection. We have regular data collections from -- at the K-12 level and with our friends in the Clery Office from higher education. So we get numbers from them. These numbers allow us to see where patterns are to focus enforcement efforts. Also because these numbers are public, it has a public information feedback system that allows members of those communities to go back to their schools and say, hey, these numbers are huge. What are we doing about it?

The second thing is our investigations both based on complaints and proactively the Office for Civil Rights has been doing more investigations
about sexual harassment and sexual violence in this administration than ever before and we've yielded some really strong public resolutions, not just in Montana, but recently in Tufts, VMI, SUNY and at the elementary and secondary level in Contra Costa, California.

And third, when we investigate, we find a problem and we're not able to reach a voluntary resolution, the administration is committed to going to enforcement and, as the Title IX authorizes, terminating federal funds. And that stick that we have, and we've had it for a long time, is a very effective tool in reaching voluntary resolutions.

But as the example of Tufts shows and the public reports were, there was some concern about whether they were going to adhere to their voluntary resolution. And we notified them that we would move to enforcement if we did not reach a resolution very quickly. And then we reached a resolution.

MR. CADOGAN: I would just briefly
add, to echo my colleague's comments, that education and training are the most important piece of this. That's not just in terms of educating people who are involved in the process of receiving, adjudicating and resolving complaints of sexual assault and sexual violence, but we -- when we bring our cases, when we do our investigations and have settlements like Montana that are global settlements that involve a number of community partners, that serves as an education piece for other schools around the nation, other educational institutions so that they know what sort of obligations they have underneath Title 9 and Title 4 and what we at the Department of Justice and Department of Education expect from them going forward.

So using these big cases and successful settlements, which are largely entered into voluntarily, we've been able to try to begin to train at an institutional level other educational institutions and schools who'll be looking to see what liability might attach in the
future and how they can avoid that.

MS. RANDALL: I'll just add that at the Office on Violence Against Women obviously we're not involved in enforcement, but we do try to help train college and university officials, and we have primarily focused that through our grants, which can't reach every university unfortunately. We make about 27, 28 grant awards under our campus program each year. So to expand beyond that small pool of grantees, we're working to create an online training clearinghouse that will be launched in the coming weeks and then fully developed over the course of the next year. This was part of the work with the White House Task Force to Protect Students from Sexual Assault.

The Bureau of Justice Assistance is also working on some training for Title IX coordinators, for law enforcement, for investigators. The CDC is involved. There's a large federal effort to really make training and technical assistance available nationwide to help schools improve, because we know schools do mean
very well.

CHAIRMAN CASTRO: Thank you.

Commissioner Kladney is going to be next followed by Commissioner Heriot, then Commissioner Achtenberg. And if any of our new Commissioners want to ask questions, I'll put you on the list as well.

Commissioner Kladney?

COMMISSIONER KLADNEY: Thank you, Mr. Chairman.

Mr. Galanter, a couple of questions. You were talking in your presentation. You said words aren't enough to create a hostile environment. Is that correct, or did I get that wrong?

MR. GALANTER: No, that's not what I said.

COMMISSIONER KLADNEY: Okay.

MR. GALANTER: What I was saying was words can be a form of harassment, but offensiveness to an individual is not the test about whether there's a hostile environment. The
question of a hostile environment looks at it from both a subjective and an objective perspective.

COMMISSIONER KLADNEY: And you said from both a subjective and objective perspective. So how does the trier of fact rate those two? How do they balance them?

MR. GALANTER: It's not a balancing test. They're conjunctive. They both need to be met. That is, if the individual who experiences the words isn't offended, you don't have to get to objectiveness. But if someone who experiences those words is offended and the trier of fact, as you call him, finds that a reasonable person in those circumstances should have reacted that way, and then looking at the entire context finds that a hostile environment has been, created that the ability to participate in the educational program has been limited in some way, then that is when they have to act and respond under Title IX.

COMMISSIONER KLADNEY: Okay. So then when they take the discipline -- you did say that the school has established their own
disciplinary levels, is that correct?

MR. GALANTER: I don't know if I said

that in my oral remarks, but absolutely we expect

the schools based on the circumstances -- a K-12

school is going to be different than a higher

education. The responses are going to have to be

individualized.

COMMISSIONER KLADNEY: Right. So in

higher education if the range of discipline can be

from minor to major, right, does the person who is

being disciplined have any ability to come to the

Department of Education and say we were disciplined

too much? Do you know what I'm trying to say? I

mean, is there recourse for them?

MR. GALANTER: Let me answer that in

two ways:

COMMISSIONER KLADNEY: Yes.

MR. GALANTER: Presume every system

regardless of what the offense is -- let me put it

into -- it -- one, OCR recommends but doesn't

require that schools permit appeals from

disciplinary decisions and many schools, both
state and private schools, have appeals procedures. And with states sometimes you can go to state court as well. And OCR is open for all claims of sexual harassment, whether they be brought by women or men, but we do not view ourselves I guess as a super administrative body reviewing disciplinary -- whether disciplinary sanctions were, you know, meted out appropriately unless there is some discrimination allegation involved.

COMMISSIONER KLADNEY: Okay. And then I was reading -- a couple of weeks ago the New York Times had a big article on sexual assault in schools and they talked about one particular school. It's two names, but I can't remember what it was off the top of my head. And they -- they described the disciplinary process that this school had or didn't have or whatever. What is the burden of proof in these college disciplinary actions?

MR. GALANTER: Well, let me start by saying before we issued our guidance on sexual
violence in 2011, surveys said about 80 percent of higher education institutions used a preponderance of the evidence standard as their standard of proof in disciplinary issues involving sexual violence. Our 2011 guidance said that Title IX requires using a preponderance of the evidence standard for determining whether sexual violence has occurred and whether it created a hostile environment and what you're going to do about it. And since that time we have been telling schools and repeated in our 2014 guidance that a preponderance of the evidence standard is necessary as part of any investigation of sexual harassment and sexual violence.

COMMISSIONER KLANDNEY: Thank you.

CHAIRMAN CASTRO: Next is Commissioner Heriot.

COMMISSIONER HERIOT: Thank you, Mr. Chairman.

CHAIRMAN CASTRO: You're welcome.

COMMISSIONER HERIOT: My question is for Ms. Randall. You used the word "incapacitated."
What's the definition of "incapacitated" under DOJ policy here and what do you do about the case of the perpetrator who's also incapacitated, the perpetrator who maybe had had just as many drinks as the victim? How do we treat that case?

MS. RANDALL: So what we do is fund schools to improve their work. We don't enforce or have any explicit requirements, nor have any legal definitions. And so my office does not have an explicit definition of "incapacitated." So what we do is train schools from the International Association of Chiefs of Police and others who have a great deal of expertise in this. And so they train on the latest research on toxicology to help schools determine was the student so intoxicated that they were incapacitated and to think through thorny situations when both parties were intoxicated. So we don't tell schools this is exactly how you have to respond to this, but we train them on the array of issues surrounding it and that the process should be completely fair obviously to both parties.
COMMISSIONER HERIOT: Mr. Galanter, you mentioned Title IX coordinators being required by law. What's the source of that requirement? Is that statutory? And I've been reading about Title IX coordinators being hired at Harvard and at Stanford and at Colorado and I think Missouri who are former Department of Education employees. What kind of safeguards do we have against the revolving door problem, the notion of having an incentive to create laws in a particular way to maximize one's chances of getting the lucrative job as a Title IX coordinator? And I understand that some of these jobs aren't quite that lucrative.

MR. GALANTER: Thank you for that question. The requirement of the Title IX coordinator has been in the Title IX Regulation since it was first enacted in 1975.

COMMISSIONER HERIOT: So that's Department of Education regulation?

MR. GALANTER: It started as, yes, Department of Health and Education Welfare.

COMMISSIONER HERIOT: Sure.
MR. GALANTER: Every agency now -- I believe up to 40 agencies have Title IX regulations. They all have the Title IX coordinator requirement in them.

COMMISSIONER HERIOT: Yes.

MR. GALANTER: And that's both at the K-12 and education level. I would say that we find in many situations they don't -- schools don't have Title IX coordinators, which is one of the reasons we're collecting more data about that, and for example in our Tufts finding there was no Title IX coordinator for a year-and-a-half when some of the significant problems were going on.

In terms of ethics issues, on both sides we recommend that the Title IX coordinator not have a conflict of interest; that is, not have too many hats within the institution. And there are general Government ethic regulations, which I apologize I can't quote verbatim, that would prohibit people who recently left the Department from working directly with the Department of Education. But again, I don't know the scope of
those regulations. Obviously it depends on the level of the person when they left the Department, but --

COMMISSIONER HERIOT: But there is such a policy? Could you get me a copy of that at some point?

MR. GALANTER: I would be pleased to.

COMMISSIONER HERIOT: Thank you.

CHAIRMAN CASTRO: Thank you, Commissioner. Commissioner Achtenberg, you now have the floor.

COMMISSIONER ACHTENBERG: Thank you, Mr. Chairman.

CHAIRMAN CASTRO: You're welcome.

COMMISSIONER ACHTENBERG: I want to begin by commending the panel and the departments that they represent. I'm a trustee of the California State University System, so I'm hoping I'm not expressing some kind of conflict of interest here when I say that I know for a fact that our university system, which is the largest university system in the country -- but our
university system benefits enormously from the
guidance that your departments offer.

I know we take our sexual assault and
sexual harassment policies very seriously and have
benefitted, as I say, from the guidance from the
workshops, from the trainings, from the relatively
light and constructive hand that's offered by both
the Department of Education and the Department of
Justice, provided that we're interested in
undertaking grappling with these issues as
proactively as possible, and then in the instances
where hostile environment is being detected or what
have you, dealing with them in a straightforward
way. We like to think that that's what we're
doing.

And in that capacity we have found the
Department of Education and the Department of
Justice to be partners in that regard. So
sometimes I think you all get the reputation of
being the heavy hand of Government. That has not
been our experience, at least to my knowledge. So
I want to commend you on that and thank you for your
guidance because we are constantly trying to evolve policies that address the real needs of our students and not based on anecdote. And so, anecdote actually is the topic of my question now that I've made my statement.

Sometimes your efforts are perceived as being based on anecdotal information as compared to studies and statistics that are scientifically verifiable, if you will. Could you talk a little bit about how you get the statistics that you utilize, how we can have faith in the viability of those statistics? Sometimes we get a sense that there's a coarsening of the body politic when it comes to issues like this. I'm wondering if you would comment about trends in this regard, as well as any other observations you have to make as experts in this field? I think we would benefit enormously from hearing about both your opinions and your expert judgment in this area.

MR. GALANTER: Let me start and let me take a moment just to say again not prejudicing any pending or future investigations how pleased we are
that the University of California has elected to undertake an audit of their sexual violence practices, and it's that kind of proactive activity that we hope many universities and schools will undertake.

COMMISSIONER ACHTENBERG: I mean, just to clarify, I was speaking of the California State University, not the University of California. And they're the one with the claim against them; not us.

(Laughter)

COMMISSIONER ACHTENBERG: But that's a whole other topic.

MR. GALANTER: See, so that's what I get for straying outside my role, which was actually going to be my first response to your question, which is that I'm a lawyer, not a statistician and you're very fortunate that on one of your -- I think the third or fourth panel you'll have someone from our Institute for Education Sciences. What we did in our statement was try and report all the data that we as the Federal
Government collected in this area and tried to be really clear about what questions we were asking, were these nationally representative samples? And Mr. Chapman will be able to go into that. What I'd like to say to kind of just feed on that is these numbers that we see seem really large, and some people call those into question. Our experience on the ground is consistent with the numbers that are being reported. And so when we go into an institute and we do see many times pervasive sexual harassment, sexual assault and reasons why you would see low numbers of reporting despite high incidence of occurrence. So I don't know if that helps or not.

MS. RANDALL: And when we look at some of the larger numbers we use, like that almost one in five students have been victims of attempted or completed sexual assault, for instance -- so we're looking at several different National Institute of Justice-funded surveys there. The one that we most commonly use that found that almost 20 percent had experienced some
type of attempted or completed sexual assault since entering college, when you look at it even more closely, when you look at a college senior -- so by the time you've left college what are you likely to have experienced, it was actually closer to 25 percent. That one in five number is a snapshot from freshman through senior. So when you look at by the time you actually graduate from college, the number is even higher.

And this is fairly consistent with previous research, previous National Institute of Justice, National Institutes of Health studies that found similar numbers. Also pretty consistent with the rates of sexual assault that we see across the country. The CDC's National Intimate Partner Sexual Violence Survey found that one in five women have been raped at some point in their lifetime.

So to many people these seemed like shockingly high numbers. To those of us who work on domestic violence and sexual assault, sadly this is no surprise, because these are the numbers that
we do see consistently. What makes it surprising for many is, as Seth mentioned, so few of these cases are reported and few of those cases that are reported are taken up by police or prosecutors. So it's a small number of sexual assault cases that really rise to our public consciousness.

CHAIRMAN CASTRO: Commissioner Narasaki?

COMMISSIONER NARASAKI: Thank you, Mr. Chair.

CHAIRMAN CASTRO: Yes, turn your mic on. There you go.

COMMISSIONER NARASAKI: As you can tell, I'm new. Thank you, Mr. Chair.

I'm very pleased about this hearing. The daughter of a very close friend of mine experienced rape in her college and the odyssey that she went through to try to get justice was quite painful for her and her family, so I think these issues are very important. And as someone who has a niece in college right now, the statistics I think are quite frightening.
So my question is in the Department of Ed's testimony you note the importance of stakeholder engagement, and I could not agree with you more. I worked on hate crime issues in colleges and I was often shocked to find that the only thing a college would do is stick a one-page notice that hate crimes were a bad thing in college in the freshman packet that literally had thousands of pages. And of course most of the students I talked to had no awareness of any kind of policy at all.

I'm wondering what kind of requirements you have. I noted that when you settle a case, you have a lot of requirements about stakeholder engagement, but what happens in terms of when it's not an active case? Are you doing something prophylactically in your guidance that says here are things we'd like you to do in terms of regularly surveying students about their awareness?

MR. GALANTER: Thank you for your question, and I'm honored to be your first
question. There are two or three things I'd like
to say about that.

First, at the higher education level,
as I mentioned earlier, the Clery Act, which is
enforced by a different office in our department,
does have requirements about training, and those
are currently subject to notice and comment
rulemaking. But at the college level we expect
those will be a primary and important platform for
assuring the kind of regular training that we think
is valuable. For those not subject to the Clery
Act, we do encourage strongly training. And as you
say, we use both climate surveys and training as
important remedies when we do find a violation.

We have, as part of the White House
Task Force, committed to developing a model climate
survey that will be free for folks to use that is
validated and we're working with our colleagues in
the Centers for Disease Control and Department of
Justice to generate that.

And then if I might be so respectful,
Ms. Randall might have a better sense of the
training available right now for educational institutions.

MS. RANDALL: So from our office, like I said, we're really looking to have more webinars, more online available material so that people around the country can get access to that level of training. And there are a number of organizations that offer training of I imagine varying levels of quality. So that's why we, the Bureau of Justice Assistance, the CDC and others are really looking to greatly ramp up that level of training.

And as folks who really helped to develop that climate survey, we're hoping that that's something that's useful as a voluntary mechanism for schools to look at the work that's being done on their campuses, and the Bureau of Justice Statistics is working on some further validation of that measure.

CHAIRMAN CASTRO: Justice, do you have a question you want to ask?

COMMISSIONER TIMMONS-GOODSON: Thank you very much, and I do. I believe --
CHAIRMAN CASTRO: Your microphone, Your Honor. There you go.

COMMISSIONER TIMMONS-GOODSON: There's that newbie thing again.

CHAIRMAN CASTRO: Don't worry. The veterans do it all the time, too.

COMMISSIONER TIMMONS-GOODSON: I believe some months ago the Department of Education published a list of institutions of higher learning indicating the number of sexual assaults or investigations under way. Is that correct?

MR. GALANTER: Yes, Your Honor.

COMMISSIONER TIMMONS-GOODSON: Yes, as a trustee of a small liberal arts school, that certainly came to our attention. I was wondering just what role, if any, you see such publication, such information -- how it assists in this education and confronting the problem. I believe I've read reports about the parents of the female students taking into account the names of the institutions listed on that. Talk to us if you will, please, about the role such listing may play
MR. GALANTER: Absolutely, and Congress started with the Clery Act requiring schools to openly report the sexual assault reports that they receive, and those are posted on our web site and are supposed to be posted by the universities themselves. Many schools have some data quality issues with that and they obviously have incentives to keep the numbers low, because when they're doing a good job and encouraging reporting, the numbers may go up and then the parents may get worried.

So we want to increase transparency, but we also need to caution folks that the numbers that they're seeing, that the lists that we're releasing don't mean that that school is any better or any worse than the schools that are different. It's just something to be aware of.

We thought long and hard about releasing that list a few months ago. There was a great demand for it and we were concerned because these are investigations. There has been no
finding, no determination. All we found was that there's enough allegation to move forward with the investigation. Our primary reason for doing so was to make sure we were getting all the evidence. That is by telling the community we have an investigation about sexual violence we hoped other people with information would come forward.

We do focus groups on campus. We work with the newspapers, we work with the administrators, we work with student groups, but just having a list where someone can say I had the problem. I'm going to University X. I have this problem. Is there someone else who has already complained about this? A single place they could go and look at that list and say, oh, someone else has already complained, so I can add my voice rather than being the first one.

Many people thought that was worth the cost of having a list, but we do caution people in the list itself and whenever we talk about it that it is just a list of investigations and those are generated both by complaints and also by our
proactive investigations, but they are not a signal
that those schools are different than the thousands
of schools that are not on the list.

COMMISSIONER TIMMONS-GOODSON: Thank
you.

CHAIRMAN CASTRO: Commissioner
Kirsanow has indicated he wanted to ask a question.
After that I'll ask the last question because we're
at the point of concluding the panel.

COMMISSIONER YAKI: And I have a very
brief final one as well.

CHAIRMAN CASTRO: Okay.

COMMISSIONER YAKI: Commissioner
Yaki.

CHAIRMAN CASTRO: All right.

COMMISSIONER KIRSANOW: Thank you,
Mr. Chair. And this is for whomever wants to
answer, but I think it is directed to both DOJ and
DOE.

