

## U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING

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FRIDAY, MAY 13, 2011

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The Commission convened in the Grand Ballroom of the Washington Marriott at Metro Center, 775 12<sup>th</sup> Street, Northwest, Washington, D.C. at 9:00 a.m., Martin R. Castro, Chairman, presiding.

## PRESENT:

MARTIN R. CASTRO, Chairman  
 ABIGAIL THERNSTROM, Vice Chair  
 ROBERTA ACHTENBERG, Commissioner  
 TODD F. GAZIANO, Commissioner  
 GAIL L. HERIOT, Commissioner  
 PETER N. KIRSANOW, Commissioner  
 DINA TITUS, Commissioner  
 MICHAEL YAKI, Commissioner

KIMBERLY TOLHURST, Delegated the Authority of  
 the Staff Director

## STAFF PRESENT:

TERESA BROOKS  
 MARGARET BUTLER  
 CHRISTOPHER BYRNES  
 LILLIAN DUNLAP  
 PAMELA DUNSTON, Chief, ASCD  
 LATRICE FOSHEE  
 ALFREDA GREENE  
 TINALOUISE MARTIN, Director, OM  
 LENORE OSTROWSKY, Acting Chief, PAU  
 JOHN RATCLIFFE, Chief, Budget and Finance  
 EILEEN RUDERT  
 DAVID SNYDER  
 AUDREY WRIGHT  
 MICHELE YORKMAN

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## COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN  
 ALEC DEULL  
 TIM FAY  
 DOMINIQUE LUDVIGSON  
 JOHN MARTIN  
 ALISON SOMIN

## PRESENTERS:

RUSSLYNN ALI, Assistant Secretary For Civil Rights, Department of Education  
 JOCELYN SAMUELS, Senior Counselor to the Assistant Attorney General for Civil Rights, Department of Justice  
 FATIMA GOSS GRAVES, National Women's Law Center  
 ROGER CLEGG, Center for Equal Opportunity  
 GREGORY HEREK, University of California, Davis  
 ILAN MEYER, Columbia University  
 HIRAM SASSER, Liberty Institute  
 ELIZA BYARD, GLSEN  
 JOHN EASTMAN, Chapman University  
 PAULA GOLDBERG PACER Center  
 HELEN GYM, Asian Americans United  
 STUART BUCK, University of Arkansas  
 KENNETH MARCUS, Institute for Jewish & Community Research  
 HILARY SHELTON, NAACP  
 RAJDEEP SINGH, Sikh Coalition  
 TAMMY AABERG, Parent Advocate  
 FRANCISCO NEGRON, National School Boards Association  
 KEN TRUMP, National School Safety and Security Services  
 EUGENE VOLOKH, UCLA  
 DEBORAH LAUTER, ADL1NOTE: FOR SPEAKER

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TABLE OF CONTENTS

Panel 1: Federal Agency Efforts to Enforce  
Civil Rights Laws ..... 8

Russlynn Ali, Assistant Secretary for Civil  
Rights, U.S. Department of Education  
Jocelyn Samuels, Senior Counselor to the  
Assistant Attorney General for Civil  
Rights, U.S. Department of Justice

Panel 2: Gender & LGBT ..... 54

Fatima Goss Graves, National Women's Law  
Center

Roger Clegg, Center for Equal Opportunity  
Gregory Herek, University of California,  
Davis

Ilan Meyer, Columbia University

Hiram Sasser, Liberty Institute

Eliza Byard, GLSEN

John Eastman, Chapman University

Panel 3: Race/National Origin, Religion  
and Disability ..... 150

Paula Goldberg, PACER Center

Helen Gym, Asian Americans United

Stuart Buck, University of Arkansas

Kenneth Marcus, Institute for Jewish &  
Community Research

Hilary Shelton, NAACP

Rajdeep Singh, Sikh Coalition

Panel 4: Federal/Local Role in Bullying

Tammy Aaberg, Parent Advocate

Francisco Negrón, National School Boards  
Association

Ken Trump, National School Safety and Security  
Services

Eugene Volokh, UCLA

Deborah Lauter, ADL

Adjourn

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P R O C E E D I N G S

9:01 A.M.

CHAIRMAN CASTRO: The meeting will come to order. My name is Marty Castro. I'm Chairman of the United States Commission on Civil Rights. I want to welcome you all to this business meeting of the U.S. Commission on Civil Rights. I also want to take this opportunity to welcome back Michael Yaki, our Commissioner who was recently reappointed.

Welcome back, Michael.

COMMISSIONER YAKI: Thank you.

CHAIRMAN CASTRO: The time is exactly 9:01 on May 13, 2011. The purpose of this meeting is to conduct a briefing on the federal response to peer-to-peer violence and bullying as well as harassment, as information today will be gathered for the purposes of our 2011 Statutory Enforcement Report that will be presented in September of this year to the President of the United States and the Congress of the United States.

This is an extremely important issue for us all. Every one of us in this room and on this Panel and listening to this has children in our lives that we love and care for, whether they are our own children, grandchildren, nieces, nephews, students,

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1 godchildren, neighbors and we all want them to have  
2 safe, happy, and long lives where they can reach  
3 their full potential.

4 I know that I can say that each one of  
5 us, regardless of our party affiliation or our  
6 political ideology, wants to have communities and  
7 schools that are safe for our children regardless of  
8 their race, their national origin, sex, religion,  
9 disability status, or sexual orientation. Where we  
10 may differ is how we want to accomplish that goal.  
11 To that point today, we're going to hear from various  
12 individuals who are going to present to us different  
13 points of view and different perspectives on the  
14 legal responsibilities and the constitutional and  
15 civil rights implications of those different methods  
16 to protect our children.

17 I think that as we have this discussion,  
18 I know that each one of my Commissioners and I will  
19 lead by example so that today we have a very  
20 thoughtful discussion about these issues with our  
21 fellow Commissioners and the witnesses so that we  
22 prepare for Congress and the President a thoughtful  
23 and bipartisan report.

24 I want to thank each of you for being  
25 here today. I want to give you a little bit of the

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1 ground rules on how we're going to manage the panels  
2 for today. We're very fortunate, we've invited 20  
3 highly-distinguished speakers to provide us with a  
4 diverse array of expertise and viewpoints.  
5 Unfortunately, with so many wonderful panelists, time  
6 is going to be at an extraordinary premium. In order  
7 to maximize the amount of time and opportunity for  
8 discussion between Commissioners and the witnesses,  
9 and to ensure that those people that are  
10 participating on panels later in the day have an  
11 opportunity for their fair share of time, I'm going  
12 to strictly enforce time allotments for each panelist  
13 to present his or her statement.

14 Panelists are going to notice that  
15 there's a system of warning lights set up here like  
16 traffic lights. The lights are red, green and  
17 yellow, as we do when we're driving, we know it's  
18 time to show caution and wrap up. You'll have two  
19 minutes remaining when you see that yellow light.  
20 When the light turns red, I'm going to ask all  
21 panelists to please cease your presentation. We have  
22 your written statements. We've reviewed them.  
23 They're part of the record, so we ask you to strictly  
24 adhere to that time limit. I don't want to have to  
25 cut anybody off, which I know my General Counsel here

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1 will require that I do, so please keep to that.

2 The first panel will have a ten-minute  
3 time frame for their statements and the other  
4 succeeding panels throughout the day will have seven  
5 minutes.

6 Also due to the time constraints, I'm  
7 only going to be giving a cursory overview of the  
8 individual panelist's background. All their full  
9 bios and some of their presentations are out in the  
10 lobby at the table. So if you'd like to see the full  
11 bio, please make sure you receive a handout if you  
12 already have not.

13 Lastly, I'm going to ask my fellow  
14 Commissioners to be considerate to the panelists and  
15 to one another by keeping their questions and  
16 comments concise. I will be calling on Commissioners  
17 as they raise their hands and I will fairly allocate  
18 the time for them to ask questions. So when you do  
19 ask a question, please make it one question, although  
20 I know that at times there will be multiple parts to  
21 that question. We just ask you to keep that to a  
22 minimum. If we all abide by that time arrangement,  
23 we're going to have multiple opportunities to ask  
24 questions of all the panelists.

25 So we'll now begin with Panel 1, which

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1 is the Federal Agency Efforts to Enforce the Civil  
2 Rights Laws. We have as our speakers Russlynn Ali,  
3 Assistant Secretary for Civil Rights, U.S. Department  
4 of Education, and Jocelyn Samuels, Senior Counselor  
5 to the Assistant Attorney General for Civil Rights at  
6 the U.S. Department of Justice. Assistant Secretary  
7 Ali unfortunately has a very tight schedule and has  
8 to leave early this morning, so in order to  
9 accommodate her schedule, I'm going to bifurcate this  
10 panel, so she will have ten minutes to make her  
11 presentation. We'll follow that with questions that  
12 will occur until 9:40. At that time we'll go to Ms.  
13 Samuels who will have ten minutes to present her  
14 presentation and then we will question her until  
15 10:10.

16 So I would ask each panelist to please  
17 raise your right hand and swear or affirm that the  
18 information you are about to provide to us is true  
19 and accurate to the best of your knowledge and  
20 belief.

21 (The panelists were sworn.)

22 Assistant Secretary Ali, we will begin  
23 with you.

24 PANEL 1: FEDERAL AGENCY EFFORTS TO ENFORCE

25 CIVIL RIGHTS LAWS

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1 RUSSLYNN ALI, ASSISTANT SECRETARY FOR CIVIL RIGHTS,  
2 U.S. DEPARTMENT OF EDUCATION

3 ASSISTANT SECRETARY ALI: Thank you,  
4 Chairman Castro. Thank you all for the opportunity  
5 to be here with you today. This is a hugely  
6 important issue and the Secretary of Education Arne  
7 Duncan has made clear it can't come from Washington  
8 only. The solutions can't come from Washington alone  
9 and certainly not from the Department, so that you  
10 are taking the time to think so deeply about this  
11 issue, we very much appreciate and will be hugely  
12 important moving forward.

13 I don't have to tell anyone in this room  
14 and certainly none of you how important the crisis of  
15 bullying has become. You would have heard the  
16 President talk about it that we need to shift the  
17 paradigm in our nation's schools, the cultures that  
18 give rise to bullying that make it seem as though  
19 bullying or harassment are somehow a right of  
20 passage. We are working with local educators and  
21 officials across the country to help change those  
22 patterns.

23 As the Secretary has also often said,  
24 students can't learn if they don't feel safe. So our  
25 work in the Office for Civil Rights on this issue has

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1 been geared towards that, ensuring that students feel  
2 safe in our nation's schools, colleges, and  
3 universities and that those responsible for teaching  
4 them understand their roles and responsibilities when  
5 it comes to complying and helping to adhere to the  
6 nation's civil rights laws.

7 We are working with educators, parents,  
8 community members, advocates, and concerned citizens  
9 everywhere to help students, to help students  
10 understand both what their rights are and to help  
11 teachers and their community members and parents  
12 understand what they can do in the event that their  
13 child is a victim of bullying and what to do in the  
14 event that they see bullies or teach bullies in their  
15 schools. We are very proud of the effects some of  
16 our recent work have demonstrated already. For  
17 example, and I'll talk about it a little bit more  
18 momentarily recent guidance that we issued on sexual  
19 violence under Title IX making it clear that sexual  
20 violence can constitute a violation of Title IX, that  
21 there are real responsibilities for college campuses  
22 and school districts to ensure that victims feel  
23 safe, that they address cultures that give rise to  
24 sexual harassment and sexual violence and they help  
25 prevent it from moving forward. In very short order,

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1 several universities began taking action. We have  
2 heard that Stanford University, that Yale University,  
3 that University of Virginia, have all announced that  
4 they are proactively changing their standards of  
5 proof in Title IX investigations to better comply  
6 with the Office for Civil Rights standards and our  
7 guidance.

8 We have also recently resolved some  
9 complaints on the issues of harassment and bullying,  
10 working with our colleagues at the Department of  
11 Justice. We are helping school districts that are  
12 confronting this issue today. Recently in Owatonna  
13 School District in Minnesota, a case involving  
14 harassment of Somalian-American students, we worked  
15 with local officials there to ensure that those  
16 students would feel safe and we would address the  
17 very serious acts of harassment that those students  
18 suffered. Owatonna's superintendent, I'm pleased to  
19 say, said in the press when asked about this that the  
20 Office for Civil Rights, and we together with the  
21 Department of Justice, have made her school district  
22 better.

23 The guidance that we've issued has been  
24 designed to help school districts and universities,  
25 recipients of federal funds, just as I mentioned,

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1 understand what their responsibilities are. We have  
2 issued two recently. One on sexual violence where we  
3 made it clear, as I mentioned, what the requirements  
4 were when sexual violence occurred, what the  
5 requirements were when adjudication of Title IX  
6 complaints happens on school campuses, the kinds of  
7 interim supports that might be required if a victim  
8 needs them.

9 We've also issued this past October  
10 guidance on bullying and harassment under all of the  
11 statutes in our jurisdiction, Title VI, Section 504,  
12 and Title IX, there too with the intent of making it  
13 clear what responsibilities were and providing as  
14 much assistance proactively that we could to  
15 institutions. We are also embarking on some  
16 technical assistance, coordinating our work with  
17 amazing relationships with the Department of Justice  
18 so that we can ensure that we bring all of our  
19 resources to bear to help solve this problem.

20 Now the role of the policy guidance,  
21 while intended to make clear what the standards are,  
22 are also a little more detailed than you might have  
23 seen in the past. That is because we are trying to  
24 apply the guidance and legal standards for school  
25 districts in circumstances that they deal with in

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1 real time.

2 We understand some of the concerns about  
3 the guidance so that we proactively address some of  
4 what we've heard. We've heard that we are changing  
5 the standards of proof. We've heard that *Davis vs.*  
6 *Monroe* requires actual notice, not institutions to  
7 know or should have known the acts of harassment or  
8 violence occurred on their campuses. There though we  
9 are talking in *Monroe* about very different  
10 circumstances. We're talking about monetary damages  
11 in the private litigation sense. Courts have  
12 recognized that we set different standards, *Monroe*  
13 itself did. And since 1994 and 2001 and beyond, the  
14 Office for Civil Rights has made it clear that the  
15 standards for harassment are whether institutions  
16 knew or should have known that harassment occurred.