The legal predicate for sexual
harassment doctrine began with Title VII sexual
harassment law emanating all the way from the
Supreme Court cases of Faragher and Ellerth, Harris v. Forklift. You've got Meritor Savings. And the idea was that conduct that is sufficiently severe or pervasive, that is unwelcome; the subjective component, and also is objectively unwelcome in terms of how a reasonable person would view it, would be a form of sexual discrimination that could render an employer liable, both under a quid pro quo standard and a hostile environment standard. And there is strict liability if the harasser is somebody in a determinative position such as a supervisor.

And I know I threw a lot out there. To what extent, if any, is there a difference between employment sexual harassment and sexual harassment in the Title IX sector? Is the definition different? If it is different, why should it be different? Are there other considerations? For example, if there's sexual harassment being conducted by somebody in a determinative position such as a professor, is that handled differently than sexual harassment that's student-to-student?
MR. CADOGAN: Thank you, Commissioner. What I would say is that under Title IX and Title IV DOJ and OCR are trying to enforce school obligations and any proceeding that follows an investigation of sexual harassment or sexually invasive violence, is in the administrative context. That is, it is run by the school. The processes and procedures are determined by the school. And DOJ and OCR do not get to the substance of that. We get to whether or not the school is responding to any complaint in a prompt, fair and equitable manner. And the Title IX and Title VII connection really depends on the case itself. We make all our determinations when we are working with schools on an individualized and case-by-case basis.

COMMISSIONER KIRSANOW: Is the definition of "sexual harassment" different then in the Title VII sector, in an employment-based sector, if you know?

MR. GALANTER: If I could just -- the answer is in part it depends. Congress created a
whole variety of fora. For Title VII the primary way to enforce it is in federal court. For our statutes, Title VI -- or sorry, Title VI, Title IX and 504, we have both administrative enforcement and private court enforcement. For private court enforcement the Supreme Court's decision in Gebser and Davis require showing not only of sexual harassment that creates a hostile environment, but also deliberate indifference and actual knowledge in order for an individual to get damages.

In our administrative enforcement we use a definition of "sexual harassment" that is the same as the one in Title VII, that it's unwelcome conduct. The definition of "hostile environment" is consistent with the one that the Supreme Court applied in Davis, which uses the same words. And I think the important thing to remember is all these words: "severe," "persistent," "pervasive," they're all trying to get at this notion that it's got to be sufficiently serious. It's not going to be an off-color remark, a stray remark. But that if one thing is particularly potent, like a sexual
assault, it may only happen once, but that's going
to create a hostile environment. So you have to
look at all these factors that the Supreme Court
decides.

And then I would just add that there's
one more layer, which is why universities are
different and why Title IX -- for example, our
regulations carve out curriculum from the Title IX
prohibition, which is that obviously you want to
have that core classroom discussion that isn't
going to be subject to judicial proceedings. And
so when you're dealing with curriculum, Title IX
carves that out as a space where we don't go. But
other than that, in the administrative proceedings
that we engage in, it is very similar to Title IX,
although each statute is different and I wouldn't
want to commit that the law crosses back and forth
completely.

COMMISSIONER KIRSANOW: Thank you.
That was a very good response, but just one
follow-up. Is the notice standard on where the
institution knew or should have known of the sexual
harassment?

MR. GALANTER: May I answer? My understanding is that in private damage actions in court it has to be actual knowledge. In our administrative proceedings it's known or should have known, and we identify to the institution who we hold them accountable for. That is, if particular responsible employees know, then we deem the institution to have known.

COMMISSIONER KIRSANOW: Great. Thank you very much.

CHAIRMAN CASTRO: Along those same lines in the next panel or one of the upcoming panels Ms. Levy from the American Association of University Professors talks about reducing the level from clear and convincing evidence to a preponderance of the evidence, as we discussed earlier. And it raises concerns about -- this mic is not working -- raises concerns about due process issues and academic freedom issues.

Could you explain why that level of proof has been altered from a clear and convincing
standard?

MR. GALANTER: I'd be happy to start that discussion. As I said to one of the other Commissioners, before we issued our 2011 guidance over 80 percent of schools were already using preponderance of the evidence standard for these types of proceedings rather than clear and convincing. So for four out of five schools there hasn't been a change, but we determined for reasons that are laid out in our 2011 guidance that preponderance of the evidence standard is the correct standard to use. That is, it's the standard we use to say what happened? After you talk to everyone, you're like, well, is it likely it happened this way or is it likely that it happened that way?

This is how civil litigation goes.

This is how the university, if it were sued in court, would be held accountable; that is, what was more likely than not? And this is how most, and certainly in Government, employment decisions are made. That is, if someone's not performing, you
don't have to say I can prove by clear and
convincing evidence that you didn't show up to work
yesterday. It's you didn't show to work. Here's
the information.

And one of the panelists you're going
to hear from later, Professor Volokh, I think is
how you pronounce it, agrees that preponderance is
an appropriate legal standard in this type of
situation.

CHAIRMAN CASTRO: I don't know if
anyone wants to add. If not, I will give
Commissioner Yaki the last question so that we can
wrap up the panel.

Commissioner?

COMMISSIONER YAKI: Okay. Thank you
very much, Chair Castro.

I just wanted to elevate it up again
to about the 30,000-foot level, not that I'm not
concerned with the valid discussions ongoing, but
we'll get to that with some of the other panels.
But I still am trying to ask the question, the Clery
Act notwithstanding, how do you take the model of
the Montana letter and make it one that requires compliance by every university and college in a country that receives federal funding in a way that is not reactive but proactive? How do we -- is there a way to require that the -- because we can talk a lot about how the individual things are being implemented, but the structure itself seems to be lacking in some universities. How do we assure that you're not simply chasing the one -- from one college campus to another? How do we assure greater compliance with the Montana requirements on a nationwide basis absent individual enforcement actions?

MR. CADOGAN: As I mentioned previously, our hope is to spread the approach in Montana as far as possible. That is not to suggest that there is a one-size-fits-all which is part of the issue. Department of Justice in its settlements, particularly in the context of Title IX and Title IV enforcement, publicizes a number of those settlements and publicizes the agreements that we have made so that other educational
institutions can learn from that example.

    COMMISSIONER YAKI: I know, but you
see -- I guess my -- I would just point to the fact
that you have like the American Council on
Education basically telling, in not so many words,
their client that this is a PR and lawyer issue and
have them lawyer up. I mean, how do we move beyond
these stances of simply batten down the hatches and
try and hide? How do we force them to be more
proactive without you having to spend an enormous
amount of resources chasing every single college
and university in this country?

    MR. CADOGAN: I would say that we will
aggressively enforce Title IX and Title IV
consistent with the extent of the law at as many
universities and educational institutions as we
possibly can. It is true that we can't necessarily
go after every institution that doesn't live up to
its obligations under the statutes, but in addition
to those enforcement actions we will certainly
work -- and OCR has certainly done an enormous
amount of work to bring institutions into voluntary
compliance and reach agreements to take action that haven't needed to be referred to DOJ for investigation or further action.

So it's not just that we have settlements that we're publicizing and hoping other institutions take note of. There's also a lot of work going on on a regular basis to engage with other institutions who have not yet dealt with this issue to the level of Montana so that they will actually be able to proactively prevent the creation of a hostile environment and ensure that they have the processes and procedures in place to be able to respond equitably, promptly and fairly to any allegation of sexual assault and reach a fair result.

COMMISSIONER YAKI: But don't we have the power now, or is there a law not that basically would tell the university or college prior to your receiving federal funds for fiscal year blah, blah, blah, blah, blah, blah we must have in our office the following information that would demonstrate your compliance with essentially a Montana-type regime?
MR. GALANTER: This is Mr. Galanter from the Department of Education. Title IX
requires assurances of compliance. Our regs and our guidance identify what we expect from them. I understand the -- I hear the frustration you have. We are using all the tools we have. Grant making from the Department of Justice, publicity, enforcement, technology, data collection. We are working with the resources we have and the tools we have. If there are other tools that would be useful, we would love to hear your thoughts and the thoughts of the other witnesses on how we can expand the scope of our work.

But given all the civil rights laws we're enforcing and the -- there are 17,000 public school districts, 7,000 institutions of higher education. We rely on voluntary compliance and we us all the tools we have to tell them what we expect of them. And when we find there are problems, we use our authority to resolve those problems and publicize that so that others know that we are both enforcing the law and what is expected of them as
one of many models they can adopt to come into compliance.

CHAIRMAN CASTRO: Thank you. And this concludes Panel I. I want to thank all the panelists for their participation. We very much appreciate it. Thank you.

And as you cycle off, we'll ask Panel II to begin to move towards the dais and our staff will put in the place cards. And I'll remind those who are on Panel II of the warning light system that we talked about earlier and the seven minutes that you'll each have before we begin to question you.

Okay. Thank you. Panel II, let me introduce folks. Our first panelist is Kenneth L. Marcus, President and General Counsel of the Louis D. Brandeis Center for Human Rights Under Law and also our former staff director.

Our second panelist is Greg Lukianoff, attorney and President of the Foundation for Individual Rights in Education, also known as FIRE.

(Whereupon, the panelists were sworn.)
CHAIRMAN CASTRO: Thank you. Mr. Marcus, please proceed.

III. ISSUE PANEL II – OCR/DOJ GUIDANCE

MR. MARCUS: Thank you, Mr. Chairman and Members of the Commission.

CHAIRMAN CASTRO: Your microphone?

MR. MARCUS: Can you hear me now?

CHAIRMAN CASTRO: Push the button.

There you go.

MR. MARCUS: Okay. It is always an honor and sometimes a pleasure to be here.

(Laughter)

CHAIRMAN CASTRO: That's more than some of us could say.

MR. MARCUS: Doubly and honored today to be in the presence of two new Commissioners. Welcome. Flipping through the materials I had the sense that the Commission has been exceptionally efficient in co-locating two different briefings in the same place and at the same time, one on sexual violence, the other on speech issues.

Both are important. As I review the
data on sexual violence, I consider this to be a stunning and shocking matter, and I hope that the Commission addresses these matters.

I'm going to focus on some of the speech issues. I would not be surprised if Mr. Lukianoff did as well. I mention this in part because I'm concerned that sometimes when we focus on issues of sexual violence, we miss the speech that's sometimes pulled in.

Sometimes when we focus just on the speech, we miss the severity of some of the sexual harassment that occurs. But I'm going to speak on the question of verbal harassment because I think it's an important issue coming out of the Montana agreement.

Now I think something very important has happened here this morning, and I'd like to underscore it because I think that the Commission has already done a great service today and hope that the Commission can amplify on it in a couple of ways that I'm going to describe.

In my written remarks, I indicated
that the Montana agreement, the agreement between OCR and DOJ and the University of Montana, which is known as the Blueprint Agreement, I indicated that it could be interpreted in either of two ways.

Either the agencies were doing something smart, or they were doing something illegal. Under Chairman Castro's questioning, they said they were doing the smart thing.

I think it's important, and I want to say what has to be done about it. Both agencies stressed orally here for us that they did not intend to indicate that the laws against sexual harassment would be violated by unwelcome sexual conduct that does not meet the standards of hostile environment.

In my written remarks, I indicated why someone might think otherwise just from a reading of the document.

And I have seen other written remarks from other speakers, specifically Professor Volokh, who was even more elaborate in coming up with the different examples why someone might think that they had something very different in mind.
I believe that the people in this room got some very good clarification on that issue and on a corollary point from Mr. Galanter along the lines that the standards for sexual harassment are not met unless the complainant has faced serious or pervasive conduct that a reasonable person would find.

So he incorporated subjective and objective. These are things that are not clear from the text of the Montana Agreement. And I'm not saying this because I want to criticize.

I'm saying this because the agencies called the Montana Agreement a blueprint for other universities. And other universities were listening.

When I asked university counsel at other universities, they're following the Montana Agreement. And if they're not in the room today, they might not get the clarification provided.

So the first thing is I think it's important, both from the Commission and from OCR and perhaps DOJ, that they say what they said in
the room and they say it in a way that will as heard as loudly as the Montana Agreement itself is heard.

And I'd like to highlight one of the aspects of this that needs to be clarified, which is that the agencies are not requiring universities to prohibit unwelcome sexual conduct unless it meets federal standards.

That's something they said today. It's inconsistent with what I think an ordinary reading of the text would be. And I think it has to come through.

I also want to focus a little bit on what might have been smart about the Smart Reading because what's interesting about the Montana Agreement, to me, is not just that it reads as if the agencies are overstepping their bounds, but also, if they're not overstepping their bounds, they might be saying something important.

And if so, maybe they should be focusing on that and elaborating on that. And you can help them. Mr. Galanter indicated that even if the standards of hostile environment are not
met, universities nevertheless should make inquiries.

In my experience, that's not always the case. In my experience, if a fleeting or minor or series of incidents is raised, university administrators might just brush it off and say that's not a hostile environment.

And I think the implication, both in Mr. Galanter's remarks today and of the Montana Agreement as interpreted in light of his remarks, is that universities need to start asking questions even before the standards of hostile environment are met because if a few things are happening there might be more things that happen later.

And there might be things that are happening that they're not aware of. So this is very important.

There's another piece that I would add to it that I think the Montana Agreement might have meant, that he didn't mention, which is not only should universities ask questions even if the legal standards aren't met, but sometimes they should
take action.

Agencies can't require them to take actions if the legal standards are not met, and there might be Constitutional requirements that provide parameters on the action that they can take.

But if students are offended by sexual actions that don't quite meet the levels of a federal violation and universities are aware of it, there are always things that they can do to articulate the institutions values, to educate so on and so forth.

I've tried to indicate some of those, but my time is limited. So I'm just going to say I hope that beyond just clarifying that they're not saying the illegal things, they also and perhaps you as a Commission can also expand on what is potentially helpful in the agreement.

CHAIRMAN CASTRO: Thank you, Mr. Marcus. Please proceed.

MR. LUKIANOFF: If you had told me before I started working the Foundation for
Individual Rights and Education that I would
routinely battle the startling misapplications of
harassment codes to punish speech that is clearly
protected by the First Amendment, I probably would
not have believed you.

But when I began work at FIRE in 2001,
I quickly discovered that not only were harassment
codes routinely abused but that the leaders of the
campus speech code movement of the '80s and '90s
explicitly argued that harassment codes should be
used to punish speech they deemed offensive.

I discovered that every single speech
code that was overturned between 1989 and 1995, the
supposed heyday of political correctness, involved
some attempt to twist the harassment code into a
vague and broad tool against the disfavored speech.

The proponents of harassment speech
codes have quietly achieved tremendous success
despite the fact that courts have consistently
recognized that merely labeling a speech code a
harassment policy does not magically inoculate it
from First Amendment scrutiny.
Since 1989 at least 37 lawsuits have been filed challenging speech codes over half of which involved over-broad harassment codes. Despite loss after loss in court, 58 percent of public colleges, bound by the First Amendment, maintain unconstitutional speech codes today.

A substantial portion of these are harassment based codes. FIRE has seen harassment based speech codes abused to punish obviously protected speech at dozens of universities around the country, including Tufts University, UC at Boulder, University of Denver, Appalachian State University and more.

In fact, I wrote a book that deals extensively with this called Unlearning Liberty. Universities have long tried to claim that the federal government made me do it by citing Title IX and the requirements of the Office for Civil Rights, Department of Education.

This blame game became so ridiculous that in 2003 OCR issued a Dear Colleague letter to every university in the country spelling out that
the federal government was not mandating --

(Off microphone comments)

MR. LUKIANOFF: Okay. And indeed

could not mandate the adoption of campus harassment

codes that violate the First Amendment norms.

After 2003, universities could no longer argue that

they're being forced by the Executive Branch to

maintain speech codes.

But in 2013, in response to the

University of Montana's mishandling of sexual

assault cases, the Department of Justice and OCR

issued a resolution agreement they deemed a

blueprint for every college in the country.

The blueprint's definition of

harassment was even broader than the speech codes

repeatedly struck down in federal court over the

past 25 years.

For context, in the 1999 Supreme Court

decision Davis v. Monroe County Board of Education,

which has already been mentioned, involved student

on student harassment in the K through 12 setting.

The court was very aware that the
standard for harassment must be clear and rigorous in order to prevent creating an all-purpose tool to punish disagreeable speech.

The court ruled that for an institution to be liable in their Title IX for inadequately responding to harassment, the plaintiffs must prove that the institution was deliberately indifferent, the claims of sexual harassment and that the targeting conduct was so severe, pervasive, and objectively offensive that the victim was effectively denied equal access to an institution's resources and opportunities.

The Davis standard is rigorous precisely because the Supreme Court knows they have to protect First Amendment rights. In the blueprint, however, OCR ignored these crucial limitations, explicitly overruling Montana's reasonable person standard.

Under the blueprint, universities must investigate harassment claims even when a reasonable person would not have found this speech objectionable thereby weaponizing the
sensitivities of the least speech tolerant members of the community.

In sharp contrast to Davis, the blueprint definition of harassment was simply unwelcome verbal conduct AKA speech of a sexual nature. Such a vague and broad standard would never hold up in court, yet OCR sought to impose it nationwide.

Understand that all harassment regulations and guidance coming from the OCR are applied by universities to a litany of categories, including race, ethnicity, religion and even political viewpoint.

So as a practical matter, the blueprint would be understood by risk adverse general counsels that the federal government was now defining harassment as "any speech that offends even if a reasonable person would not have been offended."

In the face of public outrage OCR eventually gave some indication, and you heard some of that today, that it is backing away from this
unconstitutional standard.

Assistant Secretary of Civil Rights, Catherine Lhamon wrote FIRE reaffirming OCR's commitment to the First Amendment and characterizing the blueprint as the resolution of that particular case.

Unfortunately Department of Justice officials continue to publically praise the Montana Agreement as model for other universities to follow. Universities are effectively being told pass this unconstitutional speech code or risk losing federal funding.

Universities are not willing to risk running afoul of OCR. And so many of them are passing unconstitutional codes that adopt the blueprint's harassing standard.

I actually just found out about a new one. SUNY New Paltz had just passed one that was exactly mirrored the blueprint. Troublingly, and again, if that was challenged in a court of law it would not stand a second.

Troublingly, the Legislative Branch
has followed suit. Senator McCaskill has recently suggested legislation to counter the Davis standard.

And Congress is considering the Tyler Clemente Higher Education Anti-Harassment Act, which in its present form threatened the First Amendment by failing to track data.

Harassment codes have been abused for too long, chilling, campus speech and trivializing real harassment. The Supreme Court has supplied a careful speech productive standard.

Congress can settle this debate by, easily by clarifying the Davis standard is the definition of peer-on-peer harassment under federal anti-discrimination standards.

By taking this step, Congress could end decades long attempts by some administrators and sadly some federal agencies, to turn harassment into an all-purpose campus speech code.

We hope that the Commission will help add clarity to law and protect free speech on campus. Thank you.
COMMISSIONERS QUESTIONS

CHAIRMAN CASTRO: Thank you, Mr. Lukianoff. Now we're going to open it up for questions from Commissioners. Commissioner Kirsanow?

COMMISSIONER KIRSANOW: This is both to Ken and Mr. Lukianoff. What's the definition of a public institution? I mean who is subject to the DOJ or DOE standards?

MR. MARCUS: Well, there are two issues. One is whether we're talking about --

CHAIRMAN CASTRO: Microphone.

MR. MARCUS: There are two questions. One is whether an institution has received federal funds that would bring it within OCR's jurisdiction. So there, it's a recipient of federal assistance.

Then there's a question of whether it's a public institution or state actor that could be subject to other sorts of lawsuits. I don't think I can speak to the full range of jurisdiction of Department of Justice though.
MR. LUKIANOFF: It's surprisingly messy to be honest. There are schools like Temple, for example, that was considered to be a private college but is now considered under the law to have the same duties as a public college.

In other words, they have to apply the First Amendment, for example. The same thing happened to Cornell University's Ag School is considered to be a public part of a private college.

If you were to consider federal funding, then there's practically, there's only a handful of truly, of private colleges in the entire country. And so it is actually a little messier than you would think.

COMMISSIONER KIRSANOW: Thank you.

CHAIRMAN CASTRO: Commissioner Heriot.

COMMISSIONER HERIOT: My question is for Mr. Lukianoff. I'm worried about the problem of asymmetrical remedies here.

If you have a case of a student whose First Amendment rights have been violated, whether
against a public or private university, are there differences in the ability of that person to get money damages, for example? What can you comment about that?

MR. LUKIANOFF: Absolutely. Part of the reason why I think you're having this sort of strange overreaction by universities, and sometimes to be fair, sometimes it's well intentioned.

They're trying to actually get it, you know, bad behavior by individuals, but let's be honest. Not all the time are people in power motives honorable.

But I do think that one of the things that you see going on, and when I go and speak to conferences of university administrators they are very, very worried about being investigated by the OCR.

They are very worried about being sued by students for harassment, discrimination or other liability claims. They're not that worried about being sued for First Amendment violations.
COMMISSIONER HERIOT: Why not?

MR. LUKIANOFF: Because for one,
they're not that many of them. There's not that
many First Amendment lawsuits. And FIRE actually
unfortunately feels forced that we're going to
actually have to start filing more lawsuits to
reset the balance.

The other is that the damages in First
Amendment violations are not all that high because
the damage of the First Amendment violations aren't
all that high.

So meanwhile, someone can argue that
under harassment and discrimination, they can
argue for relatively sizable damages. Courts will
award relatively small damages to students who, and
these are, just to give you a real example,
University of Cincinnati told student activists
that they had to actually limit their protest to
a tiny free speech zone on campus that was
constituted I think less than half of 1 percent of
the campus. I think it was like 0.3 percent.

They were also told that they had to
get two days advanced notice in order to use it. And in that case, there was no damages awarded and it was just a small, I think it ended up maybe around $15,000 and attorney's fees in that case.

That isn't really a strong incentive for universities to get rid of these overly burdensome codes.

COMMISSIONER HERIOT: Is that a public university?

MR. LUKIANOFF: That's a public university, University of Cincinnati.

COMMISSIONER HERIOT: What do you do against a private university?

MR. LUKIANOFF: Private universities are generally held, it's interesting because Title IX applies to private universities. However, First Amendment protections do not apply directly to --

COMMISSIONER HERIOT: You've still got the federal encouragement.

MR. LUKIANOFF: Yes.

COMMISSIONER HERIOT: You've still
got the First Amendment problem.

MR. LUKIANOFF: Exactly.

COMMISSIONER HERIOT: Do you have a lawsuit at that point?

MR. LUKIANOFF: Well, so what you end up having is universities, what you can call them to the mat for is fulfilling their own promises. And that's been FIRE's standard.

But essentially Yale and Harvard and Princeton and Stanford, my alma mater, they all promise free speech to high heaven. And we hold universities to that.

Is that an argument that you'd want to win in court on? I mean people have sued, for example, Brandeis University, and won under that theory. We find that a lot of times taking on private universities, the best way to do it is through public awareness.

COMMISSIONER HERIOT: Yes, that's very troubling the notion that this really is a First Amendment issue in the sense that the action is being taken because of pressure from the federal
government. But the lawsuit seems very difficult.

   MR. LUKIANOFF: Yes, but the incentives are all askew when it comes to a lot of this stuff. And I honestly think a big part of the problem is that we're trying to deal with two very different types of offenses under one rubric.

   We're talking about sexual assault as we talked about earlier today and trying to use the tools that we were, that jurists came up to to evaluate harassment when the normal harassment case was more like hostile work environment stuff.

   And we're finding that it's not a very good fit. So I think there's a lot of things we have to fundamentally reset if we want to actually be concerned about protecting speech but also protecting victims of assault.

   CHAIRMAN CASTRO: Okay. Thank you. Commission Kladney, you have the floor.

   COMMISSIONER KLADEY: Mr. Lukianoff, oops.

   (Off microphone comments)

   COMMISSIONER KLADEY: I find it
interesting that you say First Amendment doesn't bring many damages. If I use words to someone and, in a sexual sense --

MR. LUKIANOFF: I was talking about financial damages awarded in court.

COMMISSIONER KLADNEY: Let me finish. And I get thrown out of school. You're telling me that a court won't award me damages if I'm correct, and in a 1983 action and won't award significant attorney's fees?

MR. LUKIANOFF: It's been disappointingly small. In the worst cases I've ever seen, which is the Hayden Barnes case which was a case where a student was kicked out of school for a parking garage that was critical of a decision of the university president that still actually it's going for pretty much final adjudication before the 11th Circuit. There was --

COMMISSIONER KLADNEY: It's not finished yet?

MR. LUKIANOFF: Amazingly, the student's won at pretty much every level. It was
so bad that they even pierced qualified immunity
in that case because it was so clear that the
university president had to know he was violating
both due process protections and First Amendment
protections.

But the most they were willing to award
even in that case from a personal liability
standpoint was $50,000, which will probably be
covered by the university's insurance.

And even after that, a judge found a
way to make the argument, amazingly, that since
this litigation had gone on so long that really each
should pay each other's side's attorney's fees.

So it ends up being close to sort of
a net zero loss, which is crazy.

COMMISSIONER KLADNEY: Do you have
any examples of sexual harassment words kind of
litigation?

MR. LUKIANOFF: Of how much those end
up costing?

COMMISSIONER KLADNEY: No, how much
those wind up with damages?
MR. LUKIANOFF: Yes, I've heard estimates from different experts in the field, and they usually talk about even a frivolous lawsuit can end up costing the university $100,000.

COMMISSIONER KLADNEY: Right, but you have no specific example of words causing someone to get kicked out of school, them suing and --

MR. LUKIANOFF: And that found to be harassment?

COMMISSIONER KLADNEY: Right.

MR. LUKIANOFF: That I can think of --

COMMISSIONER KLADNEY: Personal knowledge.

MR. LUKIANOFF: Yes, for the most part it involves more than words when it comes to litigation.

COMMISSIONER KLADNEY: Okay. And another question I have is in your estimation, Mr. Marcus was talking about, and Mr. Galanter talked about it earlier about doing an investigation about a person using words and whether it was offensive to the person first and then a reasonable person
When do those kind of words become an assault in a tort sense?

MR. LUKIANOFF: Well, the standard we use is the 
Davis standard. We think the Davis standard is a wonderful standard because it actually does make harassment sound like what people conventionally mean by harassment, which is targeting someone for torment in a discriminatory way.

And that's the thing that we find so interesting about the debate around the definition of harassment is we think that the Supreme Court has provided a very well thought out definition that if universities were to follow it, it would eliminate most speech codes in a single move.

COMMISSIONER KLADNEY: Right, but I'm asking you about what constitutes an assault in terms of tort?

MR. LUKIANOFF: In terms of tort, I mean as far as, I mean certainly threatening somebody is very clear cut.
COMMISSIONER KLADNEY: Threatening somebody --

MR. LUKIANOFF: With any kind of physical violence, for example, is always an incredibly easy case.

COMMISSIONER KLADNEY: Where it puts them in fear of a battery.

MR. LUKIANOFF: Right. Oh, that would include threats and intimidation, yes.

COMMISSIONER KLADNEY: And they would use a reasonable person standard --

MR. LUKIANOFF: Right.

COMMISSIONER KLADNEY: -- to arrive at that.

MR. LUKIANOFF: Right.

COMMISSIONER KLADNEY: And a person could subjectively think they're in fear of a battery and objectively not be or objectively be.

MR. LUKIANOFF: Usually they'll try to combine those two standards where, and that's one of the things that's actually also very bright about the way we adjudicate threats is that it's,
there's a fair amount of common sense.

Would a person under the circumstances taken this as something that would reasonably place them in fear of bodily harm or death?

COMMISSIONER KLANDNEY: And that would be different than the Davis standard?

MR. LUKIANOFF: Yes, with the first doctrine of course when it comes to unprotected speech, there are several different categories of unprotected speech and FIRE roughly creates with the Supreme Court and all of those being unprotected.

COMMISSIONER KLANDNEY: Thank you.

MR. LUKIANOFF: Sure.

CHAIRMAN CASTRO: Commissioner Achtenberg and then you'll be followed by Commissioner Narasaki.

COMMISSIONER YAKI: And Commissioner Yaki wants to speak as well.

CHAIRMAN CASTRO: Okay. You'll come after Commissioner Narasaki. Commissioner Achtenberg, you have the floor.
(Off microphone comments)

CHAIRMAN CASTRO: No problem.

You've probably got my old one.

(Off microphone comments)

COMMISSIONER ACHTENBERG: Thank you.

CHAIRMAN CASTRO: There we go.

COMMISSIONER ACHTENBERG: Mr. Marcus, you are typically pretty sensitive to issues of First Amendment concern.

When you said that even when, even before the situation on a university campus may rise to the level of hostile environment, it might be appropriate for the university to ask questions and even to take action.

Although certainly the Office of Civil Rights or the Justice Department could not compel such activity, could you explain to us again why it is that raises no concern on your part that there's a First Amendment problem with encouraging that approach?

MR. MARCUS: Certainly, Commissioner Achtenberg, thank you. There's no First Amendment
problem because I'm not suggesting regulatory
conduct or certainly not regulatory conduct with
respect to protected speech.

In other words, there may be a whole
range of things that the university cannot do. The
university may not be able to punish someone for
what they've said.

And they may not be able to censor them
in advance of what they're saying, but there are
lots of other things that they can do.

And I think that administrators too
often fall into the trap of thinking either I
respond to this offensive speech by punishing it,
or I look the other way.

And what I'm saying is that there are
always a host of other things that they can do case
by case depending on the specifics. Oftentimes,
they can take this as a teachable moment.

Think about the incident, how it
reflects on the campus climate and what needs to
be said to students as a whole to sensitive them
to what's happening.
COMMISSIONER ACHTENBERG: Sure.

MR. MARCUS: Maybe there's a need for additional training. Maybe there are specific things that can be taught. There are usually going to be a whole host of things that can be done.

And I think universities need to be urged to get out of a mindset that says that if something offensive is happening, either we punish or we do nothing.

I think that they need to start thinking about responses to offensive conduct well before the standards of a federal civil rights violation are met.

COMMISSIONER ACHTENBERG: I agree with you. Thank you very much.

CHAIRMAN CASTRO: Commissioner Narasaki.

COMMISSIONER NARASAKI: Thank you, Mr. Chair. I am a little concerned about Mr. Lukianoff's statement that the schools seem to have a strange overreaction in terms of the problem.

It seems to me that there's well
documented incidents of really powerful bullying
now particularly supercharged because of the use
of social media that could really be damaging to
students that fall short of physical, actual
physical violence or threats of violence.

And I'm very concerned about the level
and what you do with that which is perpetrated
through speech but no less damaging.

I'm wondering if you have an example
of where the Department of Justice or the
Department of Education has actually sued a
university for not doing enough about an incident
that does not rise to the standard that you're
pushing.

MR. LUKIANOFF: Where they've sued a
university to protect a student --

(Simultaneous speaking)

COMMISSIONER NARASAKI: Yes. I know
that you're raising the fact that the Montana
standard you have concerns about, but have they
actually sued a university for saying you did not
act on an incident that may not meet the Davis
standard, right, because that's what you seem to be afraid of.

MR. LUKIANOFF: I'm just not understanding your question.

COMMISSIONER NARASAKI: What I hear you arguing is that the Montana example is causing universities to believe that they will be sued if they do not --

MR. LUKIANOFF: Not that they'll be sued, no.

COMMISSIONER NARASAKI: Okay. So what is the connection between the threat of, what I'm trying to get at is the agencies, are the agencies doing something wrong or is it just that you have universities who are not sufficiently well educated about where the boundaries are on free speech --

MR. LUKIANOFF: Right.

COMMISSIONER NARASAKI: -- because there are different corrections depending on what the problem really is.

MR. LUKIANOFF: What the problem is,
is that in drafting the Montana letter the OCR just wasn't careful enough in trying to address very legitimate concerns about sexual assault and --

(Simultaneous speaking)

COMMISSIONER NARASAKI: Right. No, I understand what you're saying about that, but you're not saying that the Department of Justice or the Department of Education is now actually trying to sue on a lesser standard?

MR. LUKIANOFF: I mean the Department of Education, its power is that it can remove federal funding from universities.

COMMISSIONER NARASAKI: And it hasn't threatened that?

MR. LUKIANOFF: So you're asking has the Department of Education intervened to defend students' free speech rights?

COMMISSIONER NARASAKI: No, I --

MR. LUKIANOFF: I would hope they would, but they haven't.

COMMISSIONER NARASAKI: You seem to be making the argument that schools believe that
they might get their federal funding taken away from them --

MR. LUKIANOFF: Right.

COMMISSIONER NARASAKI: -- if they do not try to punish or set standards for behavior that you feel doesn't rise to the Supreme Court's requirements.

MR. LUKIANOFF: Right.

COMMISSIONER NARASAKI: And I am asking you whether they've actually acted to do anything that would signal that they would in fact do that other than praise a settlement.

MR. LUKIANOFF: I mean this is the overall incentive problem is that universities are terrified of OCR investigations and in doing that, they will enact what the OCR tells them to enact.

(Simultaneous speaking)

COMMISSIONER NARASAKI: The answer's no then.

MR. LUKIANOFF: Have the OCR investigated universities on the basis of speech? I mean they're currently investigating I think,
what 60 or 70 colleges around the country. And
some of those instances I know do involve speech.

COMMISSIONER NARASAKI: Right, but
they haven't actually taken anyone's money away
based on a standard that --

(Simultaneous speaking)

MR. LUKIANOFF: They haven't taken
anyone's money away based on, I don't think they've
ever actually used the sanction that would take all
the money away.

But universities are terrified of the
investigation itself, hence leading to the
overreaction to speech and the --

(Simultaneous speaking)

COMMISSIONER NARASAKI: So the issue
is more on the university's side than anything
wrong that the Department's doing?

MR. LUKIANOFF: I disagree. They had
a duty to provide a constitutionally consistent and
constitutional standard for what harassment was
that did not interfere with what the Supreme Court
had said.
The OCR had done this perfectly well back in 2003 in its 2003 letter, which we still point to as a model even though we would like it to go even further towards states.

CHAIRMAN CASTRO: Commissioner Yaki.

COMMISSIONER YAKI: Thank you very much. This is also aimed at Mr. Lukianoff. I guess I'm having some, a topic that I've been following for a number of years and it stems in part from the time that Mr. Marcus was our staff director, has to do with hate speech, hate crimes against groups of individuals on campus.

And it seems to me that there are ways that you can create a very apprehensive climate of sexual harassment on a campus, but you probably would not find any prohibition by a university on that type of conduct to pass muster. Would that be correct?

MR. LUKIANOFF: Not exactly because most times when people are talking about serious patterns of hate speech, they're talking about things that do cross into unprotected speech.
They're talking about threats. They're talking about stalking. They're talking about intimidation. They're talking about actual Davis level harassment. And it's been interesting, sorry.

COMMISSIONER YAKI: Go ahead.

MR. LUKIANOFF: And it has been interesting that for the most part when people have said but are you saying that someone could paint a swastika on someone's door and say get out.

It's like no, that would be a threat. That would also be vandalism. That would be a crime for a whole variety of different reasons.

COMMISSIONER YAKI: What about a slave auction at a fraternity engagement or a day where another group decides that they're going to celebrate Latino culture by making everyone dress as janitors and mop floors or a situation involving women, have them as a ritual parade around in skimpy clothing and turn in some show or something.

I mean where do you think you can, that the university can't deal with ensuring the route
it has environment that is not oppressive or hostile because obviously a campus, especially certain types of campuses where there's a lot of, where, that are geographically compact, that have a lot of working and living situations in a close area to create a campus atmosphere.

I mean doesn't the campus only ensure itself being much more, being somewhat more closed than just sort of random person on the street where there's shouting at someone?

Doesn't that gravitate toward having greater ability to proscribe certain types of conduct that have the ability to escalate beyond what anyone would consider to be reasonable or acceptable?

MR. LUKIANOFF: There's a lot to unpack in that, so I'll start with part one. Part one is the examples you gave are examples of fraternity and in some cases actual fraternity parties and incidents.

I write in my book that I would like to point out that fraternities consistently give
me the least sympathetic free speech cases to ever deal with.

As a practical matter, the university, the organizations themselves, their national organizations usually will discipline for them or their local chapter will usually discipline them for them.

So there's, and so when these parties take place and become scandals, generally these groups end up being de-recognized by their national chapter. It doesn't even require a lot of involvement from the university itself.

Second, when it comes to whether or not offensive speech is protected, whether or not even hateful speech is protected, it is. The First Amendment is actually really quite clear on that.