17 We are also very mindful of the concerns  
18 around the interplay of our guidance with First  
19 Amendment and, as our guidance in October made it  
20 clear, our work in no way attempts to trump the First  
21 Amendment. Those values and core constitutional  
22 principles are complementary, not contradictory to  
23 enforcing the nation's civil rights laws.

24 But even so, very little of the  
25 harassment that we see involves protected speech.

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1 Physical harassment, violence, and threats are not  
2 constitutionally protected, as I know you know. Nor  
3 is harassment the same thing as unpopular or  
4 offensive speech. As our Dear Colleague Letters make  
5 clear, student-on-student harassment violates federal  
6 civil rights laws only if it is sufficiently serious  
7 to create a hostile environment that interferes with  
8 or limits students' ability to participate in or  
9 enjoy the benefits or services offered by the  
10 institution. The First Amendment's free speech  
11 clause does not give students license to say what  
12 they want whenever they want without regard to the  
13 effect that their speech has on other students.  
14 Schools cannot tolerate discriminatory harassment  
15 that interferes with providing a safe, nurturing  
16 learning environment for all of their students.

17 Of course, no universal one-size-fits-  
18 all approach will be right for every school or every  
19 student struggling with issues of bullying and  
20 harassment. And our policy guidances have not in any  
21 way attempted to mandate one, but keeping the school  
22 free from harassment is primarily a local  
23 responsibility and one that we want to help  
24 institutions maintain.

25 The other aspect of our work -- as I

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1 mentioned, some of the very positive feedback we've  
2 received has been around our complaint resolution.  
3 Last year, we received a little over a thousand  
4 complaints alleging harassment on the basis of race,  
5 national origin, sex, or disability, which was about  
6 14 percent of the total number of complaints we've  
7 received on all issues. And a 31 percent increase  
8 from 2009. That's almost twice as many as we saw in  
9 2005.

10 We carefully review all complaints. We  
11 determine whether, after our evaluation, there's  
12 sufficient jurisdiction, et cetera, to launch an  
13 investigation, and we thoroughly and diligently  
14 investigate.

15 We are also pleased to see an increase  
16 in voluntary resolution around this issue in  
17 particular. Thirteen percent of our cases were  
18 resolved either through early complaint resolution,  
19 which is a kind of mediation, or through a voluntary  
20 resolution and negotiations. We are collecting data  
21 on these issues in ways that we haven't in the past,  
22 disaggregated data on instances of bullying and  
23 harassment under all of the statutes in our  
24 jurisdiction. We are launching compliance reviews on  
25 this issue. Over the past five years OCR has

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1 initiated a dozen sexual harassment compliance  
2 reviews, one racial harassment, and one disability.  
3 Five of those were -- began in 2009, and in 2010 we  
4 initiated two sexual violence reviews. This year we  
5 have initiated two more, one under Title VI and  
6 Section 504; the other on sexual violence under Title  
7 IX.

8 Lastly, the kind of coordination that  
9 you will hear from Jocelyn and myself certainly  
10 during the question and answer period has been hugely  
11 important to ensure that we provide the kind of  
12 assistance that we know is necessary. We are also  
13 working with several other agencies. You would have  
14 seen -- the Department convened alongside other  
15 agencies, Bullying Summit in August; the President  
16 and other agencies at the White House in March to  
17 bring further attention to this issue, to understand  
18 what the kinds of best practices are so that we can  
19 help replicate them, model them, and show what's  
20 working for the nation.

21 Thank you.

22 CHAIRMAN CASTRO: Thank you, Assistant  
23 Secretary. I'll now open it to questions from the  
24 Commissioners.

25 Commissioner Heriot.

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1 COMMISSIONER HERIOT: Thank you very  
2 much.

3 ASSISTANT SECRETARY ALI: Thank you.

4 COMMISSIONER HERIOT: I want to talk  
5 about the 800-pound gorilla issue here. And that is,  
6 the Department has had a sexual harassment policy for  
7 some years and in some ways it's very similar to what  
8 we're talking about today. And it hasn't always  
9 worked out that well. For one thing, school  
10 districts have often responded by adopting zero  
11 tolerance rules and some of those zero tolerance  
12 rules have turned out rather silly. For example, in  
13 Texas, a four-year-old kindergarten student was  
14 punished after a teacher's aide accused her of  
15 pressing his face to her breasts during a hug. At  
16 the Potomac View Elementary School, just up the road  
17 here in Maryland, we had a six-year-old who was  
18 accused of sexual harassment and written up and they  
19 called the police on him. In fact, I'm told that in  
20 Maryland, and of course that's just one state, in the  
21 year 2007, 166 elementary students were suspended for  
22 sexual harassment and that included 3 pre-schoolers,  
23 16 kindergartners, and 22 first graders.

24 Now I know the Department of Education  
25 is not looking to punish pre-schoolers, but the fact

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1 is whenever the federal government gets involved in  
2 an issue, it is so very local in character and I  
3 believe so much better dealt with at the local level.  
4 There's going to be over-reaction at the local level.  
5 How is this policy going to be different? How can  
6 you prevent that kind of response?

7 ASSISTANT SECRETARY ALI: Well, I  
8 certainly can't say whether that kind of response is  
9 due to the work of the federal government in the  
10 past. What I can say is we are providing the kind of  
11 technical assistance to assure that institutions  
12 understand what rises to the level of a civil rights  
13 violation, what clearly our enforcement standards are  
14 and what doesn't rise to the level of civil rights  
15 violation.

16 We are also collecting data on things  
17 like zero tolerance policies so that we can better  
18 understand how they are being implemented.

19 COMMISSIONER HERIOT: You've got to  
20 remember that, at a school district, the worst thing  
21 in the world that can happen to them is to have a  
22 giant investigation, which is often what happens. I  
23 was a little troubled by your quoting the school  
24 district, school board member praising the  
25 Department. Remember, they're under your authority.

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1 You're supposed to know that when somebody is under  
2 your authority and they praise you, you're not  
3 supposed to take it seriously. You're supposed to  
4 realize that that may not be really what they're  
5 thinking.

6 ASSISTANT SECRETARY ALI: I can only  
7 take people for what they say and what that  
8 superintendent said was clearly that she believed  
9 that we helped make her institution better.

10 We have also heard just recently from  
11 General Counsel in a compliance review that we  
12 resolved. There, the General Counsel had been  
13 threatened with obstruction of justice when they  
14 tried to do their Title IX work, when they were  
15 confronting issues of sexual violence. And our work  
16 helped them facilitate an agreement with local law  
17 enforcement to resolve some of those issues and some  
18 of those long-standing tensions. There too, the  
19 General Counsel said that we helped break down silos  
20 in their institutions and helped make their  
21 institutions safer and better.

22 COMMISSIONER HERIOT: Again, I worry  
23 about the 800-pound gorilla problem.

24 CHAIRMAN CASTRO: Commissioner Heriot,  
25 we do have to limit the follow ups. We do want to

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1 have the opportunity to have all the Commissioners  
2 ask questions.

3 COMMISSIONER HERIOT: Sure.

4 CHAIRMAN CASTRO: We appreciate that.  
5 I'm sorry to interrupt you.

6 Commissioner Yaki, you're recognized by  
7 the chair.

8 COMMISSIONER YAKI: Thank you very much,  
9 Mr. Chair. And I just want to say it's great to be  
10 back after my four-month furlough.

11 Just a quick response and then a  
12 question. I always get a little nervous when people  
13 start talking about issues being solely of a local  
14 character and therefore should be of local reaction  
15 because certainly we heard that refrain during the  
16 '30s, '40s, and '50s when it came to certain items of  
17 discrimination that happened in this country back  
18 then.

19 But we're not talking about that. We're  
20 talking about an issue that has transcended local  
21 areas. It is a national issue and that is why we are  
22 having this hearing here today. What happens at the  
23 enforcement level, the local level, it's something  
24 that we can discuss and monitor, but it doesn't  
25 diminish the importance of what we are talking about

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1 today.

2 Now there was one aspect of your  
3 testimony and I think it's probably going to be for  
4 both of you in the next round, but for you, Ms.  
5 Assistant Secretary, and that is one of the things  
6 that has come about in the news has been the issue of  
7 cyber bullying and the fact that basically any  
8 person, young person with ill will, or lots of people  
9 with ill will, can sort of gang up on someone in  
10 cyberspace and create the kind of emotional trauma,  
11 emotional damage that we're concerned about.

12 Could you talk a little bit about cyber  
13 bullying and sort of the potential limits, if there  
14 are, of the authority of ED, as well as  
15 responsibility of the schools of what really could be  
16 described as off-campus, but as we all know probably  
17 emanates from within a particular school, circle of  
18 people.

19 ASSISTANT SECRETARY ALI: Thank you. It  
20 is certainly an issue that in this world of social  
21 media, so many superintendents and school folk and  
22 university folk are wrestling with. We are working  
23 in real time with our colleagues in the Department of  
24 Justice and in other agencies to produce some  
25 guidance on this issue that addresses the emerging

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1 technology and addresses some of the novel issues  
2 including that of jurisdiction.

3 That said, we have seen cases where  
4 bullying on things like Facebook have been done in  
5 school and clearly rose to the level of adults in  
6 school knowing about it. And in fact, we resolved a  
7 case just recently where bullying and harassment that  
8 occurred off campus that was promoted and talked  
9 about through the social media rose to the level of  
10 school district officials and school officials  
11 knowing about it and therein we worked with them to  
12 resolve those issues.

13 COMMISSIONER YAKI: Basically, anyone  
14 with a smart phone inside a classroom can engage in  
15 that kind of conduct.

16 ASSISTANT SECRETARY ALI: Again, the  
17 standard, though, is whether adults knew or should  
18 have known about it.

19 COMMISSIONER YAKI: Yes.

20 ASSISTANT SECRETARY ALI: So that is  
21 really going to be a case-by-case determination. We  
22 do believe that there are some principles that we can  
23 help institutions understand. At this point, I think  
24 it's premature for us to articulate what they are.  
25 We are working with our colleagues to sort through

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1 some of the complications and I would be happy to  
2 come back when we are ready to articulate them.

3 In the meantime, we are focusing on  
4 again what happens in school, where information  
5 occurs out of school, but impacts school, making it  
6 clear what those responsibilities are.

7 CHAIRMAN CASTRO: The chair recognizes  
8 Commissioner Gaziano.

9 COMMISSIONER GAZIANO: Thank you, and  
10 I'll ask the chair for a little indulgence. I'll  
11 forego questioning of the other witness, but this --  
12 my lead-in may take a little while.

13 CHAIRMAN CASTRO: Try to keep it brief.

14 COMMISSIONER GAZIANO: I will try, but I  
15 want the witness to understand the premise. It's  
16 sort of related to Commissioner Heriot's question.  
17 It's clear to me that if the Department of Education  
18 wants to become the 800-pound gorilla in all matters,  
19 student teasing, sexual harassment, state-level petty  
20 crimes, it can. And I have some concerns I'm going  
21 to raise with other panelists on whether you've done  
22 so, the way you've done it is authorized by your  
23 statutes and whether the way you have done so will  
24 lead to increase in violations of students' First  
25 Amendment rights who politely disagree with school

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1 administration views.

2 But my question for you at this time is  
3 really a much more pragmatic one and that's whether  
4 you coming in as the 800-pound gorilla will  
5 necessarily make matters better at the local level  
6 for students, rather than worse. I can forgive  
7 interest groups into thinking that the more levels of  
8 government that are involved, and the harder it comes  
9 down on local officials, the better. But the problem  
10 I have with that is that it allows the local school  
11 board to deflect the accountability they have to  
12 parents and to those same interest groups that would  
13 normally go to the school districts. And it's quite  
14 understandable that federal bureaucrats who want to  
15 help will also tend to believe that they can make  
16 things better, but when the -- there are thousands of  
17 school districts. There are tens of thousands of  
18 schools.

19 When parents and the interest groups are  
20 led to believe that the federal government is the  
21 guarantor of preventing teasing of little Johnny or  
22 little Betty, I have a serious concern that that will  
23 allow the school district to deflect the  
24 accountability they have to those groups by saying  
25 well, we're following federal guidelines. We're

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1 doing everything according -- our hands are tied.  
2 DOE is telling us what to do.

3 To what extent did you study that issue  
4 and how did you study that issue, the sort of  
5 unintended effect of undermining the accountability  
6 before you issued your Dear Colleague Letter?

7 ASSISTANT SECRETARY ALI: Thank you for  
8 your question. Certainly we want to help, but let me  
9 be clear. We also want to do our jobs. We're  
10 enforcing laws that for decades have been in effect.  
11 We are neither expanding our jurisdiction, nor the  
12 scope of those laws, nor creating new standards.

13 Our work is not designed in this context  
14 to imply that common teasing, that perhaps shouldn't  
15 be common at all, rises to the level of a civil  
16 rights violation. We are talking about a hostile  
17 environment that is so sufficiently severe, based on  
18 a student's race, skin color, sex, national origin,  
19 or disability status, and that harassment is so  
20 severe that it interferes with their ability to learn  
21 and to enjoy the benefits that every student in our  
22 nation's schools, colleges, and universities should  
23 enjoy.

24 I will stand with my colleagues as we  
25 work to enforce the laws that Congress has given us

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1 the job to enforce. We will provide technical  
2 assistance wherever possible so that institutions  
3 understand clearly what their lines are. I have not  
4 met a college president or a superintendent or a  
5 teacher anywhere that says that they want an  
6 environment where any student feels unsafe, no less.

7 CHAIRMAN CASTRO: Commissioner Gaziano,  
8 I've got to limit the follow-up. I've got  
9 Commissioners over here who have not had an  
10 opportunity to ask questions. Thank you.

11 The chair recognizes Commissioner  
12 Achtenberg, am I right?

13 Commissioner Titus.

14 COMMISSIONER TITUS: Thank you, Mr.  
15 Chairman and thank you, Madam Under Secretary for  
16 being here. You don't look like an 800-pound gorilla  
17 to me, but we welcome you this morning.

18 You know, the administration is not the  
19 only branch that's working on this problem or  
20 recognizing that it's an escalating issue that we  
21 need to address. In Congress, there are a couple of  
22 bills pending. I know you're familiar with them:  
23 The Safe Schools Improvement Act and Student Non-  
24 discrimination Act. Both of these have bipartisan  
25 sponsorship and they're in both houses.

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1 I just wondered if you would comment on  
2 those, if you're supporting those, if there are  
3 elements in there that help you do your job, that  
4 hinder you, or just in general how they affect how  
5 you'll move forward on this issue.

6 ASSISTANT SECRETARY ALI: We are  
7 reviewing the laws to better understand them, the  
8 proposed legislation. We've not taken a position on  
9 them as an administration. Those certainly -- any  
10 work done with the bipartisan Congress that seeks to  
11 protect students is work that we will pay close  
12 attention to and, if charged with authority to ensure  
13 that those laws are effectuated and enforced, we will  
14 diligently do that.

15 COMMISSIONER TITUS: Thank you.

16 CHAIRMAN CASTRO: We're going to go to  
17 Mr. Kirsanow and then come back to Commissioner  
18 Achtenberg.

19 COMMISSIONER KIRSANOW: Thank you, Mr.  
20 Chair, and thank you for coming this morning, Ms.  
21 Ali.

22 You stated that the issue of harassment  
23 is primarily a local matter. And I'd like to follow  
24 up on that a little bit. My understanding is that  
25 there are at least 44 anti-bullying, harassment laws

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1 at the state level. There are scores of ordinances  
2 to the same effect. There are hundreds of statutes  
3 that deal with the underlying acts that might  
4 otherwise qualify as harassment or bullying such as  
5 laws against battery, assaults, stalking, what have  
6 you.

7 What evidence is there that state and  
8 local authorities are either incompetent, incapable,  
9 unwilling, or don't have the resources to handle this  
10 matter? And could you give us an example of how the  
11 Office for Civil Rights adds value or can do  
12 something better than can be done at the state and  
13 local level to address the issue?

14 ASSISTANT SECRETARY ALI: So education  
15 at large is primarily a local issue. As I mentioned,  
16 and as the Secretary often says, we can't make the  
17 kind of transformational change that our schools need  
18 to undergo from Washington alone.

19 Our guidance was not intended, nor is  
20 any of our work, to suggest that local officials are  
21 incompetent. But as we see the complaints, the  
22 allegations of the complaints, what we're learning in  
23 our compliance reviews, places where gang rape has  
24 become all too common, where young girls feel like if  
25 they report being raped to school officials, even if

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1 they're raped on school grounds, that they will be  
2 subject to a kind of public humiliation and  
3 victimization all over again.

4 From General Counsels, as I mentioned,  
5 that need help as they're working to assure that  
6 justice is done through local law enforcement, but  
7 that they also comply with their civil rights  
8 responsibilities, standards, and laws that have been  
9 in place since the '70s and beyond.

10 So our role, while clear and defined, is  
11 but one role in the system designed to ensure that  
12 all children feel safe. We are making clear -- I'm  
13 sorry. Thank you, Commissioner.

14 CHAIRMAN CASTRO: The chair recognizes  
15 Commissioner Achtenberg.

16 COMMISSIONER ACHTENBERG: Secretary,  
17 please state for the Commission the distinction  
18 between the context in which private parties seek  
19 monetary damages as compared to the context in which  
20 the Department, through its various vehicles  
21 including compliance reviews, exercises its  
22 prerogative to set administrative procedures within  
23 the parameters of the civil rights laws?

24 ASSISTANT SECRETARY ALI: The  
25 distinction between private, the standards in private

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1 litigation and the enforcement of Title IX has been  
2 clear for a very long time, since 1979 when the regs  
3 were first done, 1994 certainly, and 2001.

4 Our -- we did not change those standards  
5 in any way. For example, preponderance of the  
6 evidence as the standard for Title IX investigations  
7 when it comes to sexual violence— that standard  
8 has always been our enforcement standard. We made it  
9 clear in the guidance that it was.

10 The many institutions, as we saw from  
11 Yale and Stanford and others, have somewhat of a  
12 higher standard more towards clear and convincing,  
13 not because they were attempting to thwart their  
14 Title IX responsibilities, but many because they were  
15 dealing with Title IX sexual violence and harassment  
16 issues in the disciplinary context of which there was  
17 a higher standard.

18 So we were helping to articulate the  
19 difference.

20 CHAIRMAN CASTRO: The chair recognizes  
21 Vice Chair Thernstrom.

22 VICE CHAIR THERNSTROM: Thank you. A  
23 couple of very fast questions. You talked about  
24 hostile environments so severe as to interfere with  
25 the ability of students to learn.

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1           Is it crystal clear in your view when  
2 actions amount to, add up to, creating a hostile  
3 environment? Those are nice words, but it seems to  
4 me they're very vague and to put some specificity --  
5 to talk about specific instances just underscores the  
6 problem of the vagueness.

7           And then let me just add another  
8 question here so you can answer both at the same  
9 time. Commissioner Kirsanow talked about state and  
10 local authorities and their ability and all the  
11 regulations that are already in place. Well, I spent  
12 11 years on the Massachusetts State Board of  
13 Education. And we were not impressed with the  
14 ability at the state level to in any way regulate  
15 bullying, nor were we particularly impressed with the  
16 ability of local school authorities, that is school  
17 boards. What we were impressed with was the ability  
18 of principals and teachers in a school to establish a  
19 culture in which such bullying was not acceptable,  
20 and the ability of those same local authorities to  
21 reach out to parents and say this is your  
22 responsibility, too.

23           And I just wondered what your reaction  
24 would be to those two points.

25           ASSISTANT SECRETARY ALI: To the latter,

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1 yes, there is certainly as we talked about all  
2 morning the local responsibility, the principals are  
3 in the best position to be able to spot it, as are  
4 teachers, when it's happening in real time. Parents  
5 and community have this hugely important role to  
6 assure that what happens out of school also is safe  
7 for all students. We at the federal government and  
8 the Department of Education also have a very  
9 important role, one that is designed to provide real  
10 assistance. For example, Commissioner Kirsanow, in  
11 December, you referenced the 44 states and an  
12 increasing number that are just developing state-wide  
13 policies on this issue. In December, the Secretary  
14 issued a memo to state officials pointing to what  
15 those policies were, helping to identify some model  
16 practices and some things that we know are working  
17 from the state level.

18 While all of those stakeholders, local  
19 law enforcement, local officials, parents and  
20 communities, have responsibilities, schools have a  
21 responsibility, too. And adults in the schools have  
22 a responsibility under the civil rights laws to  
23 ensure the students are free from a hostile  
24 environment based on protected characteristics.

25 Our work is designed to help them where

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1 they need it, remind them where they have fallen  
2 short. Well, let's also be clear. If the Office for  
3 Civil Rights gets involved in an enforcement way, not  
4 in a technical assistance way, it's probably too  
5 late. Some tragedies and unfortunate things have  
6 already occurred. So we are trying to help prevent  
7 them on the front end as much as possible.

8 CHAIRMAN CASTRO: Thank you, Assistant  
9 Secretary. We appreciate the time you spent in your  
10 testimony today and I know you have to leave soon.  
11 Thank you for being here.

12 ASSISTANT SECRETARY ALI: Thank you for  
13 your time.

14 CHAIRMAN CASTRO: We'll now move on to  
15 the Justice Department, Jocelyn Samuels, you'll have  
16 ten minutes to make your presentation. And then  
17 we'll do questions and answers.

18 JOCELYN SAMUELS, SENIOR COUNSELOR TO THE ASSISTANT  
19 ATTORNEY GENERAL FOR CIVIL RIGHTS, U.S. DEPARTMENT  
20 OF JUSTICE

21 MS. SAMUELS: Thank you very much for  
22 inviting me here today. I'm delighted to be here and  
23 appreciate the Commission's focus on this extremely  
24 important issue.

25 Before I get started, I'd like to

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1 introduce Anurima Bhargava, my colleague who is the  
2 chief of our Educational Opportunities Section in the  
3 Civil Rights Division. I'd also like to thank my  
4 colleagues in the Educational Opportunities Section  
5 for all of the work that they do in this and other  
6 areas to ensure that students can go to school free  
7 of harassment and discrimination on prohibited bases.

8 I don't have to tell any of you how  
9 important education is as a key to a child's success  
10 in our country and how important it is for a child to  
11 feel safe in order to be able to benefit from the  
12 education that our schools provide.

13 Harassment can have a profound and long-  
14 lasting effect on students who are subjected to it,  
15 as well as on students who observe it and those who  
16 become attuned to it in a school environment. We've  
17 seen truly dire consequences when students who are  
18 harassed feel like they have nowhere to turn. We've  
19 seen harassment based on sex, on disability, on  
20 religious beliefs, on national origin, and on race.  
21 And when that harassment occurs and is not remedied  
22 by a school district, we take action under the laws  
23 that have been in effect for decades. We have been  
24 involved in this area for a very long period of time.  
25 For example, in the seminal Supreme Court decisions

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1 in the *Gebser* and *Davis* cases, we have brought  
2 harassment cases or worked with school districts  
3 throughout administrations. The laws that we  
4 enforce, as I said, have been on the books for  
5 decades.

6 Among those laws are Title IV of the  
7 Civil Rights Act of 1964, which bars discrimination  
8 including harassment on the basis of race, national  
9 origin, sex, and religion in public schools and in  
10 public universities.

11 We enforce Title II and III of the  
12 Americans With Disabilities Act, which bar  
13 discrimination and harassment based on disability.  
14 We enforce the Equal Educational Opportunities Act of  
15 1974 which, among other things, requires states and  
16 school districts to provide services to English  
17 language learner students and, on referral from the  
18 Department of Education or other federal agencies, we  
19 enforce Title VI of the Civil Rights Act of 1964,  
20 Title IX of the Educational Amendments of 1972, and  
21 the Rehabilitation Act of 1973, which barred  
22 discrimination and harassment when educational  
23 institutions that received federal funds violate the  
24 laws.

25 Now under Title IX, both Courts and the

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1 Department of Education have recognized for a long  
2 time that sex discrimination includes discrimination  
3 based on gender stereotyping. In 2001, the Office  
4 for Civil Rights issued guidance stating that gender-  
5 based harassment, including that predicated on sex  
6 stereotyping, violates the law, and we apply that  
7 U.S. Court interpretation of the legal standards.

8 Now before I continue, I just want to  
9 provide a little bit of background information to put  
10 in context the information that we provided in  
11 response to your interrogatories and document  
12 requests.

13 The Educational Opportunities Section is  
14 comprised of 20 lawyers. It's a very small group and  
15 we do the very best we can with the limited resources  
16 that we have to enforce the laws mandating equal  
17 educational opportunity in the host of contexts in  
18 which they arise.

19 We get complaints about harassment and  
20 other forms of discrimination in numerous ways, from  
21 phone calls, from letters, from congressional  
22 inquiries. We look into those and marshal our  
23 resources to get involved in the cases in which we  
24 think we can have the greatest impact, those in which  
25 we can promote systemic reforms that can serve as

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1 models for school districts around the country, those  
2 where there are questions of law that will result in  
3 interpretations that will be applied across the board  
4 or in various areas of the country.

5 We do not have the resources or,  
6 frankly, the jurisdiction to proceed with every  
7 complaint that we get. And the number of complaints  
8 that we have reported to you, we think, represent  
9 only a small component of the amount of bullying and  
10 harassment that occurs out there. So for example,  
11 while bullying and harassment based on weight or on  
12 income or on appearance are all unfair and something  
13 that school districts should address, federal law  
14 simply does not give us the authority to look at or  
15 to take action in those kinds of cases.

16 As a result, the numbers that we have  
17 reported represent those cases in which we believe,  
18 with our resources, we are able to make a significant  
19 difference, not a representation of the universe of  
20 the problems out there.

21 Let me talk a little bit about some of  
22 the cases in which we've been involved. As I  
23 mentioned, we look for opportunities to help school  
24 districts with systemic reforms and often, I should  
25 say, our cases are resolved by agreements with the

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1 school districts, who are anxious to ensure that they  
2 are providing their students a safe environment in  
3 which to go to school.

4 School districts are conscious of their  
5 responsibilities here and, along with our colleagues  
6 at the Department of Education, we believe that  
7 voluntary compliance and technical assistance to  
8 enable them to recognize their legal responsibilities  
9 and implement effective practices is the preferred  
10 way to promote school safety and anti-harassment  
11 policies.

12 So, as a result in our cases, we have  
13 often looked for systemic reforms that we think will  
14 help a school district down the road to address the  
15 kinds of conduct that I know we all deplore. In  
16 Owatonna, as Assistant Secretary Ali mentioned, along  
17 with the Office for Civil Rights, we entered into an  
18 agreement with the school district to address severe  
19 and pervasive harassment of Somali-American students.  
20 Our agreement there provided for a review of the  
21 school district's policies, training for teachers and  
22 staff about both the standards of the law and  
23 effective practices to prevent harassment, evaluation  
24 of the effectiveness of policies, engagement of an  
25 expert to assess whether the school district is, in

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1 fact, providing the kinds of supports and oversight  
2 that it needs to in order to truly address this  
3 problem.

4 Similarly, in South Philadelphia, we  
5 entered into an agreement with the Philadelphia  
6 School Board in a case of truly horrific harassment  
7 by African-American students of Asian-American  
8 students that resulted at its climax in having  
9 numbers of children sent to the hospital because of  
10 the physical violence that had occurred on the  
11 premises of the school.

12 In that case, as well, we agreed with  
13 the school district that they would retain an expert  
14 to evaluate their policies and to provide advice on  
15 how to address bullying and harassment going forward.  
16 We asked them to ensure that their complaint  
17 procedures were effective. We provided for training  
18 and notice to parents and students of the resources  
19 available to them if they were subject to harassment,  
20 and agreed to work with the school district as they  
21 report to us on their success in implementing the  
22 provisions of this agreement.

23 In both of these cases, these were  
24 district-wide relief that I think will make the  
25 school environment for all students in the district a

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1 better one.