My overall thinking on this is that, is a theory of suppression, that essentially what we're saying is we're going to get rid of hatefulness by saying you can't say that only buries the problem. I don't think overall that actually even works.
COMMISSIONER YAKI: How, but to address Commissioner Narasaki's point, how do you distinguish between that and say a bully, or do you not? You think bullying is simply protected speech?

MR. LUKIANOFF: Bullying, I hate to sound like a broken record, but when it comes to bullying, we think that the right definition of bullying, first of all, I prefer that bullying be when you talk about it, you should be talking about K through 12 at most.

When you're talking about adults, you should probably use another term like stalking or harassment. But we do think that the best model for bullying is actually the Davis Standard because it's serious.

It's severe. It's speech protective. It's rational, and it's also recommended by the Supreme Court.

COMMISSIONER YAKI: Well, let me ask you this. What did you think, and this may sound like it's from left field, but there's a reason for
What did you think of the Supreme Court's decision to declare unconstitutional the death penalty for minors?

CHAIRMAN CASTRO: That was a footnote in the notice of the hearing. Did you see that?

MR. LUKIANOFF: Okay. I agree with it, but that's my personal political view.

COMMISSIONER YAKI: But it has nothing to do with policies. It has to do with science, and it has to do with the fact that more and more the vast majority, in fact I think overall in bodies of science is that young people, not just K through 12 but also between the ages of 16 to 20, 21 is where the brain is still in a stage of development.

It is not, and those studies by the way were utilized by the Supreme Court to rationalize why killing a minor was unconstitutional because in large part notwithstanding the fact that they did commit a crime and the court made it very clear, they weren't going to excuse them from committing
a crime.

Certain factors in how the juvenile or adolescent or young adult brain processes information is vastly different from the way that we adults do.

So when we sit back and talk about what is right or wrong in terms of First Amendment jurisprudence from a reasonable person's standpoint, we are really not looking into the same referential viewpoint of these people, of an adolescent or young adult, including those in universities.

And I'm just wondering is, at some point why we don't understand that because that has an impact, because that explains why all of us, many of us as adults often sit back and say God, I wonder why that young person took his or her life.

He or she had so much to look forward to when their brain processes information in a much different way than we do.

And because of that, and because of the unique nature of a university campus setting, I
think that there are very good and compelling reasons why broader policies and prohibitions on conduct in activities and in some instances speech are acceptable on a college campus level that might not be acceptable say in an adult work environment or in an adult situation.

And I am just trying to figure out from you how you square your reliance on this kind of personal and jurisprudent line in the atmosphere of colleges and universities as you have a population of young people, who for lack of a better word, don't process in the same way that we do when we're in our late 20s and 30s.

MR. LUKIANOFF: I've rarely heard that argument made so directly. Essentially just to summarize it the way I've heard it made in the past is essentially that what we're really saying is that 18 to 22 year olds are children.

And they must be therefore treated the same way as K through 12 are. They can't handle the real world. They can't handle the duties of citizenship. It's an argument that I've
definitely heard.

And if you're saying that basically we should, that maybe below graduate level study should be ruled the same way high school students should be I would disagree with you.

But that's definitely an argument that people should make that straight out, but you run into a couple moral and philosophical problems with that.

One of them is the moral and philosophical underpinnings of the 26th Amendment. Essentially, we have decided in this country that 18 year olds, that is considered the age for majority.

We also send our 18 year olds to war. Unless you're actually also willing to make the argument that nobody below the age of, I don't know, 22 should go to war and we repealed the 22nd Amendment, we've got a serious problem.

Now, to understand, I'm also never --

(Simultaneous speaking)

CHAIRMAN CASTRO: Commissioner Yaki,
I'm going to need to ask you to wrap up because we have two other Commissioners that want to ask questions, and we are getting really close to the end of the period for this panel.

COMMISSIONER YAKI: Okay.

MR. LUKIANOFF: I just want to make one last point, and do not forget that some of the greatest contributions of colleges and universities come out of their graduate and Ph.D. programs.

And so what I've watched is people try to argue that because of the presence of some 15 to 16 year old super geniuses at some of these campuses that we should be therefore limiting speech on college campuses, forgetting that would also limit the speech of 45 year old Ph.D.'s.

CHAIRMAN CASTRO: Okay. We're going to go to Commissioner Timmons-Goodson and then followed by a last question from Commissioner Kirsanow.

COMMISSIONER TIMMONS-GOODSON: Yes, as I understand your argument you say that colleges
and universities actually interpret more restrictively free speech because of fear of losing federal funding.

I was wondering can you give us the name of a college or university that has actually told you that?

MR. LUKIANOFF: I go to conventions of college administrators all the time. There is session after session after session of an entire industry of risk management consultants who go and give lectures and explain about hey, you really have to cut down on harassment.

You have to do exactly what OCR says, or you're going to lose federal funding. I would say that the answer is practically all of them.

COMMISSIONER TIMMONS-GOODSON: And have any of them considered any kind of legal action?

MR. LUKIANOFF: Against the federal government?

COMMISSIONER TIMMONS-GOODSON: Absolutely.
MR. LUKIANOFF: It's kind of funny --

COMMISSIONER TIMMONS-GOODSON: On that --

(Simultaneous speaking)

MR. LUKIANOFF: It is funny. Behind the scenes, administrators will come talk to me and talk to people at FIRE saying it's like wow, this is actually a standard we can't live up to.

Maybe we should sue, but they've never come around to actually doing that because frankly, I think they think it would look really bad if people didn't understand it.

Say I'm suing not to have to comply with OCR's harassment regulations. You maybe have to go through the level of saying but their harassment regulations have gone a little bit too far.

COMMISSIONER TIMMONS-GOODSON: Thank you.

MR. LUKIANOFF: Okay. Thank you.

CHAIRMAN CASTRO: Commissioner Kirsanow, you have the last question.
COMMISSIONER KIRSANOW: This is for Mr. Lukianoff. Supreme Court for a while now, the last several years beginning with I think with New Hampshire v. —

(Simultaneous speaking)

MR. LUKIANOFF: Yes.

COMMISSIONER KIRSANOW: -- it's a special status of universities related to the First Amendment because of their pedagogical mission.

Do you know of any jurisprudence post-Davis that differentiates between ostensibly sexual harassing speech that occurs in a pedagogical setting, classroom setting versus the social setting out on campus and social environment?

Should they differentiate in terms of what the standard is, and do they differentiate?

Is there some jurisprudence that suggests that?

MR. LUKIANOFF: As far as the case law that I'm familiar with, a lot of the case law since Davis has been telling universities that they went a step too far with their harassment codes.
And that's been pretty consistent. As I said, there's been 37 lawsuits, and about half of them involve harassment codes which is one of the reasons why even some of the risk management people that I'm very critical of are saying Davis makes sense because the Supreme Court will never overturn its own language.

It's clear. It's clean, and it avoids a lot of these problems while at the same time I think adequately protecting victims.

CHAIRMAN CASTRO: Okay. Thank you. That concludes this panel. Thank you Mr. Marcus, Mr. Lukianoff, appreciate your input.

CHAIRMAN CASTRO: I will now ask the panelists for Panel 3 to begin to come to the podium, and as you do that I'll remind you, I think you were all here earlier about the system of warning lights.

You each have seven minutes, and then we will open it for questioning from the Commissioners. Okay. We will now begin Panel 3. I'll briefly introduce our panelists in the order
in which they'll speak.

Our first panelist is Chris Chapman, Associate Commissioner for the Samples Surveys Division of the National Center for Education Statistics.

And our second panelist is Catherine Hill, Vice President for Research at the American Association of University Women.

I will now ask each of you to swear or affirm that the information that you are about to provide us is true and accurate to the best of your knowledge and belief. Is that correct? Yes? Okay. Thank you. Mr. Chapman, please proceed.

IV. ISSUE PANEL III - OCR/DOJ GUIDANCE

MR. CHAPMAN: Thank you for the opportunity to speak with you today. Data about sexual harassment and exposure to hate related words in our nation's elementary and secondary schools have been regularly collected by U.S. Department of Education's National Center for Education Statistics, which is where I work, through two data collections.
One of them is the School Survey on Crime and Safety, often referred to as SSOCS, which is its acronym. And the second is the School Crime Supplement or SCS.

And that is a supplement to the National Crime Victimization Survey. The National Crime Victimization Survey is fielded by the Bureau of Justice Statistics and my agency and the bureau cosponsor the School Crime Supplement.

The SSOCS collections have been fielded every two or three years starting back with the 1999 - 2000 school year. The most recent year for which we have released data are for the 2009 - 2010 school year.

I'll be providing some statistics from those collections here in a few moments. And we just finished fielding a simplified version of the survey for the 2013 - 2014 school year.

Collection of the School Crime Supplement also has occurred on about a two year cycle. It was first fielded back in 1999 in its present form. And the most recent year for which
we have data are for the 2011 time period.

The data for the SSOCS survey or the Survey of School Crime and Safety are collected from national representative samples of public schools during the second half of the academic year.

The respondents are principals and school administrators. The sample sizes tend to be between about 2500 and 3000 schools. The resulting data are weighted to be nationally representative.

Information about sexual harassment was gathered through this survey by asking principals and school administrators the following question.

To the best of your knowledge, how often do the following types of problems occur at your school? And one of the problems identified was student sexual harassment of other students.

Sexual harassment is defined in the questionnaire as conduct that is unwelcome, sexual in nature and denies or limits a student's ability
to participate in or benefit from a school's education program.

The conduct can be carried about by school employees, other students and non-employee third parties. Both male and female students can be victims of sexual harassment, and the harasser and the victim can be of the same sex.

The conduct can be verbal, non-verbal or physical. During the 2009 - 2010 school year, approximately 3 percent of public schools reported that sexual harassment occurred at least weekly on campus.

The estimate is not really changing. Since the 2003 - 2004 data collection, it's been pretty stable. The percentage of schools reporting that sexual harassment has occurred at least occasionally, however, in 2009 - 2010, was approximately two thirds of all public schools.

So it's a much bigger number. We plan on updating the estimates early next year. I was also asked to talk some about information that we have related to hate-related words.
We collect information about hate-related words through the School Crime Supplement, which I mentioned earlier. The School Crime Supplement is part of the National Crime Victimization Survey.

The surveys are fielded in nationally representative samples of households, and data are collected from all members of each household. Once the bigger National Crime Victimization Survey is completed, each household member between the ages of 12 and 18 is given the School Crime Supplement.

The sample size for the supplement is between 6500 and 7000 students. The questions that we ask about hate-related words ask students the following.

During this school year, has anybody called you an insulting or bad name at school having to do with your race, religion, ethnic background or national origin, disability, gender or sexual orientation?

We call these hate-related words. If
a student responds yes to the question, we ask about each type of hate word that I just mentioned, individually.

After that series of questions, we then ask if the student had seen hate-related words on campus with a question that says during the school year, have you seen any hate-related words or symbols written in school classrooms, school bathrooms, school hallways or on the outside of your building.

During the 2010 - 2011 school year, approximately 9 percent of 12 to 18 year old elementary and secondary students reported being the target of hate-related words while at school.

There was no measurable change in that rate from the 2008 - 2009 school year. However, we did see a reduction in that rate from the 2000 - 2001 school year when it was at approximately 12 percent.

In 2010 - 2011, we also noted that 28 percent of students reported seeing hate-related words on school property. Again, this did not
change from the 2008 - 2009 school year but again
was a decline from the 2001 time period when 36
percent of students reported seeing hate-related
words on campus.

The estimates of sexual harassment and
exposure to the hate-related words are available
across a range of school and student
characteristics.

In our online reports, the most recent
of them is the Indicators of School Crime and
Safety, 2013, which can be found on the NCES website
along with information about the methodology for
the SSOCS survey.

Information about how the School Crime
Supplement was fielded and more information about
the survey in general can be found on the Bureau
of Justice Statistics website. And that concludes
my testimony. Thank you.

CHAIRMAN CASTRO: Thank you.

MS. HILL: Yes, thank you for this
opportunity to testify about sexual harassment at
school and colleges. The American Association of
University Women also referred to as AAUW is a leading voice promoting equity in education for women and girls in this country for 130 years. We have 170,000 members, 1000 branches and 800 university and college partners. We've been a leader on the issue of sexual harassment.

(Off microphone comments)

MS. HILL: Does this sound a little better? Okay. I'll just continue, and please bear with me for the scratchiness. All right, so my name is Catherine Hill.

And I'm the Vice President for Research at AAUW. I'm also the author of two reports, one called Crossing the Line: Sexual Harassment at School and Drawing the Line: Sexual Harassment on Campus.

My testimony today is going to focus on those two research reports, and I'm going to start here with the middle and high school students.

We chose to do an independent study in addition to what we have available through the
federal agencies because we were then able to look at impacts.

We were able to look in more depth at what was going on in the, for the students. All of our surveys are specifically of the students. We looked at prevalence, effects and prevention of sexual harassment.

We used a nationally representative survey of students in Grades 7 through 12, and we surveyed about 2000 students. And we worked with Knowledge Networks, who is a leading survey farm.

And we have more information on our methodology both in the report and our website and at Knowledge Networks. So we used a broad definition of sexual harassment in our work.

We said that it's asking, sexual harassment was defined as unwelcome sexual behavior that takes place in person or electronically.

And students were then provided definitions about specific behaviors such as having someone make unwanted sexual comments,
jokes or gestures, being called gay or lesbian in a negative way, being shown sexual pictures that you didn't want to see, physical harassment, such as being touched in an unwelcome sexual way, being physically intimidated in a sexual way or being forced to do something sexual.

We also asked about electronic means, these same categories or some of these same categories.

And the reason we really looked at a broader category for sexual harassment is we wanted to capture the entire universe of activities and not presuppose what was going to be the most severe.

We also wanted to have a survey that would be understandable for students as young as 7th, 8th grade so 12 or 13. What did we find? Broadly defined sexual harassment is common in schools.

About nearly half have had some kind of experience with sexual harassment in the 2010-2011 school year. For the vast majority of those students, about 87 percent, they had some kind of
negative reaction to their experience.

So there is a group of students that brushed it off and did not say it was a negative experience, but the vast majority did say that it was a negative experience.

Verbal harassment was really the bulk of the incidences, and a sizable minority of students also encountered things like touching and being intimidated in a sexual way.

We found that about a third of students had been harassed through electronic means. And these categories are not, are actually not, they're not separate.

So you can answer, you could have had more than one experience. So the effects of sexual harassment, we asked students to identify one event, one experience that had the most negative effect on them in that last school year.

And we referred to that particular event. We looked at both verbal and physical forms of sexual harassment. We found that both can cause severe impacts for different students and
different kinds of harassment.

The emotional toll could be very substantial. We had a third of our harassed students not wanting to go to school as a result of sexual harassment, another third of students said that they felt sick to their stomach for either a short time or a long time.

Thirty percent said sexual harassment caused them to have a hard time studying. Trouble sleeping was a problem for about a fifth of the students, and getting into trouble at school was an outcome for about 10 percent of the harassed students.

Another 8 percent quit an activity or sport, and another 4 percent actually changed schools as a result of their experience. So still, most don’t report this.

I think this has been well covered. We find that only about 9 percent had talked to any adult, and most had no idea whether they were a Title IX officer or not.

About 80 percent of the students had
some suggestions for their schools of what could be done to make the situation better. They wanted a person that they could talk to.

   About 40 percent said that was important. They wanted online resources at 22 percent. They wanted to have in-class discussions and resources available to them.

   So, in part, students are calling for some of the protections that Title IX and other federal statutes already call for, but this is testimony to the fact that perhaps these Title IX rules are not being well enforced and well understood on campus by students.

   So in sum, our survey found that it's prevalent, and it has a negative effect. Even things like just verbal kinds of harassment, particularly when they're coupled with the cyber harassment.

   Those could have effects that could really impact someone's school experience, their ability to do well in school. And a sizeable minority of students do things, such as dropping
sports or staying home.

And before I close, I'll just mention that we made much of these same kinds of findings on campus for students 18 to 24. And in that case, we found still that women in particular it had a much stronger negative effect than men.

CHAIRMAN CASTRO: Thank you, Ms. Hill.

COMMISSIONERS QUESTIONS

CHAIRMAN CASTRO: We'll now open it up to questions from Commissioners. Does anyone have a question? Commissioner Achtenberg.

COMMISSIONER YAKI: And I do as well, Commissioner Yaki.

CHAIRMAN CASTRO: Okay.

COMMISSIONER ACHTENBERG: When I asked the prior panel about anecdotal verse statistically significant, they referred me to you. So I'm going to ask you to explain to us what makes the findings that both of you cited, that each of you cite, statistically significant as opposed to merely anecdotal.
MS. HILL: Certainly, I can start that conversation. It's about a probability based sample.

And so we worked with Knowledge Networks, which is a leading firm in this area that uses a random approach to determining where the households are that they're going to survey and then doing it online.

If a household does not have computers available to them online, at their home, the Knowledge Networks provides those. So it's really, when we say something's nationally representative, we're saying it's a probability-based survey.

And you'll see a lot of surveys on these types of issues, but you really want to check for what's been nationally representative.

MR. CHAPMAN: I'll echo much of what was just said. Basically, because it's a sample-based data collection, there is sampling error associated with the estimate as opposed to if you're doing a census, in which case there's no
sampling.

So you, we have an estimate. You know what the population is. So the sample sizes are important to pay attention to when you get reports like ours.

The smaller the sample size, the bigger the sampling error and the more concern you should have about how representative that estimate really is.

And the report should show margins of error around the estimate to help you figure that out yourself, so that's it.

COMMISSIONER ACHTENBERG: Each of you referred to this problem or challenge as prevalent. What did you mean by prevalent?

MR. CHAPMAN: I'll answer first on that. So the mention of the word prevalent in terms of the sexual harassment on campus was in reference to the fact that about two thirds of the public schools indicated that sexual harassment was at least a problem on campus occasionally.

So that is a relatively large portion
of the schools, so that's what that was in reference to.

MS. HILL: Yes, we found that this experience was very prevalent, and while it intersects with bullying, there's also some very distinct notions that, ways in which sexual harassment does overlap with bullying.

But it also has, it always has that sexual component in the activity. So I think that we found that it was really very prevalent in all kinds of schools.