2 We've also introduced a settlement  
3 agreement in cases in which there are cases pending  
4 in court. So, for example, last year we entered into  
5 a settlement agreement in Mohawk, New York on behalf  
6 of a student who had been severely harassed on the  
7 basis of sex stereotyping. This was a student who  
8 engaged in effeminate behavior, who was as a result  
9 of both the verbal and ultimately physical assaults  
10 to which he was subjected, forced to stay home and  
11 miss classes and, again, the agreement that we  
12 reached in this case provided for the kind of  
13 systemic institutional relief that we think is  
14 ultimately beneficial to ensure that students are  
15 protected going forward.

16 Similarly, in the *Lopez* case against the  
17 National School Board, we were involved on behalf of  
18 a nine-year-old autistic student who was raped by a  
19 teenager on a special education bus. And the school  
20 had knowledge that the perpetrator of this assault  
21 had engaged in similar conduct in the past and had  
22 not taken effective action to address it.

23 In this case, our settlement agreement,  
24 in fact, will enable them to do so and we look  
25 forward to working with them in the future.

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1 I'm happy to take your questions.

2 CHAIRMAN CASTRO: Thank you, Ms.  
3 Samuels. Recently, the National Council of La Raza  
4 issued a report on discrimination faced and felt by  
5 Latino youth. At around the same time the National  
6 Crime Victimization Survey indicates that about one  
7 of four Latino students believe that they've been  
8 bullied.

9 In the work that you're doing, have you  
10 seen anything to substantiate those statistics?

11 MS. SAMUELS: Yes, I am sorry to say  
12 that harassment and bullying seems to be on the  
13 increase across the country and on the basis of  
14 national origin is no exception, particularly  
15 following 9/11. I think we have seen an uptick in  
16 the amounts of harassment focused on national origin  
17 groups and we do everything that our legal tools  
18 provide us to be able to address those situations.

19 One thing I should note and make clear  
20 is that there is no federal law that prohibits  
21 bullying. Our authority goes to harassment which is  
22 physical or verbal or other conduct that is  
23 sufficiently severe or pervasive to create a hostile  
24 environment that interferes with a student's ability  
25 to learn.

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1           So there is, unfortunately, a level of  
2 school-yard taunting that we do not have the  
3 jurisdiction to reach. And that, of course, is in  
4 part a recognition of the First Amendment concerns  
5 about overly restricting student speech. But, to the  
6 extent that there is a hostile environment that is  
7 created by the harassment, that is something that we  
8 absolutely would take steps to address.

9           CHAIRMAN CASTRO: I'll remind my fellow  
10 Commissioners that we will not be doing compound  
11 questions or multiple questions. So please ask a  
12 question.

13           Commissioner Yaki has indicated that he  
14 wanted to ask a question.

15           COMMISSIONER YAKI: Yes, although I  
16 always wonder how you define compound.

17           Quick question for you, Ms. Samuels.  
18 First of all, thank you for the hard work that you've  
19 been doing on this.

20           I understand that one of the -- I'm  
21 going to stop referring to primates and go to  
22 pachyderms. I'm going to talk about the elephant in  
23 the room here, and that is the fact that we're  
24 talking a lot about, and I talked about this last  
25 year and the year before about where the Commission

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1 should be going.

2 And it addressed the issue of bullying  
3 of LGBT kids in this country and the rise and the  
4 terrible toll it's taken on families and on young  
5 people in this country. To me, the elephant in the  
6 room is to the extent to which you have the authority  
7 to proceed based upon the orientation of that  
8 particular individual, the ability to protect their  
9 civil rights.

10 I believe that the state has -- the  
11 federal government and the state has that ability,  
12 especially when it comes to young people, based on  
13 case law going back over 100 years about the state's  
14 ability to override certain protections, not even  
15 override, but simply to act on behalf of protecting a  
16 young person from harm, in this case, serious  
17 psychological harm that can result in suicide, self-  
18 inflicted harm, and other sorts of things.

19 That is part of why we are having this  
20 hearing today is to discuss whether or not, and how  
21 we go about making it clearer, that a child is not  
22 bullied based on these types of factors. But that  
23 being said, this is where I'm trying not to make it a  
24 compound question.

25 CHAIRMAN CASTRO: Ask your question now,

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1 Mike.

2 COMMISSIONER YAKI: The case law that  
3 you were using, I mean is there case law that exists  
4 out there that allows you to proceed based on sex  
5 stereotyping because -- I ask that because the -- not  
6 really compound, but a follow up you might want to  
7 put in your comments, and I'm not going to ask  
8 directly, has to do with whether or not it would be  
9 easier if there were more implementing language like  
10 a Title VII, like Title VI or Title IV that made it  
11 more specific on behalf of certain individuals in  
12 this country.

13 Thank you.

14 MS. SAMUELS: Thank you for your  
15 question, compound or not. Let me say the premise  
16 that sex stereotyping has long been recognized both  
17 under Title VII which bars sex discrimination in  
18 employment and under Title --

19 (New microphone given to Ms. Samuels.)

20 -- *Price Waterhouse* decision in the  
21 1980s, the Supreme Court said --

22 (Staff gives another microphone to Ms.  
23 Samuels.)

24 CHAIRMAN CASTRO: Just in the interest  
25 of time we would want you to continue.

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1 MS. SAMUELS: Okay. In the Price  
2 Waterhouse decision in the late 1980s -- I think this  
3 is working now -- the Supreme Court said that people  
4 who are penalized for acting contrary to stereotypes  
5 about the way members of their gender should act are  
6 protected by the prohibitions on sex discrimination.

7 Now courts have simultaneously said that  
8 the federal laws do not bar discrimination based on  
9 sexual orientation, which fundamentally is a  
10 different category than gender stereotyping which  
11 goes to behaviors, mannerisms, the way in which an  
12 individual presents him or herself.

13 That said, we know and there are studies  
14 that demonstrate that school policies that ban  
15 harassment or bullying based on sexual orientation  
16 have a significant impact. So for example, a recent  
17 study that was done showed that there was a 20  
18 percent reduction in the teen suicide rate in schools  
19 that have LGBT-supportive environments, where they  
20 have Gay Straight Alliances, where they have explicit  
21 policies that ban sexual orientation discrimination,  
22 where students feel that they have a place to turn.  
23 And this is one of those areas, as across the board,  
24 where schools have a responsibility as a matter of  
25 fair treatment of their students to step up and make

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1 sure that all of their students can go to school in a  
2 safe environment.

3 CHAIRMAN CASTRO: I will now recognize  
4 Commissioner Kirsanow, followed by Commissioner  
5 Achtenberg, followed by Commissioner Heriot.

6 COMMISSIONER KIRSANOW: Thank you. And  
7 thank you for appearing, Ms. Samuels.

8 You were talking about the increase in  
9 protected class bullying and harassment. I  
10 understand you've got jurisdiction only over  
11 harassment and not bullying. For example, bullying  
12 based on matters that are not protected class  
13 bullying, but harassment of protected classes.

14 When did the Department of Justice begin  
15 tracking data related to instances of protected class  
16 harassment and what has been the trajectory in terms  
17 of the number of such instances, if you've collected  
18 such data?

19 MS. SAMUELS: Thank you for your  
20 question, Commissioner. Let me make two things  
21 clear. First, we do not have jurisdiction over  
22 bullying on any basis, even if it is on the basis of  
23 sex, race, national origin, religion, or disability.

24 We only have jurisdiction over conduct  
25 that amounts to unlawful harassment. In addition, we

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1 don't have jurisdiction over harassment that is not  
2 on a prohibited basis. So if it is because of  
3 someone's weight or someone's appearance, that's  
4 absent a sex stereotyping approach; we don't have  
5 jurisdiction over that.

6 With regard to our tracking, as you will  
7 see from our responses to interrogatories, we have  
8 only tracked those matters that we, in fact, open for  
9 investigation. We get many more complaints every  
10 year than we open and I don't believe that at this  
11 point in time we have any means to evaluate or assess  
12 the nature of the complaints that have come in that  
13 have not resulted in Department action of some sort.

14 COMMISSIONER KIRSANOW: How many  
15 complaints did you --

16 CHAIRMAN CASTRO: I'm sorry,  
17 Commissioner Kirsanow --

18 COMMISSIONER KIRSANOW: I'm sorry --

19 CHAIRMAN CASTRO: Commissioner  
20 Achtenberg?

21 COMMISSIONER ACHTENBERG: Madam Attorney  
22 General, thank you very much for your participation  
23 in this hearing. I am assuming that the Department  
24 of Justice does not assert jurisdiction when there  
25 comes forward a single incident of playground

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1 taunting as some have accused the Department of  
2 doing.

3 But when activity rises to the level of  
4 creating a hostile environment as you have stated,  
5 could you clarify the distinction, sort of consistent  
6 with Commissioner Thernstrom's question to Jocelyn  
7 Ali, and could you respond as well to the notion that  
8 most of these issues are better dealt with at the  
9 state and local levels and by professionals such as  
10 principals and teachers?

11 MS. SAMUELS: Absolutely. In response  
12 to the first question, we do not have jurisdiction  
13 and would not take action against single incidents of  
14 playground taunting absent something like physical  
15 conduct that made a single incident sufficiently  
16 severe or pervasive to create a hostile environment.

17 I think one of the things to recognize  
18 about harassment is that it is necessarily a very  
19 fact-based inquiry and we are, both because of  
20 resource constraints and because we recognize that  
21 school districts need to be able to address  
22 situations in ways that they see fit, not -- we don't  
23 find the standards vague, but we will address and  
24 intervene in cases only where we find that the  
25 conduct or the speech is so severe or pervasive that

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1 it has limited a student's ability to take advantage  
2 of the educational offerings.

3 Most of our cases are not even close.  
4 In South Philadelphia, we had students being sent to  
5 the hospital. In *Lopez*, we had a student being raped  
6 on a special education bus. These are serious cases  
7 where it is not at all a question about whether a  
8 hostile environment has been created.

9 With regard to local issues, we  
10 absolutely think that schools are in the best  
11 position to address harassment and ensure the safety  
12 of their school environments and that's why, first of  
13 all, we only get involved when there has been a  
14 failure of the school district to take the necessary  
15 steps, and why our resolution agreements uniformly  
16 contain provisions for training of staff, evaluation  
17 of procedures, and engagement of experts, so that we  
18 can get the schools the help they need in order to be  
19 able to take the best steps possible to protect their  
20 children.

21 COMMISSIONER ACHTENBERG: Thank you.

22 CHAIRMAN CASTRO: The chair recognizes  
23 Commissioner Heriot.

24 COMMISSIONER HERIOT: Thank you. I just  
25 want to make sure I understand, and I'm tracking the

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1 Department's interpretation of Title IX here. Back  
2 when I was in school, back in the pre-historic days,  
3 we had separate personal grooming and dress codes for  
4 boys and girls, like in elementary school or junior  
5 high or high school.

6 What is the Department's position on  
7 such codes?

8 MS. SAMUELS: I'm not aware that there  
9 has been case law about dress codes. Well, actually,  
10 no, in the old days there were cases that did talk  
11 about reasonable dress codes and certainly employer's  
12 ability to create reasonable dress codes has been  
13 recognized in the case law.

14 If we got an allegation that a dress  
15 code violated Title IX, it's something that we  
16 obviously would take a look at and make a  
17 determination about how to proceed on.

18 CHAIRMAN CASTRO: The chair recognizes -

19 -

20 COMMISSIONER HERIOT: You don't have  
21 cases of that sort now?

22 CHAIRMAN CASTRO: No follow-up  
23 questions. I'm sorry, Commissioner Heriot. We've  
24 really got to get through the balance of the  
25 questions.

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1 Commissioner Titus?

2 COMMISSIONER TITUS: Thank you. It  
3 sounds like your Educational Opportunities Section is  
4 overworked and I appreciate the good work that they  
5 are doing. But you mentioned that you would perhaps  
6 look at other cases if you had the jurisdiction and I  
7 understand that issue, but also the resources. And  
8 several times that's come up, that you don't have the  
9 resources.

10 I wonder if there are not meritorious  
11 cases that are falling to the side because of those  
12 resources. Is there something that we can do or  
13 recommend to help you enhance those resources so you  
14 can do -- maybe not a better job, but a broader job?

15 MS. SAMUELS: Well, thank you for asking  
16 that question, Commissioner.

17 I think we do do excellent work, but we  
18 are truly limited by the resource constraints that we  
19 face, and I think with additional funding and  
20 additional staff we would be able to, as you say, do  
21 a broader job and address more of the complaints that  
22 we get that we find to be meritorious, but that, for  
23 example, won't necessarily result in the kinds of  
24 systemic relief that we think are the best use of the  
25 resources that we have.

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1           So we would very much like to proceed in  
2 cases which often present egregious facts, but which  
3 we simply do not have the bandwidth to be able to  
4 take on.

5           COMMISSIONER TITUS: Thank you.

6           CHAIRMAN CASTRO: Vice Chair Thernstrom  
7 is recognized by the chair.

8           VICE CHAIR THERNSTROM: You know, you've  
9 talked about the Philadelphia case, but that is  
10 really an extreme case and, as you've recognized, it  
11 involved physical violence. So, I mean, it seems to  
12 me there's a bright and clear line between physical  
13 violence and verbal harassment that I think everybody  
14 here would agree on.

15           I'm still having a problem defining when  
16 verbal harassment amounts to something that the  
17 Department needs to get concerned about. I mean,  
18 kids are monsters and I mean they are, at a certain  
19 age, and you're talking about playground stuff.  
20 You're talking about, as you said, kids say you're  
21 fat. That can be very wounding at a certain age. I  
22 mean there is a lot of wounding stuff that goes on in  
23 schools.

24           And I'm back to my point that the  
25 solution to that -- you're talking about the culture

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1 of a school. I'm not sure that the federal  
2 government can effect the culture of local schools.  
3 I'm not even sure states can; to some extent, local  
4 districts can. But it really depends upon the  
5 authorities in the schools, and there are frankly too  
6 few school authorities that really are committed to  
7 creating a culture in which kids are safe.

8 MS. SAMUELS: Thank you for the  
9 question, Commissioner. And I think we all agree  
10 that abuse by children, whether it is illegal or not,  
11 can have damaging consequences that schools ought to  
12 attend to. And, as I mentioned in citing the study  
13 before, school actions on this basis can really make  
14 a difference.

15 I can assure you that there are legal  
16 standards in place to ensure that we will act to hold  
17 schools accountable only when the environment that is  
18 created involves harassment, whether verbal or  
19 physical, although verbal is often a precursor to  
20 physical harassment, and we have found that in many  
21 of our cases what starts as verbal harassment  
22 escalates into physical violence.

23 We urge school districts to take action  
24 to nip these kinds of things in the bud, both because  
25 it will prevent legal problems down the road and also

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1 because they owe it to their students to provide them  
2 a safe environment to go to school. But as a federal  
3 government, there are legal standards that govern  
4 when we get involved, and we make that assessment in  
5 every case to ensure that we are using our resources  
6 to address and bring legal action against school  
7 districts where the harassment has, in fact, resulted  
8 in a hostile environment that limits a student's  
9 educational opportunities.

10 CHAIRMAN CASTRO: Thank you, Ms.  
11 Samuels. We want to thank you and the Department of  
12 Justice for being here today and for the work that  
13 you are doing. We appreciate it very much.

14 As Panel 1 leaves, we are going to ask  
15 folks who are on Panel 2 to begin to come to the  
16 podium here.

17 Panel 2 will focus on issues of gender  
18 and LGBT status. Those individuals who will be on  
19 Panel 2 will be Fatima Goss Graves, of the National  
20 Women's Law Center; Roger Clegg of the Center for  
21 Equal Opportunity; Gregory Herek of the University of  
22 California, Davis; Ilan Meyer of Columbia University;  
23 Hiram Sasser of the Liberty Institute; Eliza Byard of  
24 GLSEN; and John Eastman of Chapman University.

25 We ask the panelists to please take your

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1 seats.

2 (Pause.)

3 Given the time frame we're in, we're  
4 going to ask each panelist to limit their comments to  
5 seven minutes. We have your written statements. We  
6 reviewed them. They are part of the record.

7 We will thereafter have a 70-minute  
8 discussion that will take place among the panelists  
9 and the Commissioners, and I remind our Commissioners  
10 again to please keep your questions brief and simple  
11 and non-multiple.

12 Please panelists, take your seats.

13 (Pause.)

14 CHAIRMAN CASTRO: And while we wait for  
15 the panelists to sit down, I will remind our  
16 Commissioners if we're precise in asking our  
17 questions, then we'll have time at the end hopefully  
18 for brief follow-up questions. So we will endeavor  
19 to make sure we cover as much ground as fairly as  
20 possible. Unfortunately, with the size of our  
21 panels, we are, as I said, challenged in terms of  
22 time today.

23 I'll ask all panelists to please raise  
24 your right hand and swear or affirm that the  
25 information you are about to provide is true and

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1 accurate to the best of your knowledge and belief.

2 (The panelists were sworn.)

3 CHAIRMAN CASTRO: We will begin with Ms.  
4 Goss Graves.

5 PANEL 2: GENDER & LGBT

6 FATIMA GOSS GRAVES, NATIONAL WOMEN'S LAW

7 CENTER

8 MS. GRAVES: Good morning. My name is  
9 Fatima Goss Graves and I am the Vice President for  
10 Education and Employment with the National Women's  
11 Law Center. And I so appreciate the invitation to  
12 testify today and really applaud the Commission on  
13 taking up this important issue.

14 Gender-based harassment including  
15 bullying and violence manifests itself in many ways.  
16 It includes sexual harassment, and sexual violence  
17 and assault. It includes harassment that is not  
18 sexual in nature and instead is based on sex  
19 stereotypes. So for example, the conduct of a group  
20 of students who have harassed and intimidated a  
21 female student to discourage her participation in  
22 wrestling because they consider her athletic activity  
23 to be not feminine would constitute gender-based  
24 harassment.

25 Or a girl who targets a female classmate

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1 for repeated humiliation and name calling through  
2 electronic means at school, names like slut and whore  
3 and things like that because her classmate is  
4 pregnant, is engaged in gender-based harassment, and  
5 these are the sort of intakes that we get frequently  
6 at the National Women's Law Center from parents who  
7 are concerned about their children.

8 Gender-based harassment need not be  
9 perpetrated by boys or targeted at girls. Students  
10 can be harassed by other students, by teachers, by  
11 coaches, school employees, third parties. It can  
12 involve images that are posted on blogs or through  
13 electronic means. And a sense of comments that are  
14 heard by a group can create a hostile environment.

15 These are all core principles that have  
16 been developed by courts over the time as they have  
17 grappled with these issues and that the Office for  
18 Civil Rights has helpfully spelled out in guidance to  
19 educational institutions.

20 As you've heard earlier today, Title IX  
21 plays an important role in addressing harassment, and  
22 we really view bullying as a form of harassment when  
23 it rises to a certain level. The Supreme Court has  
24 recognized that Title IX provides for a private right  
25 of action under which students may pursue claims for

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1 damages and for injunctive relief to address  
2 harassment and, you know, I raise this because I know  
3 that there has been some confusion over the standard  
4 for damages versus the standard for administrative  
5 enforcement or for injunctive relief that Assistant  
6 Secretary Ali spoke about today. Now she explained  
7 the distinction has been a long one, but the good  
8 news for students is that, even though some courts  
9 around the country have interpreted the Title IX  
10 standards for damages in ways that have really raised  
11 the bar for being able to bring these cases, the  
12 standard for administrative enforcement and for  
13 injunctive relief is whether school officials knew or  
14 should have known about the harassment. And this  
15 should have known standard applies also when  
16 individuals file a lawsuit seeking injunctive relief  
17 only, and likewise, for enforcement actions that have  
18 been brought by the administration and these are  
19 standards that are closer to the legal protections  
20 for employees in the work place.

21 Moreover, even if there is a suit for  
22 damages, the *Gebser* and *Davis* cases that have been  
23 talked about today only apply when the harassment  
24 does not involve an official school policy, as the  
25 purpose of the standard is to really ensure that the

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1 school is held liable for damages for its own acts  
2 and not responding to harassment not for a third  
3 party's act. So for example, in the *Simpson vs.*  
4 *University of Colorado* case, the 10th Circuit held  
5 that the University had an official policy of  
6 deliberate indifference to sexual harassment in its  
7 footballrecruiting program. So the plaintiffs did  
8 not actually have to show that actual notice of  
9 particular incidents of harassment.

10 Speaking at least in part to clarify  
11 what constitutes unlawful gender-based harassment in  
12 the wake of *Gebser* and *Davis*, around ten years ago  
13 the Office for Civil Rights issued its 2001 guidance  
14 that's been discussed today. And in that guidance it  
15 recognized that conduct that is sufficiently severe,  
16 persistent, or pervasive remains actionable under  
17 Title IX.

18 The Office for Civil Rights also  
19 emphasized that a school must respond to harassment  
20 if it rises to a level that denies or limits a  
21 student's ability to participate or benefit from an  
22 educational program. And it clarified that schools  
23 run afoul of Title IX by failing to respond to  
24 harassment of a student on the basis of a victim's  
25 failure to conform to stereotype notions of

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1 masculinity or femininity.

2           Despite the 2001 sexual harassment  
3 guidance, gender-based harassment continued to  
4 pervade our schools and in some cases such conduct  
5 may have led to particularly tragic consequences. It  
6 is unclear as to whether educational institutions  
7 understood that the conduct that was referred to  
8 commonly in the media as bullying and by schools as  
9 bullying included, in some cases, gender-based  
10 bullying that could have implicated Title IX.

11           So, drawing from this revised guidance,  
12 we were very pleased to see that in 2010, just this  
13 past fall, the Department issued its new guidance  
14 which reiterated the core principles from 2001, but  
15 also provided hypotheticals that allowed for schools  
16 to really be able to see what these standards mean in  
17 practice.

18           The letter was not, as some critics may  
19 imply, a break with or an expansion of the Office for  
20 Civil Rights' previous interpretation of Title IX,  
21 and it was consistent with the cases that had come  
22 out between the 2001 guidance and what happened in  
23 2010.

24           Importantly, in 2011, the Office for  
25 Civil Rights also released additional guidance on

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1 peer-to-peer sexual violence. Among other things,  
2 that guidance supplemented the 2001 guidance and  
3 expanded upon the standards that apply for sexual  
4 violence in schools, and we have really been  
5 gratified to see some institutions change their  
6 standards even in the past month, that some have  
7 announced that they would be implementing, for  
8 example, a preponderance of evidence standard, rather  
9 than the higher threshold that they had before. And  
10 we saw that the University of Virginia, for example,  
11 made that their standard.

12 CHAIRMAN CASTRO: Thank you, Ms. Goss  
13 Graves.

14 Mr. Clegg.

15 MR. CLEGG: Thank you very much for  
16 inviting me to testify today. My name is Roger  
17 Clegg, and I am the President and General Counsel of  
18 the Center for Equal Opportunity, which is a  
19 conservative civil rights organization. I should also  
20 say, that for four years in the Reagan and Bush  
21 administrations, I was in the Civil Rights Division  
22 at Justice Department and my duties there included  
23 supervising the Educational Opportunities Section.

24 In my written statement I focus on the  
25 issue of bullying and harassment on the basis of

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1 sexual orientation. And I make two basic points.  
2 One is that Title IX does not cover that kind of  
3 bullying and harassment. And the second point I make  
4 is that this is not an area where federal government  
5 involvement is likely to help, and therefore  
6 additional statutes that would focus on sexual  
7 orientation to give the federal government authority  
8 to investigate and prosecute bullying and harassment  
9 in this area would be a bad idea.

10 We're going to hear a lot today about  
11 how damaging bullying and harassment can be to  
12 individual students. And it certainly can be a  
13 heartbreaking situation. We're also going to hear  
14 about how widespread it is.

15 The first point is not really disputed.  
16 Nobody disputes that bullying and harassment can be a  
17 terrible thing.

18 On the second point, how widespread it  
19 is, I would just say that I think the Commission  
20 needs to take with a grain of salt the numbers that  
21 you're given by interest groups and by federal  
22 bureaucracies who want to expand their jurisdiction,  
23 especially when the two of them are working together.  
24 I also think that we have to bear in mind when we're  
25 looking at trends the changes in technology, like the

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1 Internet, have made it much easier to file  
2 complaints, and may also have made the kinds of  
3 harassment we're talking about here more widespread.  
4 So I think that's all something to bear in mind when  
5 people are trying to lay the groundwork to say well,  
6 the federal government has to get in here: This is a  
7 problem that's not being addressed.

8 As I say in my statement, I really think  
9 that this is a very difficult area with a lot of  
10 difficult line-drawing that has to be done. When  
11 does protected speech become unprotected speech, and  
12 that become harassment? When does harassment become  
13 a threat? When does a threat become an actual  
14 physical assault? And so forth.

15 These are difficult line-drawing  
16 questions and I've heard nothing today from the  
17 administration representatives to suggest why the  
18 federal government is going to improve the way that  
19 this line-drawing is done. I'm not going to repeat  
20 what I say in my written statement on that point.

21 What I'd like to focus on a little bit  
22 in my oral remarks here is why I actually think that  
23 the federal government involvement would make things  
24 worse. I think the burden is on the federal  
25 government to show — or those who want the federal

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1 government to get involved to show — why the federal  
2 government is going to make it better. I don't think  
3 they carry that burden.

4 In addition, I think that there are a  
5 lot of reasons — and I think some of the  
6 Commissioners have alluded to this — why the federal  
7 government is actually going to make things worse.

8 It is going to be the 800-pound gorilla  
9 when the federal government gets involved. And  
10 there's going to be pressure for it to have  
11 guidelines, and these guidelines are going to end up  
12 creating not only a floor, but also a ceiling. It's  
13 going to encourage local schools not to be as  
14 proactive in this area as they should be. The  
15 guidelines will inevitably lead to speech codes and  
16 sensitivity training. It will coerce schools into  
17 zero tolerance policies.

18 The involvement of the federal  
19 government makes it much easier for interest groups  
20 to get involved — on both sides of the aisle — to  
21 get involved and to use that as a means for effecting  
22 policy in this area. I think you can see that by the  
23 interest that these hearings today have attracted.  
24 This is going to create a whipsaw effect. As  
25 administrations change, there's going to be pressure

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1 brought by interest groups to change the guidelines  
2 that have been put out, to pass new or different  
3 laws, to amend regulations.

4 And local schools are going to be caught  
5 in this bind where they're afraid of being sued if  
6 they do, they're afraid of being sued if they don't.  
7 It's going to chill the kind of local involvement and  
8 local attention to these issues which I think  
9 everybody agrees needs to happen, since this is  
10 really the sine qua non of good policy in this area.

11 Let me just say that it's very odd that  
12 the gay rights groups should need to be reminded that  
13 government legislating morality, particularly the  
14 federal government legislating morality, is something  
15 that we ought to be very wary about. It wasn't very  
16 long ago where the morality that was being legislated  
17 was aimed at gays. Now we're being asked to pass  
18 laws that are going to get the federal government  
19 involved in saying whether what a fifth-grade student  
20 says is or is not something that ought to attract the  
21 attention of the Federal Government.

22 Finally, I also think that we ought to  
23 agree — both sides ought to agree — that it's very  
24 scary in this area to have the federal government  
25 just making up laws so that it can go after behavior

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1 that it views as being immoral. I think that Title  
2 IX, I think everybody agrees that Title IX is about  
3 sex discrimination. It is not about discrimination  
4 on the basis of sexual orientation. Yet, the federal  
5 government is being very aggressive in concocting the  
6 issues to prosecute civil rights issues, to  
7 accomplish something that's not there in the  
8 statutes.

9 CHAIRMAN CASTRO: Thank you very much.  
10 Professor Herek.

11 MR. HEREK: Mr. Chairman and members of  
12 the Commission, I'm pleased to have the opportunity  
13 to appear before you today to discuss social  
14 scientific knowledge on peer-to-peer violence and  
15 school bullying based on sexual orientation.

16 Thank you for addressing this important  
17 matter. My name is Gregory Herek. I am a professor of  
18 psychology at the University of California at Davis.

19 As a social psychologist, I have been  
20 conducting empirical research related to sexual  
21 orientation, stigma, and prejudice for more than 30  
22 years. The details are in my curriculum vitae, which  
23 I submitted to the Commission earlier.