We also looked at private schools in our particular survey, so we were able to look at that both through, at the college level and at the K through 12.

One of the things I really was proud that we were able to do is to have an online survey, which is very hard to do in a probability-based way.

And that meant that people could answer the questions at home, in the safety of their own house. And it was also I think nice, particularly for young men.
I think we got more young men talking about how difficult and how challenging these experiences were, in part, because they felt a greater sense of privacy.

COMMISSIONER ACHTENBERG: And finally, could you mentioned that the negative impacts were felt quite acutely by both males and females but even more acutely by females. Could you reiterate the statistics that you're referring to?

MR. CHAPMAN: Absolutely. In both cases, both at the middle school and high school and at the college level we found that women tended to be more affected by sexual harassment.

And by affected, the things that I mentioned, things like feeling sick to their stomach and having trouble sleeping and not being able to concentrate, not wanting to go to school.

Then, and even doing things like dropping activities or dropping out of school, so those are the kinds of things. And across the board, we saw more young women and girls saying that
they had those kinds of experiences.

We also asked them to clarify if they had experience for a short time or for a long time. And we found that women were more likely to say that they felt that effect for a long time. They were also more likely to feel afraid and threatened.

CHAIRMAN CASTRO: Okay. Next I have Commissioner Narasaki, followed by Commissioner Yaki and Heriot, then Kirsanow and Kladney.

COMMISSIONER NARASAKI: Thank you. Ms. Hill, I have a few questions. One is I'm wondering if the survey, since it requires parental permission for the students who participate, whether the process involves in language because so many more kids now have immigrant parents who may be limited English proficient in either Spanish or Asian or Russian or other languages.

The second question I have is are they asked, since they're asked about what approaches they feel would help, are they also asked what they think their school, what they know their schools do.
In other words, do you have a sense of do they know that their schools have policies? Do they know that their schools are actually doing anything?

And then the third question I have is that the representative from FIRE raised First Amendment concerns. And a lot of harassed, some sexual harassment is not physical, right. It's verbal.

And I'm wondering what AAUW's position is in terms of their assessment, FIRE's assessment and their recommendations about what needs to be done.

MS. HILL: Certainly, on the first question we did have a lengthy parent approval process, of course. So these were minors, of course. [And we did have, there were several languages that Knowledge Networks was, did cover. However, it was not every language, so it was somewhat limited in that respect. But they did certainly have Spanish, which is a large group
Ms. Hill subsequently corrected this by withdrawing the statement in brackets, stating that AAUW could afford only to provide the materials in English and that only students who read English were surveyed for the research discussed in Crossing the Line: Sexual Harassment at School.
COMMISSIONER NARASAKI: Do you know if they had any Asian languages, because as you know, Asians are now 15 percent of California's population. And the school age is even higher, so.

MS. HILL: That's an excellent question. I'm going to have to get back to [you on that, but I do know they had at least several languages where they were able to provide those questions to parents who had limited English and had other languages as their primary language.]2

The survey was given in English, just mostly due to constraints of costs, but good points.

On the issue about whether, how we deal with this question of verbal harassment and whether, what rises to the level of a complaint, I really think there are other people here at this hearing that will know better than I how the law works in this respect.

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2 Ibid.
I will say that I don't think we want to prejudge what's going to be severe and what's not going to be severe because a lot of this is contextual. We did try to get at some of the feelings and how people experienced it.

But there's a lot of nuance, and it's really hard to say for sure how different things will affect people.

So I think having a mechanism where we can have students reaching out and having someone who they can speak with to learn about what they can do and not do, I think that would be a very positive thing.

And I think we can't know for sure that something just because it's verbal or cyber harassment, we do know that people who experienced more than one form of harassment, so if you experienced verbal harassment and electronic harassment on Facebook or email or text messages and so on, those were the people who had the strongest negative effects.

I'm sorry. Did I miss a question of
yours?

COMMISSIONER NARASAKI: The second question about whether you asked their knowledge of anything their school was already doing.

MS. HILL: We did ask, and most students knew that there was a policy. But there was very little beyond just knowing that there was a policy, and almost no one knew who a Title IX officer was.

Nearly all the people that, only about 9 percent told any adult at their school. And only a handful knew about Title IX.

CHAIRMAN CASTRO: Okay. We'll move on to Commissioner Yaki.

COMMISSIONER YAKI: Yes, thank you. This is for Dr. Hill. Are there particular types of, and this considers, follows along my conversation with Mr. Lukianoff and what Commissioner Narasaki was just alluding to.

Are there particular types and can you give examples of verbal harassment that is more severe than others? And I think in your testimony
or your written intro you may have referenced sexual jokes.

And then specific, having quantified how it appears with the learning environments. So first is particular types of verbal harassment are more severe than others, the role that sexual jokes plays in that, and secondly, the impact on the learning environment in general and specific for the victim.

    MS. HILL: Thank you. Those are some very helpful things that we can talk about. I think the question of joking. This is just fun.

    This was a big part of the harassment issue and certainly was a big part of the rationale for the students who said that they harassed other students, which I thought was, I was sort of surprised that we got the findings we did, that students said yes, I have done this.

    And for the most part what they said as their rationale was I'm trying to be funny. I thought it was just the way school is, so it wasn't seen as a big deal.
And they were not able to cognitively understand that what was not a big deal to them might in fact be a big deal to somebody else.

Just as an example, there was one young woman who the students on her dorm threw condoms in her bedroom, in her dorm room. This was very traumatic to her.

Part of the trauma of it was that it was everybody. It felt like everybody was doing it, and that's something we see a lot with the online kinds of harassment, that there's no privacy, that the shame is very public and that it affects, it comes at some point to the pervasive kinds of standard.

But I think that that's, those are the things we want to look for as we begin to talk to students about the experiences, looking for the pervasiveness.

I think people, this has been mentioned several times, but the electronic forms of cyber harassment and cyber bullying can be extraordinarily painful in part because they are
such a public humiliation.

In terms of the effect on the learning environment, with these surveys we really had to struggle to make them understandable and accessible to young people.

They don't have a lot of incentive to answer them. So we want to make sure that the questions are easy for them to grapple with and to think about.

So we didn't just say well, did this affect your learning. Did you not do as well in your classes as a result because those are not necessarily things that students can see in themselves.

We worked, we did do a lot of pilot testing with different kinds of questions and looked at young people and how they responded to different questions.

And we found that these things, these measures like feeling sick to your stomach, things that are feeling, having trouble concentrating, those are all things around anxiety.
We know that anxiety does not help the learning experience. That's well established, so this way we're sort of maybe getting at this a little bit, a different way.

But I think we are documenting that this does make a big deal to these students, to many of these students.

CHAIRMAN CASTRO: Commissioner Heriot.

COMMISSIONER HERIOT: I just wanted to clarify --

MR. CHAPMAN: Your microphone.

COMMISSIONER HERIOT: See veterans do make this mistake. First of all, I want to make sure that I, the study I have in front of me or rather a piece of it I have in front of me is a 2001 study, Hostile Hallway.

Is that the same as what you're talking about, or is that an earlier iteration?

MS. HILL: That's an earlier iteration.

COMMISSIONER HERIOT: Okay.
MS. HILL: It's the same study. We made many of the same findings, but there are some differences.

COMMISSIONER HERIOT: And I know in the 2001 study and the way you've described the more recent study, you're not using the Davis standard. You're asking the much broader question.

MS. HILL: Absolutely.

COMMISSIONER HERIOT: And what concerned me was in the 2001 study, a great deal was made out of the notion that only 20 percent of the people had actually reported the activity.

And then there was a little column that gave some of the reasons that they didn't. And I was struck by the fact that I believe nine examples were given, but none of them were I was afraid to respond.

Instead, it tended to be things like, and I've got the whole list here. I don't know. I thought it was normal kids' stuff, because I didn't really care, it was not a big deal, I could handle it myself, I didn't think it was necessary.
I liked it was one of the responses, and if there'd been some response that was more along the lines of actual fear, I would've thought that the 2001 study would point that out.

Instead, all of them are along the lines of it wasn't a very big deal, or at least I thought I could handle it. And that doesn't mean that it wasn't a big deal, to say I thought I could handle it.

That's still significant. My point is just that it's important that we do root this out and we treat it seriously.

But it's also important that we not exaggerate it and we make sure that we're targeting it right where it is rather than to the point of fearmongering which was concern here.

MS. HILL: For example, we would not have included someone who said I like it. That would not have been seen as sexual harassment.

COMMISSIONER HERIOT: But it was there in the report.

MS. HILL: In that older report, yes,
but not in the new report.

COMMISSIONER HERIOT: Okay.

MS. HILL: So, but I hear your point, and you're absolutely right. We do not, some of those people don't report because it's not a big deal.

And as I said, there is a group of students, about 13 percent who said I had this experience. And no, it didn't have a negative effect on me.

COMMISSIONER HERIOT: But reading the report it was 100 percent of the responses that were published, which is odd because I thought that the report itself wouldn't want to, if anything err on the other side.

And yet it came out this way with all the responses being sort of oh, it's not that big a deal.

MS. HILL: Yes, I think that the people in our new report, we have a more balanced approach of different things remembering that the quotes are absolutely just examples.
They are not nationally representative. The quotes are just one individual student.

COMMISSIONER HERIOT: Yes, but again, it just seemed weird that you would choose all the ones that are on the side of making it seem trivial. I know I should be looking at the new report, and I promise to look at that very soon.

MS. HILL: Yes, okay. And I'll make sure that we get that to you because I think you're going to have an easier time reviewing it.

But your point about the fact that some students don't see this as a big deal and don't report it because it's not a big deal to them is absolutely correct.

CHAIRMAN CASTRO: Okay. Commissioner Kirsanow followed by Commissioner Kladney.

COMMISSIONER KIRSANOW: Thank you. Mr. Chapman, you indicate in your testimony that in the 2010 - 2011 school year, that approximately 9 percent of 12 to 18 year olds in elementary and
secondary education reported being called hate-related words at school.

And the definition of hate-related words, that is they are being called bad names at school having to do with race, religion, ethnic background, national origin, disability, gender or sexual orientation.

Did you, in this, are the students provided any examples of hate-related words, or is that simply the definition that's presented to them and then they respond thereto?

MR. CHAPMAN: I actually have the questionnaire with me, so give me just a second. I'll take a quick look. I can't remember off the top of my head. No, we don't give an example.

I know sometimes the examples can lead the student, so there's probably a reason for that.

COMMISSIONER KIRSANOW: And is there any control for context, as Ms. Hill indicated. Some of this is, well, there are different contexts in "hate-related words" may be uttered.

In sports context, for example, just
about everybody on a team is uttering hate-related words every three seconds.

In other contexts, there are terms that may be, fall within the definition of hate-related words that may be even pedagogical. They may be joking around, when controls placed on those.

MR. CHAPMAN: So we don't frame the question in terms of situations where it might not count, so for instance, if someone got called a hate-related word in the middle of a sporting event and they remembered it during this interview, they would be able to report it as being exposed to a hate-related word and being called it.

But the point is, well-meaning but we don't have a way to tease out those different situations.

COMMISSIONER KIRSANOW: Okay. Thank you very much.

MS. HILL: Sure.

CHAIRMAN CASTRO: Commissioner Kladney.
COMMISSIONER Kladney: Thank you, Mr. Chairman.

Chairman.

Chairman Castro: You're welcome.

Commissioner Kladney: Ms. Hill, I might have heard this wrong because I have small ear holes. I think you said that 9 percent knew who their Title IX officer was.

Ms. Hill: Actually, it was smaller than that. I meant to say 9 percent of the middle school and high school students went to some adult at the school, teacher, guidance counselor, other adult.

Commissioner Kladney: Okay. So that would mean that 91 percent did not.

Ms. Hill: That's correct.

Commissioner Kladney: Okay. Is that because students didn't know how to activate the policy?

Ms. Hill: I think it's a combination. Some of the students are, it wasn't a big deal to them. Or they just didn't want to.

Commissioner Kladney: They're used
to taking the punch?

    MS. HILL: Well, students make those kinds of decisions, but I think it does. The large, it's a very large number of people who don't seem to be using the system, which suggests to me that they're not fully aware of it.

    COMMISSIONER Kladney: Okay. So let me ask you this. For those that did go to an adult, how many were satisfied with the result?

    MS. HILL: That's an excellent question, and unfortunately, I don't know that we have an answer for you. I certainly have anecdotal.

    Some people wrote about, we asked students to write outcomes, and we had students who said my mom called the school and it's great. Everything worked out.

    But I have to say I don't know that as a nationally, it's a good question.

    COMMISSIONER Kladney: Could you add that to your next survey?

    MS. HILL: Absolutely.
COMMISSIONER KLADNEY: Okay. And one more question. What do students say schools should do to deal with and prevent sexual harassment?

MS. HILL: The students focused on having someone to talk to. They also talked about having some kind of anonymous way to engage with the system, having, which is problematic.

But I'm just, we gave the students all the options that make sense, and that's what they mentioned. They also, having online resources would be helpful to them.

These, I think these answers suggest to us that this fear of the process is something that goes on maybe both sides and that if we can find ways where we can help inform students even before it gets to the same level, we can do better around the areas of prevention.

That's obviously a key goal for us and for all of us.

COMMISSIONER KLADNEY: In any of these school situations, especially when you get
to middle school or K through 12 I guess, are there
specific ages or classes or class grades where this
type of education should take place about sexual
harassment or whatever you're surveying there?

   MS. HILL: Right. I did a lot of
interesting work between the relationship between
bullying and sexual harassment. I would say
middle school is a key period.

   That's where we actually see more
sexual harassment in middle school than in high
school in many cases, especially for boys and this
issue about students being called gay in a negative
way.

   That was something we saw happening a
lot in the middle school context, so that would be
a place for us to focus our prevention.

   COMMISSIONER Kladney: Thank you.

   CHAIRMAN CASTRO: Do we have any other
Commissioners who wish to ask a question?

   COMMISSIONER YAKI: If I can, I have
a brief comment.

   CHAIRMAN CASTRO: Okay.
Commissioner Yaki, then Commissioner Kirsanow.

COMMISSIONER YAKI: To the panel, given what you've heard in the first panel and the problems with enforcement and in outreach and in understanding of the situation, just to throw out there, do you believe that universities and colleges should make this part of their freshman orientation, a presentation on the issue of sexual harassment?

MS. HILL: Yes, I think that would be a wonderful thing to see. We have seen some colleges already doing that, but it's something that really is a universal need to have these kinds of discussions.

And I think that's what, if we want to begin prevention, we really have to start with having people talk about these issues in a serious way.

CHAIRMAN CASTRO: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Thank you. Are there any longitudinal studies showing whether
or not there's been an increase, decrease, plateau
in terms of sexually harassing speech or
hate-related speech?

I looked at some of the studies here. Most of them seem to be in the 2000s. I'm wondering if we have any studies from say the '60s, '70s, '80s, '90s that would show that.

MR. CHAPMAN: Real briefly on that, so I mentioned that the School Crime Supplement had been fielded every couple years since 1999. But there had also been one done in 1995 and then one done in 1989.

So we could do some trend analysis, at least on some of these items going back to the late 1980s in a consistent manner. But I don't have knowledge of other ones that go back further.

CHAIRMAN CASTRO: Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: Commissioner Yaki's mention reminded me that about ten years ago when I took my son to the orientation week for his college, I remember the university
president talking to the parents and students extensively about alcohol consumption and alcohol-fueled incidents on campus and the fact that the students were going to be spoken to about this, that there are, workshops were going to be undertaken about it.

They were going to be given many opportunities to self-report about their own conduct. And some longitudinal work was going to be done with regard not only to that class but the class following and that class longitudinally so that they could be monitored throughout their four years on campus.

And it's my understanding that practices like that have yielded significant reductions in alcohol consumption, alcohol-fueled incidents that are harmful to students, alcohol-related sexual incidents, for example, that all of those are on the decline as a result of this kind of persistence, if you will.

I'm wondering if you're familiar with any programs on the side of sexual harassment and
sexually aggressive behavior, either on the college level or on the high school or junior high school level.

MS. HILL: Absolutely, I think that that's an excellent point. And yes, there's been a lot of good research on alcohol consumption and its effects on sexual harassment and bullying and other kinds of negative behaviors and clearly that they've made that connection.

And some schools are taking the lead in doing this. I think we have a lot of variation among the schools in terms of the kinds of orientation and the way that they're handling these issues.

And more guidance and prevention could be very helpful. Even being welcoming to some of the other resources in the community would be helpful, regardless of whether the school itself wants to provide this kind of guidance.

But it can also provide guidance to an outside group that has knowledge and skills in the area of sexual assault and sexual harassment.
prevention.

CHAIRMAN CASTRO: Any other questions, Commissioners? If not, we will conclude this panel. Thank you very much for the information, and we will now begin to invite the folks from Panel 4. I hope they're all here in the room, to come forward. I'm sorry.

COMMISSIONER NARASAKI: Can we take a five minute break so they can --

CHAIRMAN CASTRO: Okay. We're going to take a five minute break while the panel assembles itself.

(Whereupon, the above-entitled matter went off the record at 11:52 a.m. and resumed at 11:59 a.m.)

CHAIRMAN CASTRO: Okay. We're back on the record. I'll remind the panelists that they have a seven minute opportunity that will be governed by the little traffic lights in front of you, and then we'll begin our questioning of our fourth and final panel who I will introduce now in the order in which they will speak.
We have Professor Eugene Volokh of the University of California Los Angeles School of Law. Our second panelist is Ada Meloy, General Counsel of the American Counsel on Education, and I might add was one of my partners at the Oxford Union in November. We were on the same debate team in support of Affirmative Action, so it's good to see you again. Our third panelist is Anita Levy, Ph.D., Senior Program Officer at the American Association of University Professors. And our fourth panelist is Fatima Goss Graves, who is the Vice President for Education and Employment at the National Women's Law Center.

I will now ask each of you to swear or affirm that the information that you are about to provide us is true and accurate to the best of your knowledge and belief. Is that true? Yes. Okay. So, Professor Volokh, please proceed.

V. ISSUE PANEL IV – DATA ON SEXUAL HARRASSMENT

MR. VOLOKH: As Ken Marcus pointed out, there are two things going on here. One has to do with sexual violence and related physical conduct,
and the other has to do with speech. I'm not going
to speak to the first part, but I'm going to focus
on the second because, unfortunately, the term
sexual harassment—in addition to dealing with
violence, offensive touching and the like—also
covers material that could very well be protected
under the First Amendment.