24 I have published more than 100 scholarly  
25 papers and chapters on these and related topics. I

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1 have received numerous federal, state, and foundation  
2 grants for my research.

3 I am a Fellow of the American  
4 Psychological Association and the Association for  
5 Psychological Science. I have testified on behalf of  
6 the American Psychological Association for  
7 Congressional hearings on anti-gay violence. I was an  
8 invited participant at President Clinton's 1997 White  
9 House Conference on Hate Crimes, and recently I was a  
10 member of an expert panel convened by the National  
11 Academy of Sciences to prepare a comprehensive report  
12 on the health of lesbian, gay, bisexual, and  
13 transgender people, which was just released in March.

14 These and my other professional  
15 activities are detailed in my vita.

16 My written statement details the  
17 findings of social science research related to school  
18 violence and other forms of victimization based on  
19 sexual orientation.

20 And to put that research in context, it  
21 also discusses current knowledge about sexual  
22 orientation and stigma. In my oral statement I will  
23 briefly summarize that material.

24 Sexual orientation is commonly used to  
25 refer to an enduring pattern of sexual or romantic

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1 attractions to males, to females or to both sexes.

2 It's also used to refer to an  
3 individual's sense of identity based on those desires  
4 and attractions, his or her pattern of behaviors  
5 expressing them, and his or her membership in a  
6 community of others who share them.

7 Although sexual orientation ranges along  
8 a continuum, it is usually discussed in terms of  
9 three categories: heterosexual, homosexual, and  
10 bisexual.

11 The terms lesbian and gay are commonly  
12 used to refer to people whose social identity is  
13 based on their homosexual orientation.

14 The mental health profession has long  
15 recognized that homosexuality is a normal expression  
16 of human sexuality, and there is no inherent linkage  
17 between sexual orientation and a person's mental  
18 health, or ability to contribute to society and to  
19 lead a happy, healthy, and productive life.

20 Like most heterosexuals, most sexual  
21 minority individuals function well in their daily  
22 lives.

23 There is currently no consensus about  
24 the specific factors that cause an individual to  
25 become heterosexual or homosexual or bisexual but,

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1       irrespective of origins, most gay men and lesbians  
2       report experiencing little or no choice concerning  
3       their sexual orientation.

4               Sexual orientation is highly resistant  
5       to change through psychotherapy or other  
6       interventions. Because homosexuality is a normal  
7       variant of human sexuality, the major mental health  
8       professional organizations don't endorse efforts to  
9       change sexual orientation. Virtually all of them have  
10      adopted policy statements challenging the safety,  
11      efficacy, or ethics of treatments purporting to  
12      change sexual orientation.

13              Homosexuality remains stigmatized in the  
14      United States, and such stigma can be observed both  
15      in the institutions of society and the attitudes of  
16      individuals.

17              Large numbers of lesbian, gay, and  
18      bisexual people experience harassment, discrimination  
19      and violence based on their sexual orientation.

20              And because a person's sexual  
21      orientation is not readily apparent in most social  
22      interactions, virtually anyone can be a  
23      target of anti-gay violence or harassment regardless  
24      of their actual sexual orientation.

25              Children, adolescents, and adults whose

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1 behavior or appearance is perceived as atypical for  
2 their gender are frequently victimized, often because  
3 the perpetrators assume that gender nonconformity is  
4 a marker for homosexuality or bisexuality.

5 In addition, gender nonconformity is  
6 itself stigmatized and some people are targeted  
7 entirely because of their gender atypicality.

8 Although there is no inherent linkage  
9 between sexual orientation and mental health,  
10 research indicates that experiencing stigma-related  
11 victimization is stressful and can lead to  
12 psychological and physical problems.

13 Thus, to the extent that non-  
14 heterosexuals are subjected to additional stress  
15 beyond what the heterosexual population normally  
16 experiences, including stress resulting from stigma,  
17 they may as a group manifest poorer overall physical  
18 and psychological health.

19  
20 With this general discussion as  
21 background, I turn to the main focus of today's  
22 briefing.

23 Peer violence and victimization based on  
24 sexual orientation are widespread in school settings.

25 The problem may be more extensive today

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1 than in the past because contemporary sexual minority  
2 youth appear to be recognizing their sexual  
3 orientation and coming out at earlier ages than was  
4 the case for previous generations.

5 Being identified as gay, lesbian, or  
6 bisexual poses risks to students in middle and high  
7 school, where negative attitudes toward homosexuality  
8 and sexual minorities are common.

9 Experiencing bullying and peer  
10 victimization based on sexual orientation is often  
11 associated with mental health problems, including  
12 depression, anxiety, and suicidal thoughts and  
13 behavior.

14 It also is often associated with truancy  
15 and poor school performance, substance use and other  
16 risk behaviors.

17 Although bullying and victimization are  
18 likely to have negative consequences for all students  
19 who experience them, being targeted because of one's  
20 sexual orientation is associated with more problems  
21 and greater distress than is experiencing bullying or  
22 harassment that is unrelated to one's identity.

23 The negative psychological effects of  
24 anti-gay bullying and peer victimization can last  
25 long after students leave high school.

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1 Institutional practices and policies may  
2 help to reduce peer victimization based on sexual  
3 orientation and to mitigate its negative impact when  
4 it occurs.

5 Research currently points to at least  
6 three promising strategies. First, having anti-  
7 bullying and non-discrimination policies that  
8 explicitly include sexual and gender minority youth  
9 appears to reduce anti-gay behaviors among students,  
10 increase feelings of safety among sexual minority  
11 youth, and create safer schools.

12 Second, schools in which teachers and  
13 staff are trained to stop and prevent harassment and  
14 victimization of sexual minority youth are likely to  
15 provide a safer environment for those youth.

16  
17 A positive school climate also helps to  
18 buffer the negative impact of experiences with anti-  
19 gay harassment and violence.

20 And third, having resources and  
21 supportive groups and programs for sexual and gender  
22 minority students increases school safety.

23 Now, I have been focusing on peer  
24 violence based on sexual orientation, but some of the  
25 research cited in my written statement also examined

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1 the experiences of gender minorities, that is,  
2 transgender people and other individuals whose gender  
3 expression does not conform to cultural norms.

4 Gender minority youth, some of whom are  
5 also lesbian, gay, or bisexual, routinely experience  
6 harassment and violence and they are likely to  
7 benefit from policies and interventions designed to  
8 protect sexual minority youth.

9 But a comprehensive approach to the  
10 problem of peer victimization in schools will  
11 necessarily include attention to their specific needs  
12 as well. Thank you.

13 CHAIRMAN CASTRO: Thank you. Professor  
14 Meyer?

15  
16 MR. MEYER: Good morning Mr. Chairman  
17 and members of the Commission. My name is Ilan Meyer  
18 and I am a Professor of Clinical Sociomedical  
19 Sciences at Columbia University's Mailman School of  
20 Public Health.

21 My background is in psychiatric  
22 epidemiology and social psychology; that is, I study  
23 patterns and causes of mental disorders and mental  
24 health problems, particularly as they relate to  
25 social factors.

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1 I submitted a written report for the  
2 record that is more comprehensive than my oral  
3 testimony and that includes references to cited  
4 research as well as my curriculum vitae.

5 In my testimony today, I will discuss  
6 three issues: the nature of anti-gay stigma and  
7 prejudice and how it forms stress for sexual  
8 minorities; the exposure of sexual minority youth to  
9 stress related to peer-to-peer violence and bullying;  
10 and the effect of such stress on mental health and  
11 well-being.

12 Stigma is a function of having an  
13 attribute that conveys a devalued social identity in  
14 a particular social context. A related concept,  
15 prejudice, refers to negative attitudes and actions  
16 that society as a whole or individuals take against a  
17 stigmatized group member.

18 For example, discriminatory acts and  
19 anti-gay violence are expressions of stigma and  
20 prejudice. I have developed a theory of minority  
21 stress that states that, when compared with  
22 heterosexuals, stigma, prejudice can predispose gay  
23 people to excess stress and as a result to increasing  
24 prevalence of mental disorders and other adverse  
25 health outcomes.

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1                   Stress can be defined as any condition  
2 that requires adaptation. Researchers have shown that  
3 stress negatively impacts a multitude of health  
4 outcomes, both mental and physical, and well-being.

5                   In addition to stressors that all people  
6 experience, gay people are exposed to unique, added  
7 stressors. I have referred to these as minority  
8 stress.

9                   Minority stressors strain sexual  
10 minorities because they require adaptation to an  
11 inhospitable social environment. Exposure to minority  
12 stress is chronic in that it is attached to enduring,  
13 persistent social structures.

14                   Exposure to these minority stressors is  
15 a risk for mental disorders and other adverse  
16 outcomes. Although generally, causal relationships  
17 are difficult to prove in public health research,  
18 results from studies of sexual minority youth provide  
19 solid and irrefutable support for the minority stress  
20 hypothesis, showing that social stressors resulting  
21 from stigma and prejudice against gay populations  
22 expose them to the unique stressors that in turn  
23 cause health problems.

24                   It has been shown in numerous studies  
25 that sexual minority individuals, especially youth,

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1 have more stressful experiences than their  
2 heterosexual peers.

3 Results concerning sexual minority youth  
4 are abundant and overwhelming in their evidence.  
5 Indeed, of the numerous scientific studies conducted  
6 on gay youth, many with large probability samples,  
7 conducted in the United States, Canada, and other  
8 nations, I know of not one study that shows  
9 significant contradictory evidence.

10 Gay youth at home, at school, and at the  
11 community at large significantly more frequently than  
12 their heterosexual peers experience adverse events.

13 At school, sexual minority youth  
14 experience more bullying, including physical assault,  
15 being injured, threatened, and harassed, having their  
16 property stolen or damaged.

17 Out of school, sexual minorities are  
18 more often victims of violence, homelessness,  
19 physical and sexual abuse, verbal and physical sexual  
20 harassment, and forced sex and dating violence.

21 Studies have also shown that, unlike  
22 other minority groups, rejection can occur at home  
23 and anti-gay events can be perpetrated by family  
24 members of sexual minority children and youth.

25 It is important to note that stress

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1 related to stigma has a symbolic meaning. Even a  
2 seemingly minor event or incident, such as being  
3 called derogatory names, can be damaging because of  
4 its deep, cultural meaning, and does create pain and  
5 indignity beyond its seemingly low magnitude.

6 In the context of school climate,  
7 seemingly minor experiences, especially when chronic,  
8 can color the entire social environment for the  
9 sexual minority youth, sending a message of rejection  
10 and disdain.

11 This message is exacerbated when, as has  
12 been found to be the case, teachers and school  
13 personnel ignore instances of such harassment, such  
14 as name calling, implicitly joining the perpetrator  
15 in rejecting the sexual minority youth, and indeed  
16 sending a message that gay youth are to be scorned.

17 Studies that assess mental health  
18 outcomes also provide conclusive evidence that gay  
19 populations, including youth, have higher prevalence  
20 of disorders and adverse health outcomes compared  
21 with heterosexuals.

22 Several meta-analyses found that gay  
23 populations have about one-and-a-half to three times  
24 as many disorders as heterosexuals, including mood,  
25 anxiety, and substance abuse disorders, and they are

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1 more than twice as likely to have suicide ideation.

2 Against minority stress, gay people  
3 individually, as well as the gay community as a group,  
4 mount coping efforts that build resources that may  
5 buffer the toll of stress.

6 Research has shown that coping and  
7 social support can reduce the adverse effect of  
8 stress health outcomes.

9 In the context of minority stress,  
10 coping and social support must have an affirmative  
11 function supporting the person as a gay person.

12 For these reasons, and because families  
13 and other community institutions such as the church,  
14 are not always supportive, and are sometimes  
15 rejecting and even harmful, it is important for  
16 schools and community organizations to provide sexual  
17 minority youth with resources to counter minority  
18 stress.

19 Many studies in various settings and  
20 using a variety of methods have shown that when  
21 families, friends, and school environments are  
22 supportive of sexual minorities, the otherwise  
23 observes adverse effects of minority stress on health  
24 and school performance drop significantly.

25 Overwhelming observations of the

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1 relationship of stress exposure and health and  
2 academic performance outcomes, and the ameliorating  
3 effect of coping and social support, had led many  
4 schools and government and non-governmental  
5 organizations to create supporting services to sexual  
6 minority students.

7 Studies on the effectiveness of such  
8 programs span over a decade now. They have been  
9 conducted in different states and locales and using a  
10 variety of methods.

11 CHAIRMAN CASTRO: Thank you, professor.

12 MR. MEYER: These studies show that such  
13 programs have been effective in improving crime  
14 rates, including dating violence and improving the  
15 health and educational outcomes of sexual minority  
16 youth.

17 CHAIRMAN CASTRO: Thank you Professor  
18 Meyer. Mr. Sasser?

19 MR. SASSER: My name is Hiram Sasser. I  
20 am the director of litigation for Liberty Institute  
21 and I have spent the better part of a decade both  
22 suing and defending governmental entities in the area  
23 of the First Amendment, including free speech and  
24 discrimination issues.

25 The Liberty Institute, like federal

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1 organizations such as the ACLU, seeks to protect the  
2 rights of students who express what are sometimes  
3 unpopular views at school, even views that reflect  
4 particular religious sentiments.

5 Decades ago the student speech fights  
6 were much different. They had students who wanted to  
7 protest the Vietnam War in very military-friendly  
8 towns, wearing black armbands to school and had to  
9 take their case to the Supreme Court in order to  
10 ensure their right to free speech.

11 Next three paragraphs were inaudible.]

12  
13 You had students in the south, who were wearing  
14 freedom buttons to protest desegregation, not a very  
15 popular stand to take at the time. They had to take  
16 their case to the courthouse too in order to prevail  
17 and ensure that they had the right to wear the  
18 freedom buttons.

19 And in the middle of World War Two,  
20 there were two elementary school children who did not  
21 want to say the pledge of allegiance. They wanted to  
22 express their patriotism in other ways. They too won  
23 the right.

24 These early victories had led to a body  
25 of clearly-established law that protects students'

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1 free speech rights while they are at school,  
2 specifically as relevant to this particular issue,  
3 the religious viewpoints or the viewpoints that  
4 students may express.