To give a couple of examples from the
OCR's proposed policies, telling sexual or dirty
jokes is generally constitutionally protected.
Spreading sexual rumors—note, there's no
limitation here to false rumors—is the kind of
gossip that generally speaking does not fall within
any First Amendment exception. Circulating or
showing emails or websites of a sexual nature,
displaying or distributing sexually explicit
drawings, pictures, or written materials, all of
these are examples of potentially—in fact,
generally speaking—constitutionally protected
speech.

And, indeed, university
administrators and faculty members have often
viewed prohibitions on sexual harassment as covering this kind of speech. For instance, in 2004 a student at Occidental College in Los Angeles, who had a radio show on the University radio station, had made on-air sexually themed jokes about his rivals in student government—not terribly good behavior—there's a reason the word "sophomoric" is part of the English language, but it's still constitutionally protected. It was speech in the context of government, although in that case student government, debates; yet it was labeled sexual harassment.

In 2005, a Muslim student employee at a public university in New Jersey was charged with sexual harassment. A professor had promoted a film labeled, "A Lesbian Relationship Story," and the student responded with an email to the professor, saying that he thought that homosexuals are perverted and that he didn't want to get any promotional pro-gay material from the professor. He was actually disciplined on the grounds of sexual harassment, and it took an appeal to a New
Jersey Hearing Officer within the New Jersey Administrative Court system to get the sanction reversed.

The University of Michigan harassment policy struck down back in the late '80s in Doe v. University of Michigan labeled harassment, among other things, a student saying, "Women just aren't as good in this field as men," jokes about gay men and lesbians, and the like. Now, one may agree or disagree with such speech. Generally, women are as good as men in various fields, but that is a constitutionally protected opinion. Nonetheless, there was an attempt to restrict it under sexual harassment policy.

Similarly, in late 1994 there was a controversy at Santa Rosa Junior College in Northern California. The student newspaper ran an ad that some perceived as sexist. It was an ad containing a picture of the rear end of a woman in a bikini. This led to hot debate on various online chat rooms. (You might recall this was the infancy of the internet age.) And two of the most
prominent critics of this ad were themselves criticized, including using "anatomically explicit and sexually derogatory terms." Again, something that I do not approve of but lots of Supreme Court cases and lower court cases have made clear that especially in the context of these public debates and public issues, people are entitled to insult each other even in harsh and unfair ways. *Hustler v. Falwell* is the classic example of that.

Nonetheless, the OCR concluded the speech created a hostile educational environment, and concluded that, among other things, first, the college had to settle the case by paying the complainants $15,000 each, not a vast amount but certainly a signal that OCR thinks this kind of speech, or thought at the time this kind of speech, should be punished. And, what's more, OCR demanded that Santa Rose Junior College institute a new speech code which, among other things, covered "negative stereotyping...that relates to race, color, national origin, gender, disability,"

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including “acts that purport to be jokes or pranks, but are hostile and demeaning,” and a range of other speech.

So, those could go on. I don't have the time for more, but I think it should be clear that the definitions that the OCR has used in the past potentially cover speech that would under standard First Amendment law, fall within constitutional protection.

This danger is exacerbated by the language in the University of Montana case, which suggested that OCR treats, and the Justice Department treats, harassment as including not just speech that is severe and pervasive to create a hostile environment; of course, there's a dispute about which standard should be used to create a hostile environment, but even individual instances of this kind of speech that when added together may amount to a hostile environment. So, to the extent that that is the OCR's position, as it seemed to be in the Montana documents--although now it appears that perhaps that was a misstatement--that
suggests that the OCR thinks that even more speech
should be restricted, without regard to whether it
falls within the existing First Amendment
exceptions.

Finally, I should stress that the
courts have pretty much uniformly, whenever speech
codes have been challenged, struck down speech
codes, including some speech codes that have used
the hostile environment language. Then-Judge,
now-Justice Samuel Alito noted in a case involving
K through 12 students where the government to be
sure has actually even broader power than it does
in colleges, so it's kind of an a fortiori case that
if what he said is true for students, K through 12
students, it is even more true for college and
universities, but he said that there's no
categorical harassment exception to the First
Amendment's Free Speech Clause, and the Free Speech
Clause protects a wide variety of speech that
listeners may consider deeply offensive, whether
based on race, religion, national origin, sex, and
the like. So, I think this is a very serious problem
that, unfortunately, recent actions on the part of OCR seem to have in some ways exacerbated.

What I would like to see is the government make clear what speech it acknowledges is constitutionally protected - and not just in statements such as, say, “here's all the speech that's restricted, but none of this shall be interpreted as undermining First Amendment rights,” which is what the government has at times done. (It did it in the Santa Rosa Junior College settlement agreement, and has done it in other recent documents.) That's just mystifying, it's just --- we're saying we're restricting this speech, but we're saying speech is protected under the First Amendment. Well, do you think this speech is protected or it isn't under the First Amendment? Please make that clear.

So, I think that the solution would be for both the Justice Department and the Education Department to make clear that certain kinds of speech, in fact, a wide range of speech is constitutionally protected and cannot be punished;
while, of course, violence and death threats, and other kinds of constitutionally unprotected behavior can be.

CHAIRMAN CASTRO: Ms. Meloy.

MS. MELOY: I want to thank the Commission and its staff for inviting the American Council on Education to participate in this briefing. You are examining a very important topic in higher education.

As my written remarks reflect, I had expected the focus to be on restrictions on speech particularly in the area of sexual harassment and hostile environments on campus. However, as some of the previous speakers have shifted the focus of the topic to sexual assault, I want to address that, as well.

I must begin by saying that every college and university president wants to have a campus that is safe for the students, the faculty, and staff, that is safe both physically and psychologically. However, sexual assault is a complex societal issue. The negative behaviors
that sometimes manifest themselves on college campuses start long before the students arrive there. They are grounded in lack of respect for others and in highly sexualized and alcohol-infused media that young people are exposed to from an early age.

Higher education institutions cannot simply counteract that in the days of college orientation, but they try mightily to do so, and continue their efforts to instill personal responsibility to their students throughout their enrollment.

Colleges are redoubling their efforts in the past several years, particularly following the April 2011 "Dear Colleague" letter issued by the Education Department's Office for Civil Rights. Initially, we struggled with that letter that appeared almost from nowhere with no notice or comment, no attempt to engage those who, like myself, have long years of working on campus issues, who might have informed the various commands to institutions found in that letter.
However, over the subsequent years many institutions were able to conform their policies and practices to align with the spirit, and some with the actual letter of that document. The lengthy clarifications issued three years later in the Q&A released in April 2014 with the "Not Alone Report" were similarly not subjected to notice or comment.

Of course, OCR puts the spotlight on the schools that OCR in 20-20 hindsight finds may have failed to comply in a way OCR deems necessary. The negative focus is not productive in engendering cooperation and respect, but the overhanging threat of removal of federal funding, as President --- excuse me, Assistant Secretary Lhamon has recently noted is a very powerful one.

One point I must make is that the focus of the attention in the sexual assault has been the traditional residential campus with student bodies mostly in the 18 to 22 age range. That is where I expect most of the people in this room experienced college. However, that is a minority of the
institutions and the students now in higher education. The vast majority are in commuter campuses, whether community colleges or regional institutions, and some are in online programs, and many are working adults. In addition, the majority of 18 to 22-year olds are not in college at all. When dictates from OCR or the Department of Justice come out, they do not take into account the complexity of the non-traditional campuses in attempting compliance.

I also must emphasize the need for colleges to be fair to all of their students. We cannot simply credit one and not the other when accounts diverge. Colleges have grievance processes and disciplinary processes, and they are strained by the complexity of many sexual assault allegations.

Just to clarify, in general, a grievance process is one when a student claims the college or faculty member did not follow its rules and the student is harmed. A disciplinary process is when an institution undertakes to assess whether
a student has broken college rules and should be sanctioned. The confusion surrounding the "Dear Colleague" letter, the McCaskill survey, and other pronouncements on the issue of sexual assault on campus using terms like adjudicate and defendant is evidence of the misunderstanding of the way campuses actually address student misconduct. We are not courts.

Colleges are designed for teaching and research, and they are taking up the challenge to research, educate, and try to prevent sexual assault. The difficulties in addressing it after a complaint is made are still working their way through institutions challenged by the need to hire additional personnel to deal with the complexities, or face the public shaming of the OCR list.

We admit that there are cases that appear to have been mishandled, and cases that reflect egregious conduct by the accused, but there are many more that are resolved outside the spotlight of attention by experienced campus
officials and through effective campus processes.

ACE has been working with our member institutions to try to convey to the Administration, the Congress, and the media the sincere desire to prevent sexual assault on campuses. We have met with the White House Task Force, and provided two letters to them. We were not invited to Senator McCaskill's roundtables, but we have met with staff on the Hill and provided written testimony to the Senate HELP Committee.

We are facing the fact that excessive drinking and drugs, and drug use affect the behavior of our students, and that efforts to control that behavior in past years have been only sporadically effective. Perhaps the surge of attention to the sexual assault issue will have a positive effect on unhealthy drinking behaviors, such as heavy drinking even before the party starts.

The drastic effects of a finding of sexual assault cannot be overstated. Whether in the campus proceedings, or in the Criminal Justice
system that is the most qualified arena to assess this serious felony, it is a crime that has lifelong consequences for both the accuser and the accused.

In conclusion, I note that this briefing was entitled as "Federal Enforcement of Title IX Sexual Harassment Law in Elementary, Secondary, and Post-Secondary Schools." I hope that you may increase the attention to the secondary schools where destructive ideation and behaviors begin, and that students will arrive on campus with better understandings of the need for mutual respect and individual responsibility so that colleges and universities can then take their students to higher levels of recognition of the importance of these attributes in their future relationships and lives.

We want to solve this problem more than anyone. It would be far easier if the knowledge, insight, and perspective of those who deal with these cases were carefully considered before policy directives were handed down.

I would also like to correct one
statement for the record, which is that ACE did not in any respect try to discourage any school from responding to the survey that Senator McCaskill issued. And, indeed, we encouraged responses by the schools with which we communicated. Thank you very much for this opportunity.

CHAIRMAN CASTRO: Thank you, Ms. Meloy.

MS. LEVY: Thank you for this opportunity to provide testimony today to the Commissioners.

Since its founding in 1915, the American Association of University Professors has served the common good by promoting sound academic standards in higher education. In cooperation with other higher education organizations, the AAUP developed the policies and procedures on academic freedom, tenure, and faculty governance that have become normative in American colleges and universities. We like to say that we're the gold standard.

The AAUP has long recognized that the
freedom to teach and to learn is inseparable from
the maintenance of a safe, hospitable learning
environment. Several association documents
identify important elements of such an
environment. The Joint Statement on Rights and
 Freedoms of Students formulated in 1967 states
that, "The freedom to learn depends upon
appropriate opportunities and conditions in the
classroom, on the campus, and in the larger
community."

The 1966 Statement on Professional
Ethics emphasizes the responsibility of faculty
members to avoid any exploitation of students. Our
1995 statement "Sexual Harassment Suggested
Policies and Procedures for Handling Complaints,"
reiterates this ethical responsibility asserting
that acts of harassment clearly violate
fundamental standards of campus conduct.

The same statement emphasizes that the
success of any policy requires campus leadership
to provide appropriate ethical standards and to
provide suitable internal procedures to secure
their observance.

AAUP recently developed a statement on "Campus Sexual Assault Suggested Policies and Procedures," which addresses the problem of sexual assault on campuses and the dearth of effective coordinated policies for adjudicating these cases. The statement also addresses the distinctive role of faculty members in protecting student rights and freedoms. As advisors, teachers, and mentors, faculty members may be among the most trusted adults in a student's life, and are often the persons in whom the students will confide after an assault.

Sexual harassment and sexual violence are not only women's issues. Too often, addressing sexual harassment is seen only as a means to protect women. The AAUP is concerned with addressing systemic gender inequities by educating both men and women on campuses. By educating men and women on our campuses about sexual harassment and sexual violence, and by educating every member of our campus community. We're professors, of course.
The Department of Education's Office for Civil Rights "Dear Colleague" letter was released, as you well know, and then the May 9th, 2013 resolution agreement was also released regarding the investigation of the University of Montana's handling of allegations of sexual assault. These are necessary and welcome steps forward in this process.

In particular, the assertions in "Dear Colleague" that all parties be notified of the outcome of the complaint and the institutional action be reasonably prompt are crucial to addressing gender inequity.

In an effort to improve the likelihood of bringing perpetrators to justice, the Office for Civil Rights has mandated lowering the standard of proof in disciplinary proceedings involving sexual assault. The Office argues in "Dear Colleague" that replacing the prevailing standard of clear and convincing evidence with a preponderance of the evidence standard would help level the playing field for victims of sexual violence. The proposal
has, in general, been favorably received by women's advocacy groups and sexual assault support agencies, but has been opposed by many organizations representing both progressive and conservative values.

The AAUP advocates the continued use of clear and convincing evidence in both student and faculty discipline cases as a necessary safeguard of academic freedom, due process, and shared governance. The AAUP's advocacy for a clear and convincing evidence standard stems from our longstanding commitment to basic principles of academic freedom and tenure as first developed in our 1940 Statement of Principles, which was developed jointly with the Association of American Colleges, now the Association of American Colleges and Universities. And the statement was endorsed by 225 scholarly organizations and learned societies.

Given the seriousness of accusations of harassment and sexual violence, and the potential for accusations, even false ones to ruin
a faculty member's career, we believe that the
clear and convincing standard of evidence is more
appropriate than the preponderance of evidence
standard.

Since charges of sexual harassment
against faculty members often lead to disciplinary
sanctions, including dismissal, a preponderance of
the evidence standard could result in a faculty
member being dismissed for cause based on a lower
standard of proof than we consider necessary to
protect academic freedom and tenure. We believe
that the widespread adoption of the preponderance
of evidence standard for dismissal cases involving
charges of sexual harassment would tend to erode
the due process protections for academic freedom.

While clear policies and timely
responses are critical for both the complainant and
the accused, preserving a higher standard of proof
is vital in achieving fair and just treatment for
all. We urge both the Departments of Education and
Justice to reconsider the preponderance of
evidence standard.
We are also concerned about the potential violation of academic freedom for those who teach courses with sexual content. We would call your attention to the AAUP Statement on Sexual Harassment which provides guidelines on speech in the classroom and what would be considered reasonable speech in a teaching context.

Effective training must differentiate between appropriate course content and harassment. No policy should inhibit intellectual inquiry. Even a first-year writing class or a course on African literature that discusses a topic like female genital mutilation or other controversial topics can create discomfort. Any training for faculty, staff, and students should explain the differences between educational content, harassment, and hostile environments, and a faculty member's professional judgment must be protected.

Again, I see my time is running short but we very much appreciate the Department of Education and Justice's action on these efforts,
and hope that the standard of evidence will be reconsidered, and that academic freedom will be duly protected in the classroom. Thank you.

CHAIRMAN CASTRO: Thank you, Dr. Levy. We'll now --- while we switch the mikes there, Ms. Goss Graves, please proceed.

MS. GRAVES: Thank you. My name is Fatima Goss Graves, and I'm the Vice President for Education and Employment at the National Women's Law Center, and I really appreciate your invitation to testify today before the Commission on an issue of really such profound importance.

Title IX, the over 40-year old law that bans sex discrimination in education programs offers schools a critically important tool to address sexual harassment and violence. This law requires schools to take prompt and effective action to resolve sex discrimination, and to prevent its recurrence, and sexual harassment is no different.

And schools can comply with Title IX requirements without running afoul of the First
Amendment. Of course, as was discussed earlier, in many cases of sexual harassment, First Amendment concerns may not even be implicated. The First Amendment applies only to state actors, which for educational institutions largely means public school districts or state universities. And nearly all private colleges and universities that receive federal funding in addition to these public institutions must comply with the requirements of Title IX.

Second, there is, of course, no question that non-expressive physically harassing conduct is entirely outside the ambit of the free speech clause, so the First Amendment doesn’t apply --- and the First Amendment also doesn't protect true threats. A school who is attempting to intervene in response to physical harassment or true threats doesn't rise --- doesn't raise First Amendment concerns.

In addition, harassment often doesn't fall neatly into a single category. We like to, at the Law Center, think about it as a part of a
continuum in many cases. And where conduct involves both speech and non-speech elements, what courts have said is that a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. So, as these courts have emphasized there's a compelling government interest in preventing discrimination and harassment, and schools both have a duty to protect their students from harassment, and schools administrators must be able to prevent and address it. And they also must be able to do their job in providing safe school environments that are conducive to learning, and ensure that students have equal access to that learning.

Finally, and there's far more detail in my written testimony, but cases indicate that Tinker and Title IX are consistent in that they allow, through Tinker, and that they require, through Title IX, a school to intervene in response to such conduct, including speech that simultaneously creates a hostile environment, and
a foreseeable risk of substantial disruption of the school environment. And as the Third Circuit, which has considered several of these cases raising the First Amendment and harassment at the same time has held, intimidation of one student by another, including intimidation by name calling is the kind of behavior that school authorities are expected to control or prevent, and there isn't a constitutional right to be a bully.

There's been a lot of mention of the University of Montana Missoula agreement, so I think it's critical to revisit some of the facts that were described in the agreement. According to the findings, there were over 20 reports of sexual assault and 10 reports of sexual harassment at the university in a three-year period. And the findings also found that the policies the university had in place at the time were confusing. There were eight different types of policies that left it really unclear when students should report harassment, how students should report it, what appropriate steps that the university must and should take, and
the process was really burdensome and left complainants with unequal rights in the process.

The agreement that emerged applies the same standards to the Montana resolution that had been applied to OCR investigations and in injunctive relief cases in Title IX claims through multiple administrations, and it also repeated basic principles that really are not new. So, for example, it made clear that sexual harassment is defined as unwanted sexual advances, but also that not all sexual harassment is actionable under Title IX by a particular individual.

There are also other forms of harassment that are gender-based but don't involve unwanted sexual advances. And like the longstanding guidance, the Montana agreement tells schools to look at the type of harassment, its frequency, the setting or context of the harassment, any other incidents of harassment that have occurred, and the severity of the harassment, the more severe the harassment the less need for repetition to support a finding of a hostile
environment. For example, as we heard earlier, a single instance of rape can be enough.

There's also nothing new in the Montana agreement that infringes on free speech rights of faculty or students at the university, so to the extent that there is confusion on those points, I think it's good that today there is additional clarity from the Department of Justice and Department of Education, but we also have seen since the Montana agreement the 2014 guidance that provided extreme detail on a number of questions, and reiterated the requirements of the First Amendment.

In any event, the agreement outlines a constellation of factors that are considered both from the objective and the subjective perspective. And that's really important, because whether a reasonable person would find the conduct hostile, and whether a particular victim would subjectively perceive it as hostile are both important questions that have to be considered. So, there may be some conduct that is offensive to a reasonable person,
but the complaining individual does not perceive it that way, and as a result that sort of conduct would not be actionable.

So, in sum, Title IX's prohibition against sexual harassment and assault does not inherently infringe on student's constitutional protected rights to free speech, nor does it infringe on due process. And the work that's happening now, the work that's coming from the Administration, that's happening in Congress, work that, in my view in many ways is being sparked by student activists raising concerns about what's happening on their college campuses, I think in the end will ensure that schools are vigilant in stamping out this discrimination that has so many devastating effects for students across the country. So, again, thank you so much for you time today, and for the opportunity to testify. I look forward to any questions.

COMMISSIONERS QUESTIONS

CHAIRMAN CASTRO: Thank you. I'll open with a question to any of the panelists. The first
panel I asked questions that actually some of you raised in your written, and now your oral presentations about the issue of the burden of proof, clear and convincing versus preponderance. And I believe it was Mr. Galanter that responded that well, most schools are already using the preponderance standard anyway, so we really didn't reduce the threshold. Could you speak to that? Is that the case? Does anyone here know if that was the prevalent policy?

MS. MELOY: I can't say that I know that that was a prevalent policy, but I don't know where he got statistic that he quoted that 80 percent of institutions were using that standard. There was no survey done of institutions with respect to that, and I don't --- frankly, if I'd had a chance, I would have asked him that myself, because my experience is that the clear and convincing was much more common.

MS. LEVY: I don't have statistics on what schools were using which standard, but the AAUP has advocated in proceedings involving
faculty members, either dismissal proceedings or other kinds of conduct issues, that the clear and convincing standard be used. So, we are looking to carry that standard over to proceedings involving sexual harassment because it is one that we deem protective, amply protective of academic freedom and faculty governance.

CHAIRMAN CASTRO: So, you're just focused on the faculty as opposed to the student ---

MS. LEVY: Well, you know, they're not independent of each other because, obviously, they come into play in the classroom, and faculty, as we say, are on the front line. Oftentimes, students will confide in faculty members, and we do know that at times inappropriate relationships happen between faculty and students that we also address.

CHAIRMAN CASTRO: It's working.

MS. LEVY: Okay. That we also address. But we are primarily focused on faculty issues in relation to classroom teaching and other environments where students and faculty intersect.
CHAIRMAN CASTRO: Ms. Goss Graves.

MS. GRAVES: You know, I only have anecdotal evidence of how schools were using it before the guidance came out. And I know we had done a scan of a lot of universities and found that the ones we were looking at were --- I know that Senator McCaskill's new report where she surveyed institutions said that 85 percent of institutions said that they were using the preponderance of evidence standard. I think once the Cleary regulations are final and there's a process for implementing the new rules, we'll have more information because schools will be required to report that as part of their Cleary obligations, as well.

CHAIRMAN CASTRO: Okay, thank you. Commissioners, Commissioner Achtenberg, then Commissioner Kirsanow after that, and then Commissioner Heriot.

COMMISSIONER ACHTENBERG: Thank you, Mr. Chairman.

COMMISSIONER YAKI: Commissioner Yaki.
CHAIRMAN CASTRO: Okay.

COMMISSIONER ACHTENBERG: I was surprised at the vehemence with which Ms. Meloy spoke about the dramatic and negative reaction you portrayed America's schools and colleges, universities and colleges as having toward the far-reaching and heavy-handed actions of the Department of Education and Department of Justice.

Similarly, I was instantly relieved to hear Ms. Goss Graves assurances that there was not much new, but something more comprehensive that was being put forward in the "Dear Colleague" letter, and then the subsequent guidance, as well as the University of Montana agreement that's being made an example of for other universities and colleges, if not to follow precisely, then being used as guidance.

If you could, Ms. Goss Graves, reassure Ms. Meloy that it's a more collaborative process than some of the universities and colleges may fear.

MS. GRAVES: Well, I think it's kind
of hard to have it both ways. We hear a lot from
schools that they want more information, that they
want the Department of Education to be really clear
about how they're going to enforce, and what
they're going to enforce on, and what that's going
to look like. So, when you have an agreement like
the Montana agreement and they say this is a
blueprint, and if you follow these approaches,
these are the sorts of approaches we think that can
help make your campuses safer and better places.
And then there's a reaction saying well, don't do
that. I think it's a tough position.

I think what probably makes the most
sense is for there to be as much information out
there as possible. I was really gratified to hear
that the Department of Education is holding
meetings with colleges and training sessions. I
think that sort of information will be good,
because I think we're in a particular time where
students are becoming really aware of their rights,
and are wanting their universities to move quickly.
So, it's not sort of an academic thing, it's sort
of in real time they expect to be able to have access
to their universities, and access to their
classrooms and dorms without being in fear.

COMMISSIONER ACHTENBERG: If others
want to comment, please feel free. And if I --- I
didn't mean to mischaracterize. I was actually
surprised.

MS. MELOY: Well, I think we heard from
some of the other speakers today on the panels that
we are put in --- higher education institutions are
put in a very difficult spot because OCR puts out
the blueprint and says this is what we want you to
do, essentially. They seem to have backed away a
little bit from that in their testimony today, but
that blueprint simply cannot be carried out at
every higher education institution in this
country. By some counts, and I believe even the
Department of Ed said there are over 7,000
institutions, and many of them do not have the state
funding, for example, that the University of
Montana would have. Many of them are very small
institutions, some of them are for-profit, they're
community colleges that really don't have the same kinds of fact patterns coming up, and yet they're being told that you must, essentially, have the entire sort of bells and whistles that the University of Montana, very excellent programs that they are putting into effect at great expense. So, colleges and universities are kind of caught in the middle of how do we comply with this, and how are we also at the same time fair to all of our students, and not kind of overstepping the bounds or treating our faculty in ways that they are unhappy with because of the kinds of standards that the Department of Education imposes by guidance without notice and comment proceedings upon colleges and universities.

COMMISSIONER ACHTENBERG: So, you really understood this to be not just an example of a series of perhaps even safe harbors or something, but this was essentially a prescription for every college, and university, and community college in the country.

MS. MELOY: That has been the way it was
portrayed from time to time by the Department, but I'm happy to hear if they are stepping back from that some and will have more recognition of the great diversity of higher education institutions, and the different situations that arise in these many different kinds of institutions that they have not been really dealing with in their enforcement procedures, if you look at the list that they put out.

MR. VOLOKH: The --- if I might step in?

COMMISSIONER ACHTENBERG: Please.

MR. VOLOKH: The resolution agreement expressly says it is meant to "serve as a blueprint." It strikes me as not just an example, a blueprint is something that is the foundation for building your building. And a blueprint, among other things, to protect students from sexual harassment. It faults the university for defining sexual harassment using the severe or pervasive standard. It faults the university for treating objective offensiveness as a necessary condition. It says whether conduct is objectively offensive
is a factor used to determine liability, but not an element of the standard for liability. It demands that sexual harassment be defined to include individual instances like, for example, an individual instance of a sexual rumor, or a sexual joke, or sexually explicit material that's seen by someone. And then it calls for the "prohibition" of sexual harassment, "elimination" of sexual harassment, defining sexual harassment and, making clear it is "unacceptable," a statement that the university does not tolerate sexual harassment.

You read the document according to its text, and it looks like the Department is saying, essentially, universities, this is a blueprint. You ought to follow it in order to prohibit individual instances of this kind of speech, whether or not it is severe or pervasive. That's according to the text of the document.

Now, it looks like it may have been a misstatement, may have been --- may not have properly captured the position of the Justice Department or the Education Department, so that's
great. But I can see why there was a lot of concern
about the Montana resolution agreement.

COMMISSIONER ACHTENBERG: I would only
point out that they didn't make this up out of whole
cloth. The University of Montana is a pretty small
place. When you consider the number of incidents,
very, very serious that were experienced in a very
short period of time, I would have read that to be
a blueprint for colleges and universities that have
had the kind of adverse experience that the
University of Montana has had. And it would be a
blueprint, therefore, not for every college, and
university, and community college, but for ones
where the conduct was as pervasive and as
derogatory as the conduct was found to be, and in
fact seems to have been on the University of Montana
campus. So, that would be the way I would read that
admonition from the Department of Education, but
that's my opinion.

CHAIRMAN CASTRO: Thank you. Moving on
to Commissioner Kirsanow, who will be followed by
Heriot, Yaki, and Kladney.
COMMISSIONER KIRSANOW: Thank you.

This is for Professor Volokh. Actually, I had a different question, but this -- your last comments prompted this.

Would universities that are subject to the OCR guidance feel obligated perhaps because of the emails being sent out by OCR to adhere to the blueprint established in the Montana case, have a viable compelled speech action against OCR where the blueprint seems to suggest training that goes beyond First Amendment -- what they're permitted to do under the First Amendment?

MR. VOLOKH: I don't think that they would have a viable compelled speech claim. It's not completely clear, compelled speech doctrine is some degree of disarray now, but cases -- such as Rumsfeld v. FAIR suggest that the government, when the government imposes requirements on various institutions it can also, among other things, require them to convey information about those requirements. Rumsfeld v. FAIR did not actually include these kinds of educational programs but
might, in fact, include them. And I think that's especially so if there is a condition attached to funding. I think that the government is entitled to buy speech through funding. So, it could say look, here is the funding we're giving you, and a condition of this funding is that you have workshops on sexual harassment, or whatever else.

So, I don't think there would be a compelled speech problem. I think the real problem here is not so much with speech compulsions as with speech restrictions. The universities are being put in a position where they're being pressured to restrict the speech of the students. And I think that's very much true also of private universities.

I don't accept the notion that was suggested in earlier commentary by Ms. Goss Graves that because private universities aren't bound by the First Amendment, that the First Amendment is, therefore, not in play. It's true that if a private university --- if, say, Harvard wants to restrict allegedly racist, or sexist, or religiously bigoted speech by its students, that doesn't
violate the First Amendment. But when the government pressures private universities to restrict speech of their students, that is implicating the First Amendment.

To make an analogy, if America On Line, I guess that's an old example, or Google or Yahoo wants to restrict speech on its services, it's free to do that. But if the government were to say you will be held liable if you allow sexist, or racist, or religiously bigoted speech on your services, that would implicate the First Amendment. So, I think what universities could do is they could say this is an unacceptable burden on our student's rights, and we are asserting the rights of the students as on First Amendment law. You often are allowed to assert the rights of third parties whose speech is being chilled.

The difficulty, of course, is that universities are often in a position where they don't want to be suing the government. They have too many relationships with the government they don't want to jeopardize. Nobody wants to rock the
boat that way.

COMMISSIONER KIRSANOW: Would anyone else have a cause of action, either on compelled speech or restriction of First Amendment ---

MR. VOLOKH: Yes, I think students certainly could. And, in fact, students have challenged campus speech codes quite successfully. The cases that have been challenges to the campus speech codes have prevailed. The cases have not been brought against the federal government, as such, but I do think that under certain situations the federal government essentially pressures the university into instituting a speech code in a particularly direct way, as happened in Santa Rose Junior College, for example.

COMMISSIONER KIRSANOW: What about an association of universities, would they have standing to bring cases?

MR. VOLOKH: I'm not a standing expert. There is a whole body of law on associational standing. I think they might. It's possible, although I think that for similar reasons there
might be a reluctance to bring that kind of lawsuit.

COMMISSIONER KIRSANOW: Even under Rumsfeld isn't it the case that the government can tell someone to speak on behalf of the government, in other words, give a defined text, but the government cannot tell an independent actor to speak in a certain way he would not otherwise speak. In other words, it's not its own speech. As long as the government is saying here, here's a license plate and the license plate says whatever it is, they can compel you to speak. But if it compels you to speak in a way the government has not authorized you to speak either under statute or some regulation, it is not permitted to do so.

MR. VOLOKH: I'm sorry, I'm not sure I understand. Compels you to speak in a way that the government is not authorizing you?

COMMISSIONER KIRSANOW: For example, the government gives you cigarettes ---

MR. VOLOKH: Yes.

COMMISSIONER KIRSANOW: --- a cigarette package. It says --- the warning label
says this may cause all kinds of things and make
you look like a Klingon. It can do that. And, of
course, that's commercial speech, a different
context.

MR. VOLOKH: Yes.

COMMISSIONER KIRSANOW: But it can do
that because it's what the government tells you to
say specifically.

MR. VOLOKH: Yes.

COMMISSIONER KIRSANOW: But it can't
give you some kind of amorphous or nebulous charge
to speak in ways you would not otherwise speak but
for the government's compulsion.

MR. VOLOKH: I'm not sure that's right.
Actually, the license plate example is one where
the government was found not to be allowed to compel
people to speak.

COMMISSIONER KIRSANOW: Right.

MR. VOLOKH: But in Rumsfeld v. FAIR,
for example, it's not that the universities were
required to convey specific government prescribed
messages, as such, it's that they were required to
convey particular facts about when recruiters were
going to be showing up.

I'm inclined to say that, again, as a
condition of funding it's permissible for the
government to say look, here we're giving you this
funding. If you want the money, one of the things
we want the money to go for is you putting on
seminars that train people not to violate human
subjects rights in medical experiments, not to
violate student's sexual harassment rights,
seminars in avoiding plagiarism and such. Maybe I'm
mistaken, I'm inclined ---

COMMISSIONER KIRSANOW: But then even
if the government is going to do that as a condition
of funding, shouldn't it be pursuant to regulation
and not a guidance under the Administrative
Procedure Act?

MR. VOLOKH: It's an interesting
question. I have to pass administrative law
questions to others.

COMMISSIONER KIRSANOW: Okay. Thank
you very much.
CHAIRMAN CASTRO: Commissioner Heriot.

COMMISSIONER HERIOT: I want to play off something that you just said to Commissioner Kirsanow.

MR. VOLOKH: Okay.

COMMISSIONER HERIOT: I'm speaking to Professor Volokh here. I work at a Roman Catholic University, and that school struggles to maintain some semblance of a Catholic identity. I know that you work at a public university, that has a very different identity, and a very different way of doing things.

I can imagine a private college that would want to be the super civil college, and would want to attract students on that basis and say, you know, here we are always polite to each other, and we require that of our students at all times. We're very formal, we have very formal interactions between students and faculty, even between students and students. And I can imagine a private university that would go completely in the other direction, the sort of let it all hang out, you
know, you need to develop a tough hide, and if somebody calls you a dirty name, call them a dirty name back. You know, two different schools, two different worlds.

What I'm thinking about is like to what extent does the Department of Education's policy sort of suck the oxygen out of the room for that and make it less likely that --- I mean, obviously, the school that wants to be the super, you know, we mix it up, everything is fair. That's not possible under the current policy. But the school that wants a very, very civil policy, I could imagine this actually interfering with that in the sense that they would be fearful that if it's perceived to be a reaction to the Department of Education policy, then the constitutional issues come up. Whereas, if there weren't such a policy, they'd be free to think about how they want to do this themselves. I mean, do you have any comment on that?

MR. VOLOKH: You know, I haven't thought about it from the perspective of, for
example, a Catholic university. It's true, I don't work at one, and haven't really focused on it much. My sense is that the universities that want to be more restrictive, and there are some such, are free to do so. And if they make it clear that we are disciplining you because we don't like your speech, either because we think it's vulgar or uncivil, or because it's contrary to our religious values (say, you are expressing particular views about evolution that we think are wrongheaded views) I think generally speaking that a university would have, subject --- actually, I'm sorry, there might be some ban on religious discrimination by students --- by universities with regard to students, so let's change it to political views. We don't like your political views, and if you express pro abortion rights views, we are going to expel you. Not that Catholic universities do that, but if the university wants to do that, I think it would be free to do that, at least setting aside California state law.

COMMISSIONER HERIOT: What if came to
be a question of fact, are you doing this because
the Department of Education --- if the trier of
fact found that it was because the Department of
Education policy, I take it that would be a problem.

MR. VOLOKH: I think that the
university would not be held liable under the First
Amendment in that kind of situation, even if the
trier of fact found you were pushed into that. I
think the government may be liable for the pushing.
I don't think the university would be liable for
being pushed.

COMMISSIONER HERIOT: Okay.

CHAIRMAN CASTRO: Commissioner Yaki.

COMMISSIONER YAKI: Thank you, Mr.
Chair. Mr. Volokh, to the extent that you can be
brief in this one answer I'd appreciate it, because
I want to use it to springboard to another question.
But it seems to me from what you've been saying
today, and tell me if I'm wrong, that you believe
that in the context of schools that anything that
is not essentially meet the classic definition of
assault, if it's speech, cannot and should not
create a hostile environment.

MR. VOLOKH: I think in the context of colleges and universities if speech does not fall within an existing First Amendment exception, could be threats -- could be fighting words, could be libel or slander which is saying knowing falsehoods about people-- then I think it is, indeed, constitutionally protected and should not form the basis for university retaliation.

One exception is that I think that's the rule for speech outside the classroom, in the classroom, and in class assignments, necessarily, some kind of content-based judgment has to be ---

COMMISSIONER YAKI: Sure. So, Ms. Meloy, I'm wondering whether or not the ACE adopts Mr. Volokh's view of whether or not --- that broad definition of our speech is what the ACE supports, as well, in terms of whether or not they believe their members should be liable or responsible for protecting its students from sexual harassment.

MS. MELOY: I don't know that ACE has put out a specific proclamation or resolution that
would respond to your question, but I think ACE does support its members in acting in legally responsible ways.

CHAIRMAN CASTRO: Okay. We will now move on C-

COMMISSIONER YAKI: But ---

CHAIRMAN CASTRO: I'm sorry, go ahead.

COMMISSIONER YAKI: I'm sorry. And then just let me over to Ms. Graves, based on those first responses I just heard which I --- frankly, are interesting to me.