5 The case law is very clearly established  
6 -- there has been no wavering for more than half a  
7 century -- that students must be free from viewpoint  
8 discrimination perpetrated by the schools.

9 Unfortunately the schools have not  
10 always responded to the case law positively and that  
11 has led to continuing conflict with schools engaging  
12 in sort of rolling censorship of religious speech.

13 Some examples that I would like to  
14 share, and these are not limited to any particular  
15 faith, it seems that students of all faiths have had  
16 their troubles recently, being -- invoking the laws  
17 that have been hard fought and won by our group and  
18 ACLU and others.

19 For example, there was a student in  
20 Muskogee, Oklahoma. She wanted to wear her hijab, her  
21 head covering that is consistent with her Muslim  
22 faith, and it took litigation to enforce a clearly  
23 established law to make sure that she could continue  
24 to wear her hijab at school.

25 You have little kids who wanted to hand

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1 out candy cane pins to their classmates, not causing  
2 a major problem, but those candy cane pins had to be  
3 confiscated by the school because they were too  
4 dangerous for all those other kids to see because  
5 they had attached to them a religious message about  
6 the candy cane, Jesus pencils being ripped out of  
7 kids' hands while they are standing in line, after  
8 school, outside the school building, to get on the  
9 school bus, because you know, this type of message  
10 was not going to be tolerated.

11 There's a lot of intimidation and  
12 harassment that goes on at schools and unfortunately  
13 a lot of it seems to be directed at religious  
14 students, students expressing a religious faith, and  
15 attempts by government-roving censors to ban that  
16 speech.

17 It's quite unfortunate that this sort of  
18 up-tick is going on, and if you'll read the paper you  
19 will notice that many of the cases that we are citing  
20 are -- the current examples are within the past few  
21 years, and it seems to be a growing trend, sort of  
22 this roving censorship of religious sentiment at  
23 school.

24 Another example that I might give is  
25 that, you know, again it's not a matter of one

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1 particular faith. There was a school district in  
2 Texas recently that the ACLU had a case on that the  
3 kid wanted to wear his hair length longer than the  
4 dress code allowed because of his native American  
5 faith.

6 Well that law has been clearly  
7 established for many years in the Fifth Circuit, yet  
8 the school district continued to try to ban him from  
9 wearing his hair.

10 So this is a very sensitive issue and a  
11 very litigious issue that is going on, which is  
12 totally unnecessary, because the law has been, like I  
13 said, clearly established since World War Two.

14 One of the outgrowths of -- so there's a  
15 call, there's been a call for training students in  
16 trying to persuade them to hold particular views as  
17 that runs directly in conflict with clearly  
18 established law from the 1943 West Virginia  
19 University Barnette case that I alluded to before,  
20 dealing with the pledge of allegiance.

21 Justice Jackson in that marvelous  
22 opinion really expressed, I think, the sentiments  
23 that most Americans agree with, which is that our  
24 school districts are not there to teach and ingrain  
25 into our students a particular orthodoxy.

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1           They are not to decide what is right and  
2 what is wrong on questions of social importance.  
3 Those should be left to parents and other  
4 institutions.

5           And that has been our law since 1943. As  
6 a matter of fact, I think the Supreme Court said it  
7 best in *Tinker v. Des Moines*, and I would just like  
8 to read the quote because it is really a magnificent  
9 quote.

10           It warns against this type of  
11 indoctrination, to try to teach students of a  
12 particular -- whatever it is, whatever view it is,  
13 this happens to be the homosexual rights issue, but  
14 it could be on any issue, that any departure from  
15 absolute regimentation may cause trouble, and  
16 variation from the majority's opinion may inspire  
17 fear.

18           Any spoken word in class, in the  
19 lunchroom, on the campus, that deviates from the  
20 views of another person, may start an argument or  
21 cause a disturbance, that our Constitution says we  
22 must take this risk, and our history says that it is  
23 this sort of hazardous freedom, this kind of  
24 openness, that is the basis for our national  
25 strength, and of the independence and vigor of

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1 Americans who grow up and live in this relatively  
2 permissive, often disputatious society.

3 Freedom to speak amongst our students  
4 has been a clearly established right for many, many,  
5 many decades. It affects a broad range of issues,  
6 from students fighting against racial desegregation  
7 -- segregation rather -- students protesting the  
8 Vietnam War, or even today, students protesting  
9 military actions in other parts of the globe.

10 These rights are very precious because,  
11 as the Supreme Court has said, we have to be careful  
12 lest we strangle the free mind at its source amongst  
13 our students, who obviously are the most  
14 impressionable, and that impressionability is greatly  
15 impacted by the power imbalance that school officials  
16 exert over them.

17 CHAIRMAN CASTRO: Thank you Mr. Sasser.  
18 Ms. Byard?

19 MS. BYARD: Thank you, and thank you  
20 very much for the opportunity to testify today. My  
21 name is Eliza Byard and I am the Executive Director  
22 of GLSEN, the Gay, Lesbian and Straight Education  
23 Network.

24 Founded in 1990 by a group of educators,  
25 parents, and students, GLSEN is now the leading

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1 national education organization focused on LGBT  
2 issues in K-12 schools and committed to partnering  
3 with school districts across the nation, to promote  
4 school cultures of respect and safe schools for all  
5 students.

6 I want to begin by introducing you to  
7 Joey, a fairly typical high school junior, except in  
8 one respect: Joey is gay. Until he revealed this  
9 fact, Joey was a popular kid and never thought twice  
10 about his safety at school.

11 After he came out, Joey's school  
12 experience changed dramatically. He was harassed  
13 daily, a problem that escalated to the moment when  
14 another student threatened Joey with a knife.

15 Rather than intervene, a school  
16 administrator's response was to encourage Joey to act  
17 "less gay" and to suggest that the bullying he  
18 experienced was something that he deserved.

19 On Joey's behalf, I thank you for  
20 shedding light on this important issue, but I must  
21 also urge you to act.

22 Visible or invisible, LGBT youth are in  
23 every district in this country, and are drawn from  
24 every constituency that you are empowered to protect.

25 They need your help to cut through the

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1 noise that too often surrounds this issue. LGBT  
2 students face bullying, harassment, and violence that  
3 can deprive them of equal educational opportunity,  
4 undermine their individual well-being, and keep them  
5 from achieving their full potential.

6 In GLSEN's 2009 National School Climate  
7 Survey, nearly nine out of 10 LGBT students reported  
8 that they had been verbally, physically, or sexually  
9 harassed in the past year at school, because of their  
10 sexual orientation or gender identity.

11 One in three had skipped school because  
12 they were simply too afraid to go, and one in five  
13 had been physically assaulted.

14 Youth who face this violence do less  
15 well academically and are less likely to plan to  
16 graduate from high school. LGBT youth are more likely  
17 to engage in behaviors that put them at risk, because  
18 of the discrimination and violence they suffer.

19 These statistics are grim. Equally  
20 disheartening is the fact that this situation has not  
21 yet sparked the response it requires. Only 18 percent  
22 of LGBT students report that their school explicitly  
23 protects them on the basis of sexual orientation or  
24 gender identity, and the vast majority of LGBT  
25 students report that when a member of the school

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1 staff witnesses anti-LGBT behavior, they do little or  
2 nothing about it.

3 A core challenge we face is the fact  
4 that bias-based bullying complicates adult response.  
5 Whether out of fear of controversy, failure to  
6 recognize the seriousness of the behavior, or active  
7 indifference to the fate of the students involved,  
8 adults charged with the education and care of our  
9 children are not consistently living up to their  
10 responsibilities.

11 Federal leadership is necessary to make  
12 the basic level of the extent of their  
13 responsibilities crystal clear, and to assure those  
14 who fear controversy or backlash that they are doing  
15 the right thing.

16 We are grateful to the Office of Civil  
17 Rights at the Department of Education and to the  
18 Department of Justice for their commitment to  
19 exercising what authority they have under Title IX to  
20 protect LGBT students.

21 But this statute only covers some of the  
22 serious challenges LGBT students face. Research  
23 consistently shows that the policies that most  
24 effectively address anti-LGBT behavior in our  
25 schools, actually name the problem by specifically

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1 enumerating sexual orientation and gender identity as  
2 categories included within the commitment to protect  
3 all students.

4 LGBT youth whose schools have such  
5 policies are less likely to be victimized and more  
6 likely to say that school staff intervene when they  
7 witness anti-LGBT behavior.

8 In recent months, school districts in  
9 Oklahoma City, Jackson, Mississippi, Dallas, and Park  
10 City, Utah have adopted enumerated policies that  
11 include sexual orientation and gender identity among  
12 their protections. And just last month the state of  
13 Arkansas passed an enumerated anti-bullying law, the  
14 11<sup>th</sup> state to do so.

15 But state laws and district policies  
16 create only a patchwork quilt of protection for LGBT  
17 students. As a baseline matter of safety, we need to  
18 establish a national floor of protection upon which  
19 states and districts may build.

20 As a national issue of equity, we also  
21 need non-discrimination protections for some of our  
22 nation's most vulnerable students.

23 I encourage the Commission to support  
24 the Safe Schools Improvement Act, a measure  
25 introduced in Congress with bipartisan support in

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1 both chambers and broad-based support among  
2 education, youth development, health, religious, and  
3 civil rights organizations, and the Student  
4 Non-Discrimination Act, which would extend  
5 non-discrimination protections to students on the  
6 basis of their sexual orientation.

7           You have heard testimony that to extend  
8 these protections would somehow compromise the First  
9 Amendment rights of other students' strongly-held  
10 personal beliefs regarding homosexuality.

11           As an educator and as a parent myself, I  
12 am firmly committed to the principle of respectful  
13 debate and dialogue as part of a good education.

14           But let me be very clear: the words  
15 faggot and dyke are not part of any religious creed.  
16 And harassment and assault are crimes.

17           To those who deny the need for action  
18 and attack the principle of enumeration, I challenge  
19 them to provide data to support their arguments.

20           For every Jackson, Mississippi, and Park  
21 City, Utah, there are places where  
22 bullying-prevention efforts do not explicitly protect  
23 all students and where the consequences are real.

24           Joey knows this all too well. His family  
25 had to move across state lines to find a school where

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1 he would be treated with the same respect as every  
2 other student.

3 Fortunately his family had the means to  
4 find that safe school. Many parents don't, nor should  
5 any parent have to make this choice.

6 Every child in this nation deserves a  
7 school environment where they are safe and respected.  
8 Each deserves the same chance to excel, and they need  
9 your help to have that equal opportunity. Thank you.

10 CHAIRMAN CASTRO: Professor Eastman?

11 MR. EASTMAN: Good afternoon Mr.  
12 Chairman and members of the Commission, thanks for  
13 having me here, back at the Civil Rights Commission.  
14 I was a number of years ago the director of the  
15 Congressional public affairs office here, so it's  
16 nice to be back, although different digs than we had  
17 back then up on Vermont.

18 I am not going to address the particular  
19 topic in front of the panel, but the broader question  
20 about federal authority generally in peer-on-peer  
21 harassment that is the broader purpose of this  
22 hearing, because I think we have greatly  
23 misunderstood the role of the federal government  
24 here.

25 In fact, the misunderstanding of federal

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1 authority, I think, is evident from the very opening  
2 sentence of your own briefing concept summary, which  
3 states that acts of bullying, violence and harassment  
4 are reportedly pervasive in K-12 schools.

5 Even if true, and with all due respect,  
6 that statement does not begin to establish the  
7 necessary premise for federal intervention.

8 Rather, federal intervention is  
9 warranted under the Fourteenth Amendment only to  
10 remedy violations of that amendment, which speaks to  
11 state action, not private conduct.

12 Congress's lawmaking power under Section  
13 5 of that amendment extends only to enforcing the  
14 provisions of the Fourteenth Amendment, and when  
15 Congress seeks to act proactively to prevent  
16 potential harms, there must be both a congruence and  
17 proportionality between the injury to prevent it and  
18 the means adopted to that end.

19 And remember, under the Fourteenth  
20 Amendment we are talking about state action, not the  
21 conduct of private actors.

22 So federal intervention might be  
23 warranted if the assertedly pervasive acts of  
24 bullying, violence and harassment were being  
25 perpetrated or facilitated by the school district

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1       itself, and the intervention was designed to remedy  
2       that unconstitutional state action.

3               Yet, even if that was the case, and  
4       neither the Commission's briefing summary, nor the  
5       recent efforts by the Department of Education that  
6       led to it, appears to be aimed at that concern, the  
7       description of prior federal interventions that have  
8       been deemed appropriate by the Supreme Court,  
9       indicates a much higher threshold before Congress  
10      itself, much less unelected administrative agencies,  
11      can intrude on core state powers, such as how we  
12      manage the local school districts.

13              The Voting Rights Act of '65, for  
14      example, spoke of the flagrant violations that had  
15      been existing for decades. It sought to banish the  
16      blight of those discriminations that had been in  
17      place for nearly a century.

18              The Court also approved using strong and  
19      remedial preventative measures when necessary to  
20      respond to the widespread deprivation of  
21      constitutional rights that was going on by government  
22      officials themselves.

23              None of those preconditions are evident  
24      here. There's no indication that school districts  
25      have engaged in widespread and persistent deprivation

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1 of constitutional rights, either through their own  
2 harassment, or in the manner in which they have  
3 responded to student-on-student harassment.

4 There's no hint that any such failure on  
5 the part of schools, even if it exists, has been  
6 flagrant or long-standing. Indeed, the Dear Colleague  
7 Letter sent last October from the Department of  
8 Education to school districts across the nation,  
9 demonstrates just the opposite.

10 In that letter, Assistant Secretary Ali  
11 praises state departments of education and local  
12 school districts for the steps they have taken to  
13 reduce bullying in schools, describing the efforts as  
14 a movement that reflects schools' appreciation of  
15 their important responsibility to maintain a safe  
16 learning environment for all students.

17 It is impossible to tease out of that  
18 complimentary picture the kind of flagrant disregard  
19 of constitutional rights by the officials themselves  
20 that is a necessary precondition for federal  
21 intervention under the Fourteenth Amendment. We are  
22 hardly witnessing a return of Bull Connor here.

23 But the Department of Education further  
24 claims that a number of federal statutes enacted  
25 pursuant to the spending clause fully authorize

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1 federal intervention here.