My question to you is, given the Davis case occurred in 1999 prior to Twitter, Instagram, Facebook, to YouTube. Do you think that that kind of a position, that is we can short of essentially classic assault or libel, there can be no sexual harassment to be guarded against? I mean, what is your opinion on that?

MS. GRAVES: Well, I guess two things. One, I don't think that's the state of the law right now, that it has to be physical or a true threat. I just don't think that's the state of the law. As
I said in my testimony, I think that Title IX and the First Amendment are entirely consistent, and that includes what that looks like when you're bringing a case in federal court for damages under the Davis and Gebster standards, and the ways in which the Department of Education has articulated what schools obligations are as recipients.

COMMISSIONER YAKI: Okay, but do you think Davis needs to be harmonized with or modified with regard to the explosion in the ways that people can be exposed to ridicule, harassment, exploitation, et cetera because of the rise of social media?

MS. GRAVES: Well, I don't --- I mean, I think that there could be ways to address some concerns I have with Davis, but I don't think that is the concern. I think, you know, some courts are taking up cases that are raising the relationship of cyber harassment and what happens on line, the relationship between on line and off line, and things don't happen so neatly. You know, even in the last couple of years online harassment can
happen in the same room with someone from one cell phone to another, so they're tough questions. You know, the standards still apply. You know, I think it would be a good idea for the Department of Education to articulate what --- and provide guidance to institutions about what that means, what harassment looks like in an online environment.

I did want to, if I can, just respond to a little bit of the conversation I heard earlier, because I thought I heard something that almost sounded like it should be sort of market-based taking care of harassment, that some schools will decide to deal with it, and that some schools will be sort of free, and maybe they won't address it so directly. And I think that's why we have laws like Title IX and broader civil rights protections because they're sort of baseline standards that are there for a reason.

CHAIRMAN CASTRO: Thank you.

Commissioner Kladney, you have the floor.

COMMISSIONER KLASDEY: Thank you. And
if the panel would bear with me, I'm sure these are not going to be well formulated questions because I'm not exactly sure where I'm going with this. But, Professor Volokh ---

COMMISSIONER YAKI: I'm just teasing Kirsanow.

COMMISSIONER Kladney: It's okay, Commissioner Yaki. Professor, and this is a question I guess I should have asked earlier of most of the other panelists. You were speaking basically about First Amendment and college.

MR. VOLOKH: Yes.

COMMISSIONER Kladney: Okay. Do you think that there's more of a restriction and the government has more ability to control or discipline for what goes on in K through 12?

MR. VOLOKH: Absolutely. The Supreme Court has so held in the Tinker case.

COMMISSIONER Kladney: And how much can they, do you think, discipline for that kind of thing?

MR. VOLOKH: So, the court has set forth
three extra ways in which K through 12 students could be disciplined for their speech. One is if it's vulgar, that's under the Fraser case, obviously, not at colleges. In colleges, vulgar speech is protected, too. But in the case of that context the court said that's okay.

A second is in the Morse v. Frederick case: if speech encourages or can be interpreted reasonably as encouraging illegal behavior and particular drug use, presumably also alcohol use, maybe other things, again, very different in colleges. And, in particular, actually with regard to Morse v. Frederick if it's apolitical and yet encouraging that illegal behavior. --- The third one is if it is substantially disruptive of the ---

COMMISSIONER KLADNEY: Environment?

MR. VOLOKH: --- work of the school. And, generally speaking, either that standard has not been applied in a higher education context, or the courts applying it have essentially said that doesn't give the government any extra leeway at least outside the classroom because the whole point
of modern colleges and universities, public ones, is to have ferment, have debate, have things that may even be offensive.

The interesting question is unresolved in the K through 12 context, unresolved in the K through 12 context is to what extent do these rules, especially the disruption rule, applies to speech that's outside campus? On one hand, I can certainly sympathize with a principal who says look, this speech is outside campus but it's causing disruption on campus. It's interfering with my provision of these educational services I'm supposed to be providing.

COMMISSIONER KLADNEY: Kind of like the Long Arm Statute.

MR. VOLOKH: There you go. There you go. On the other hand, one saving grace historically of restrictions in schools was look, you want to say what you want to say, just don't say it here, don't say it during the school day at school. If the restrictions become 24/7 restrictions, which says essentially any time you're enrolled in a
public school, if you say certain things outside school which could even be political things, if you say very racist things, or religiously bigoted things, or harshly criticize some religious group outside campus that's causing fights on campus, then in that case you could be expelled from the school, or suspended, or something along those lines. That becomes a much broader burden, and that's something that lower courts have not yet---

COMMISSIONER KLADNEY: Well, if it does cause a fight on campus, I would think the fight itself would be sufficient to get you disciplined.

MR. VOLOKH: Well, no, no, causes other people to fight.

COMMISSIONER KLADNEY: Oh, okay.

MR. VOLOKH: So, the hypothetical is imagine somebody says something that's harshly critical of some religious group, Mormonism, for example, or Catholicism. And then as a result, somebody on campus starts punching him. The puncher could certainly be disciplined, but the question is can the student be disciplined on the grounds
that you are creating disruption? You better stop saying these incendiary things off campus because this is causing disruption on campus.

COMMISSIONER KLADNEY: So, in your opinion, basically, K through 12 speech could be controlled on campus.

MR. VOLOKH: Can be substantially controlled. It's not unlimited. The courts have, in fact, imposed limitations on that kind of speech, but much broader government ---

COMMISSIONER KLADNEY: But in reference to this Title IX.

MR. VOLOKH: Yes.

COMMISSIONER KLADNEY: It could pretty much be controlled.

MR. VOLOKH: Yes.

COMMISSIONER KLADNEY: You can imagine most of what would be speech.

MR. VOLOKH: Yes. Most of what Title IX would be seen as restricting would either be vulgar or disruptive. There may be some exceptions, but generally speaking not much of a problem with the
COMMISSIONER Kladney: Well, let me ask you this question. When we talk about Twitter, Facebook, social media people seem to be getting all in a twitter about that. If a studentTwitters while on campus, or Facebooks while on campus these terrible things, K through 12, can that be disciplined, as well, in your opinion? Something sexual or harassing in nature?

Mr. Volokh: Yes. I think if it fits within one of these categories, probably --- again, it's an interesting question. If there is a line between on and off campus, is it focused on whether it is actually sent on or off campus, whether it's received on or off campus? Hard to tell. But, yes, in many of these situations yes, most of them would be disciplined.

COMMISSIONER Kladney: And then one last area, which is not well formulated either. When you were talking about a blueprint ---

Mr. Volokh: Yes.

COMMISSIONER Kladney: --- when
there's a new statute, a new law, a new regulation, you have to give it time to work out, I think, and it changes and people interpret things along the way. In other words, don't you think that just reading the black letter of this Title IX, or the letter from Montana, you say this is the blueprint --- well, they said it was the blueprint.

MR. VOLOKH: Yes.

COMMISSIONER KLADNEY: Not you, I apologize.

MR. VOLOKH: Yes.

COMMISSIONER KLADNEY: Isn't that actually what seems to be happening now when Mr. Galanter said, Words only are not enough," but he said that "schools set their own standards of discipline and what it's for." And then they have to like work with --- were you here during that?

MR. VOLOKH: Yes.

COMMISSIONER KLADNEY: With the Department to decide what's right or wrong. In other words, do you really think that the Department of Education would come right in and
shut a school right down without interaction back and forth?

MR. VOLOKH: So, my understanding, and this was mentioned earlier, is that the Department of Education has never withdrawn federal funds to any school for any reason.

COMMISSIONER Kladney: Right.

MR. VOLOKH: But there's a line from I think Justice Thurgood Marshall about the sword of Damocles—that the sword of Damocles is dangerous not because it falls, but because it hangs. They don't have to withdraw funds from universities for universities to pay very close attention to them, and do the interactive process that they engage in. And universities would prefer not even to get that call from the Office for Civil Rights. So, when the Office for Civil Rights speaks, people listen. People pay close attention to what's written down. And to the extent that OCR retracts some of that, I think that's great. I'm not saying any of this is set in stone.

COMMISSIONER Kladney: Well, they
don't retract it just to retract it. Obviously, they retract is because there has been input or pressure from the other side, pressure from the students to the school, and the school to the Department. I mean, I'm speculating, but I mean there's pressure somewhere. They just didn't say oh yes, we're going to change it today. Would you agree with that? I know it's speculative to some extent.

MR. VOLOKH: I think they saw public criticism, they may have concluded either they should change their position, or that their position was inartfully set forth. And to the extent that they are changing, again, I think that's great; just that that is the context of why it was that people were quite up in arms about what the Justice Department and Education Department said. They suggest that, well, this is just --- we're just following the old rules. Well, it didn't look they were following the old rules, or if they were, then the old rules were a lot more aggressive and speech restrictive than many people
thought.

CHAIRMAN CASTRO: All right.

Commissioner Kladney, we're going on to ---

COMMISSIONER KLADNEY: Ms. Goss Graves has ---

CHAIRMAN CASTRO: Oh, yes, sure, go ahead. Respond, please.

MS. GRAVES: I just wanted to add something. I didn't hear them retracting the Montana agreement, and I wanted to make sure that was clear. You know, the Montana agreement is still out there, and there is a --- Montana has a policy that I think a lot of schools had been looking at as a model policy.

What I heard happening today was to the extent that there was any confusion about what the longstanding rules have been and continue to be, and what was happening in the Montana agreement, they were trying to provide more clarification there.

CHAIRMAN CASTRO: Thank you.

Commissioner Narasaki.
COMMISSIONER NARASAKI: Thank you, Mr. Chair. I have a question for Professor Volokh, also for Ms. Meloy. So, my question to Professor Volokh is, in the last page of your testimony you note that serious problems involving alleged physical assaults and the failure to deal with such assaults have been merged by the government and others with sexually themed speech. The policies the government is seeking deliberately aren't limited to physical assault, but expressly cover speech. And then you go on to say, "But the government's demands to universities go far beyond the questions of physical assaults, and extend to speech that you feel is protected by the constitution."

And that, plus some of the comments you have made during the Q&A causes me concern, so I want to give you an opportunity to clarify, because I must be --- I might be mishearing you. And that is, you seem to be arguing that the university has --- that there's no constitutional ability and it is wrong for the universities to say things like they don't tolerate sexual harassment, that that
somehow --- if that's required by the government
to make the statement that as a university we do
not tolerate sexual harassment, that that would be
unconstitutional suppression of free speech. I'm
hoping that's not what I'm hearing, but I'm a little
cconcerned that you're saying that unless it rises
to a physical act, it's not somehow C-- neither the
government nor the school can do anything about it.

MR. VOLOKH: So, I'm sorry, let me just
ask for clarification. When you say don't tolerate
sexual harassment, does it mean we think it's bad,
or we will punish you for it?

COMMISSIONER NARASAKI: I'm just
repeating --- you gave a long list of things in
here, and also verbally that you found outrageous
or supported your claim that the Department of
Justice and Department of Education in the Montana
case was going beyond into the territory of
protected speech.

MR. VOLOKH: Yes.

COMMISSIONER NARASAKI: So, I'm trying
to figure out where you think the boundary is,
because I would be concerned because there is harassment that is purely speech that I think is dangerous, and I hope somebody can do something about it.

MR. VOLOKH: Well, if by don't tolerate you mean we will punish you for, as opposed to we just condemn it and we want to make a public statement it's bad. Then, yes, if the university says we do not tolerate people telling sexual or dirty jokes, or we do not tolerate spreading sexual rumors, including accurate ones, or we do not tolerate circulating or showing emails or websites of a sexual nature, or we do not tolerate displaying or distributing sexually explicit pictures or written materials, yes, that would violate the First Amendment. There have been speech codes that are framed in terms of hostile environment, harassment, that have been struck down by courts precisely because in the definition of harassment that they were using included constitutionally protected speech.

COMMISSIONER NARASAKI: So, is there
any kind of speech that you consider to be not
protected sexual harassment? That's what I'm
trying ---

MR. VOLOKH: Absolutely.

COMMISSIONER NARASAKI: I'm trying to
figure out where that is.

MR. VOLOKH: We do not --- if they say
we do not tolerate threats of violence, that's
constitutionally unprotected speech. It's
unprotected against criminal punishment, it's
unprotected against university punishment. We do
not tolerate libel or slander in the sense of false
statements especially, knowingly false,
complicating that, a fact about a particular
person. We do not tolerate fighting words personal
insults said face to face in a way that is
calculated to provoke a violent, or likely to
provoke a violent reaction. So, that kind of
speech, there are other categories, and I'd be
happy to talk about other examples, continued
unwanted mailings to someone after they said stop,
for example.
COMMISSIONER NARASAKI: Yes, because it seems to be, again, you're tying things only back to where there's some connection to potential physical violence.

MR. VOLOKH: No. Libel is an example where there could be no physical violence but, nonetheless, it's constitutionally unprotected. But it is true that the First Amendment exceptions are relatively narrow, and some of them, incitement, threats, fighting words are there precisely because of risk of physical violence. But once ---

COMMISSIONER YAKI: And bullying is fine.

MR. VOLOKH: The problem is that bullying is not a legally well-defined term. To the extent that I have seen attempts to define bullying, it has been often extremely overbroad to the point of --- just to get examples from state statutes and city and county ordinances that I've criticized, where it would be bullying, in fact, even a crime for somebody, for example, or
especially a minor to post about a minor oh, my ex-boyfriend broke up with me, or excuse me, cheated on me and now I want all of you to ostracize him. That would be under the definition of some of those rules bullying.

COMMISSIONER YAKI: Versus saying someone is so hideous that they should go and kill themselves. How would you describe that?

MR. VOLOKH: I think if an adult were to say, with regard ---

COMMISSIONER YAKI: No, sir, if it were a kid to say that, and he texts it to ---

COMMISSIONER NARASAKI: Commissioner Yaki, if I could get my time back.

COMMISSIONER YAKI: Sorry.

COMMISSIONER NARASAKI: So, my example would be say you have a whole ring of boys who are harassing a group of girls, calling them sluts, calling them, you know, herpes carry --- you know, just generally denigrating them. To you, that would be protected First Amendment ---

MR. VOLOKH: Yes.
COMMISSIONER NARASAKI: That no one could do anything about.

MR. VOLOKH: Well, people could do things about it, but the government actors cannot --- can neither throw in jail or impose administrative punishment on students who are expressing this, K through --- excuse me, college and university students. I'm not talking about K through 12, who are expressing derogatory opinions about others. Again, Hustler v. Falwell is an example, that Jerry Falwell was ---

COMMISSIONER NARASAKI: That's fine. That's fine.

COMMISSIONER HERIOT: Herpes, I assume, is a fact issue. If it's a false statement ---

MR. VOLOKH: If it's a false statement, then yes, that is, indeed --- that falls in the slander section. If it's true well, that's something people may very well talk to each other about.

COMMISSIONER NARASAKI: Okay, it's
fine. So, my question to Ms. Meloy --- thank you.

My question to Ms. Meloy is, I was very --- I very much applauded your call for increased attention to what's going on in elementary and secondary schools, because I do think that there has not been sufficient attention to their --- while there has been, thankfully, more attention to what's going on in colleges, I think, obviously, high school and elementary school kids are even vulnerable, and it's important to pay attention. And government has a little bit more ability to do something.

But I was intrigued by your statement about non-traditional colleges, and what I'm interested in is, so what would be the difference in policies? What difference about them --- what would they be required to do that doesn't make sense because of how it plays out in their campuses?

MS. MELOY: Well, I don't know that there needs to be a dramatic difference in their policies; although, I think that the necessity of some of the policies is probably less in the non-traditional community college-type
atmosphere, because I think that they will have fewer incidents of student on student sexual assault, or that sort of situation happening.

And the kinds of problems that we see coming down the pike on this relate to some of the requirements for training and surveying, and it will be very difficult, depending upon how some of these things play out, and how they're enforced by OCR or DOJ against the institutions, if they say you must have mandatory training of all students. And when you have students who are in certificate programs that are very short, that start and stop at different times, students who never set foot on your campus because they're in online learning, or they're in placements or internships outside of the institution, those kinds of situations are going to be very hard, or very expensive for some of these more non-traditional schools to carry out.

COMMISSIONER NARASAKI: What I have increasingly seen is for employers who have large employees scattered around the world, is very effective online training which reduces the cost
and the burden. So, I'm just wondering if that is --- if there are options that would help --- is your concern just it's a high cost with little payoff, and there's no way to address that? I'm just trying to figure out like what ---

MS. MELOY: Well ---

COMMISSIONER NARASAKI: So, what would be the real thing that we would be asking government to do?

MS. MELOY: Well, I think the A number one thing that we would want to ask government to do is to follow the Administrative Procedure Act and to provide for notice and comment before imposing obligations on the institutions, and to make sure that there is real consideration of the reality of how some of these things that sound good to those of us who went to college, it sounds good, as opposed those who actually have to carry this out and do it under the mandate to try to reduce college costs and all of the other mandates that come down on higher education in this day and age. And I thought I had another point, but I lost it.
CHAIRMAN CASTRO: I opened it. I'm good. Let me just get this microphone working here. I appreciate that, thank you.

So, this bring us to the end of the panel, and as well as the end of the briefing. So, I want to thank each of you who spoke on this panel and the prior panels, as well. This has really been a very informative program for us. I want to thank each of you, and I also want to thank our staff who over the last few months put this program together. It was very effective and will be very helpful to us. And I want to thank the staff in advance because they're going to have to pull together all of this information for us and prepare a report for our consideration and review. So, I want to make sure that we all acknowledge that.

Lastly, I want to let folks know that for the record this record of the briefing report is going to remain open for the next 30 days. If panelists or members of the public would like to submit materials or additional materials in the case of panelists, you can either mail them to the
U.S. Commission on Civil Rights, Office of Federal Civil Rights Evaluation, 1331 Pennsylvania Avenue, N.W., Suite 1150, Washington, D.C., 20425, or via email at publiccomments@USCCR.gov, that's P-U-B-L-I-C-C-O-M-M-E-N-TS@USCCR.gov.

V. ADJOURN BRIEFING

It is now 1:16 Eastern Time, and this meeting is adjourned. We will reconvene at 2:00 for our monthly business meeting. Thank you, everybody.

(Whereupon, the above-entitled matter went off the record at 1:17 p.m.)