2 Now, although Congress's power under the  
3 spending clause is not limited by its other  
4 enumerated powers, it may not use its spending power  
5 as a pretext to accomplish indirectly what it cannot  
6 do directly.

7 The limits on Congressional regulatory  
8 authority under the Fourteenth Amendment are  
9 therefore quite germane to the issues before us  
10 today.

11 And if Congress cannot accomplish  
12 indirectly through federal funding, then it is even  
13 more clearly the case that an administrative agency  
14 cannot impose new conditions on the receipt of  
15 federal funding that are not authorized by law.

16 The Department seems to claim such  
17 authority when it cites the *Gebser* case from 1998,  
18 but I think it's misreading that case.

19 Thus the Department's claim that the  
20 liability standards in the *Davis* case do not limit  
21 the terms of its funding contracts is highly  
22 misleading at best.

23 The latitude given to the agencies is  
24 narrow. The deviations between the Department's Dear  
25 Colleague Letter last October and the reasonable

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1 interpretation of the relevant civil rights statutes  
2 are large.

3 The Department may not think the Supreme  
4 Court interpretation of those statutes is protective  
5 enough for the rights at issue here, but it has no  
6 conceivable basis to fundamentally alter the meaning  
7 of those statutes in the name of enforcing them.

8 I should be clear, none of the statutes  
9 cited in that letter were passed with the child-on-  
10 child playground bullying even in mind, much less out  
11 of concern about flagrant violations of  
12 constitutional rights by the school officials in  
13 dealing with the bullying.

14 That alone makes it extremely  
15 problematic to extend those statutes to cover the  
16 child-on-child conduct here.

17 I see my time is running out so let me  
18 skip towards the end. You know, the Department's  
19 discussion about the specific kinds of conduct that  
20 would trigger remedial action is somewhat erroneous.

21 Harassing conduct may take many forms,  
22 it says, including verbal names, acts and name  
23 calling, graphic statements, et cetera.

24 But the Supreme Court has expressly  
25 disclaimed such conduct as a trigger for school

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1 district liability. Courts must bear in mind that  
2 schools are unlike the adult workplace and that  
3 children may regularly interact in a manner that  
4 would be unacceptable among adults, it noted in the  
5 *Davis* case.

6 It is thus understandable that you are  
7 going to have those kinds of insults and banter and  
8 teasing, et cetera. Damages are not available for  
9 those acts, even if the comments target differences  
10 in gender under Title VI, or race, or color or  
11 national origin, et cetera.

12 Rather, in the context of school on  
13 school - student-on-student harassment, damages are  
14 available only when the behavior is so severe,  
15 pervasive and objectively offensive, that it denies  
16 the victims equal access to the education.

17 And the deliberate indifference response  
18 by the school district must be systemic, not just  
19 with respect to individual instances of harassment.

20 In the end, I think it's important for  
21 us to recognize that, in our federal system, there  
22 are some things that are left not just primarily, but  
23 exclusively, to state and local control, and this is  
24 one of those things.

25 It's time to let the school districts,

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1 their principals and their teachers do their jobs  
2 without being second-guessed by folks in Washington,  
3 D.C., often a thousand miles away.

4 Only then can we take advantage of the  
5 laboratory of experiment that our federal system  
6 provides, and maybe they can come up with solutions  
7 yet envisioned here in Washington, D.C. Thank you.

8 CHAIRMAN CASTRO: Thank you, Professor  
9 Eastman. We are now going to open it to questions  
10 from the Commissioners. I remind the Commissioners,  
11 keep your questions concise. If possible, indicate  
12 what panelist you are asking the question to, and  
13 then we will have enough time for follow-ups,  
14 hopefully.

15 Commissioner Yaki, Commissioner  
16 Kirsanow, and Commissioner Achtenberg and Gaziano.

17 COMMISSIONER YAKI: Thank you very much,  
18 Mr. Chair. So many interesting comments to be made  
19 from what we just heard but I want to go back to  
20 something that I think was best addressed to Mr.  
21 Herek and Mr. Meyer.

22 I think one of the most, to me one of  
23 the most important factors in determining why we are  
24 having this hearing and why I believe we need  
25 specific federal legislation protecting LGBT youth,

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1 has to do with the harm associated with this kind of  
2 bullying behavior to individuals in that grouping.

3

4           Could you elaborate a little bit more  
5 about the susceptibility and the vulnerability of  
6 especially young people, in the LGBT category, who in  
7 terms of bullying, in terms of this kind of conduct,  
8 that I think it's important to draw out why it is  
9 that protection is necessary in these instances.

10           MR. HEREK:     I think I can start.  
11 Certainly one thing we see, that many survey studies  
12 looking at especially middle and high school age boys  
13 and girls have found, is that those who are lesbian,  
14 gay or bisexual, or those who have a history of same-  
15 sex attraction or behavior, often appear to be not  
16 functioning as well, at least on average. Many are  
17 functioning well, but on average they look like they  
18 are doing worse than many of the other kids and they  
19 often manifest higher levels of depressive symptoms  
20 and anxiety. They miss class more often. They skip  
21 school. They often engage in risk behaviors.

22           And that is one pattern that was  
23 observed in research, but then when researchers  
24 started asking about the kids' experiences with  
25 victimization and harassment in the school setting,

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1 it turned out that that helped to explain quite a lot  
2 of the disparities there.

3 And so it seems that the experience of  
4 being targeted for harassment and violence in the  
5 school setting leads kids to have more psychological  
6 problems, leads them to be afraid of school, to  
7 perceive it as being an unsafe place, and this often  
8 leads them to both not be as healthy and to engage in  
9 more behaviors that are going to be detrimental to  
10 their own well-being.

11 It also appears to be the case that when  
12 that -- when questions have been asked about whether  
13 that teasing, harassment, and violence were  
14 specifically targeted at them because they were  
15 perceived by someone else to be lesbian or gay or  
16 bisexual, that is associated with a greater negative  
17 impact than other, what might be called routine  
18 teasing and harassment and violence that isn't based  
19 on a particular aspect of the child's identity.

20 MR. MEYER: I think it is important to  
21 add to that that we are not talking about a  
22 vulnerability that a child has coming in. We are  
23 talking about a reaction that a child has to the  
24 environment that is, not as some of the panelists  
25 characterized it, as something like teasing and

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1 saying things.

2 This is a severe -- and I am not saying  
3 this is for every single child who is gay. Many of  
4 them are not out and nobody knows about it -- but  
5 when a child or youth is out or when people identify  
6 him or her as being LGBT, they suffer from  
7 persistent, chronic, day-in and day-out harassment,  
8 intimidation, things that, from a stress perspective,  
9 require immense adaptation if they are to sustain  
10 themselves in that environment.

11 We have had adults tell us in research  
12 about experiences that happened to them 20 years  
13 prior to that that they still remember freshly about  
14 not being able to walk to school, having to change  
15 their route, having to walk in different times from  
16 other children, missing classes and missing school.

17 So this is not minor events, not minor  
18 teasing and it is not about freedom of speech. This  
19 is about making the environment completely  
20 intolerable for these kids and that is why they  
21 suffer from these types of outcomes that I described  
22 before.

23 I just want to add one thing that two of  
24 the panelists said that there was not sufficient  
25 evidence, and I think that is something that I

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1 strongly disagree with.

2           There are many, now, studies, there are  
3 meta-analysis studies that have looked at the  
4 accumulation of studies, that is they looked at --  
5 over the accumulation of studies, what are the trends  
6 that children that overcome any kind of problems  
7 within a study, those permutations.

8           Those are studies with probability  
9 samples that they represent the population of  
10 students, and these studies showed, as I said before,  
11 incredibly strong evidence for, number one, the  
12 experience of stressors that I described, number two,  
13 the evidence of the outcomes that come out of this as  
14 well as the evidence for the mediating, as we call  
15 it, role of those experiences, that is that those  
16 experiences are responsible for those outcomes.

17           CHAIRMAN CASTRO:           The Chairman  
18 recognizes Commissioner Kirsanow.

19           COMMISSIONER KIRSANOW:   Thank you, Mr.  
20 Chairman. Thank you all the panelists. This has been  
21 really informative. And I also thank the previous  
22 panel although they did not answer two questions I  
23 posed to them.

24           And pursuant to the testimony of  
25 Professor Eastman, I am curious as to the extent of

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1 the deprivations of civil rights based on protected  
2 class, perpetrated by school districts, that would  
3 necessarily engender federal involvement or federal  
4 jurisdiction.

5 And to that extent I would repeat my  
6 question, of whether any of you have the answer to  
7 when there's been reliable data collated and prepped  
8 either by the Department of Education, Justice, or  
9 any other entity, as to the number of complaints of  
10 protected class harassment, when that tracking began,  
11 what the number was when that tracking began, and  
12 what the number is now, in terms of, again,  
13 deprivations of civil rights based on protected class  
14 status, related to harassment. Does anyone have any  
15 such data or know where we can find such data,  
16 because we have gotten copious amounts of information  
17 in advance of this hearing from a number of people  
18 and we appreciate that, but in going through the  
19 data, I have not been able to assess it.

20

21 CHAIRMAN CASTRO: Can we get an answer,  
22 if not -- any panelist?

23 COMMISSIONER KIRSANOW: Thank you, I  
24 appreciate it.

25 CHAIRMAN CASTRO: We will move on to

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1 Commissioner Achtenberg.

2 COMMISSIONER ACHTENBERG: Thank you, Mr.  
3 Chair. Dr. Meyer, I have next to me approximately  
4 3,000 pages of recent reports, peer-reviewed journal  
5 articles and book chapters which are already in the  
6 record of this proceeding and to which you have  
7 referred indirectly.

8 These documents examine a range of  
9 issues related to the overall mental health of the  
10 LGBT population, the pervasiveness and nuanced  
11 problems associated with peer-to-peer student  
12 violence directed at sexual minority youth, and many  
13 short- and long-term negative outcomes suffered by  
14 targeted youth to which you have testified.

15 The authors come from institutions  
16 including Harvard Medical School, Columbia  
17 University, UCLA, UC Davis, and many other most  
18 reputable institutions.

19 Do you have an overall comment that you  
20 can make to this Commission about this body of  
21 scholarship and the weight we should give this  
22 scholarship in our deliberations?

23 MR. MEYER: Yes. Of course I haven't  
24 reviewed each of those 3,000 pages, but the  
25 references that I provided, as well as the articles

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1 that I could identify from your cues there, are  
2 published in peer-reviewed, top scientific journals.

3 It is not very easy to put an article  
4 out there after it has been reviewed by an editor and  
5 at least three other reviewers who are not  
6 necessarily friendly to the author.

7 Those articles went through very, very  
8 severe critical review. In my mind, having reviewed  
9 many of those articles, in particular in the area of  
10 youth, the evidence is overwhelming on each of those  
11 three elements that are required to show causal  
12 relationships between the environment and some kind  
13 of health outcomes.

14 And the three are: number one, that you  
15 have to show that the group, in this case sexual  
16 minority youth, experienced more stressors; number  
17 two, that they experience more of the disorders that  
18 are purported to be caused by the stressors; and  
19 number three, that these are -- that the reason for  
20 the increase in rates of disorders are those  
21 stressors.

22 This is called mediation analysis. In  
23 this particular evidence, we have very, very strong  
24 evidence for each of those three elements, as I said  
25 before, using a variety of methods, a variety of

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1 samples, a variety of sampling methodologies, a  
2 variety of analytical approaches, and for many, many  
3 institutions and investigators in many different  
4 places, and across two decades now.

5 COMMISSIONER ACHTENBERG: Thank you.

6 CHAIRMAN CASTRO: The chair recognizes  
7 Commissioner Gaziano.

8 COMMISSIONER GAZIANO: I want to thank  
9 all of you but, because our time is limited, I think  
10 I will direct my question to former Dean Eastman,  
11 because I wanted you to elaborate using an example  
12 from an OCR's recent Dear Colleague, to illuminate  
13 this point you made, that the use of federal funding  
14 cannot be used as a pretext to invent new legal  
15 standards.

16 We heard from Assistant Secretary Ali  
17 that they only use funding or their power for sort of  
18 procedural issues, and I would certainly concede, I  
19 think we all would concede, that the federal  
20 government could potentially require data to be  
21 submitted to show that they are actually living up to  
22 the standards of the civil rights law.

23 But the example that I would like you to  
24 apply is, on April 4<sup>th</sup>, the Office for Civil Rights  
25 sent a letter to colleges and universities seeming to

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1 insist that they have a preponderance of the record -  
2 - preponderance of the evidence standard in student  
3 sexual harassment disciplinary proceedings.

4 The only argument I could see in the  
5 OCR's letter is this was the standard in Title VII.  
6 To me it's profoundly troubling that they would  
7 borrow that standard where discovery is available,  
8 where an employer has control over its supervisors,  
9 to the university context where students don't even  
10 have a right to know who accused them, don't have a  
11 right to see the statements, don't have a right of  
12 discovery.

13 But my question to you is, does OCR,  
14 regardless of who's right, whether that's good or  
15 bad, does OCR have the authority to read Title IX as  
16 requiring colleges and universities, or is there any  
17 authority that OCR has, to require colleges and  
18 universities to apply a preponderance of the evidence  
19 standard in student sexual harassment or rape  
20 allegations?

21 MR. EASTMAN: I don't believe so and I  
22 should clarify as well that I am here in my own  
23 capacity, not as the former Dean of Chapman  
24 University. We don't always speak with the same voice  
25 in a university, as I am sure many involved with

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1 universities acknowledge.

2 No, they don't. The federal government  
3 generally is not supposed to be intruding on local  
4 decisions unless they rise to a certain level. That's  
5 the congruence and proportionality test that comes  
6 under the Fourteenth Amendment.

7 And the Court has also been very clear  
8 that we can't use the spending power to accomplish  
9 things that we don't have other authority to  
10 accomplish.

11 What OCR seems to be doing here is using  
12 its conditions on spending in an effort to obtain a  
13 regulatory regime that they could not do directly,  
14 that Congress itself could not do directly, much less  
15 OCR.

16 And I'll give you another example, from  
17 the Dear Colleague Letter from last October. The  
18 standard that the Supreme Court sets out in the *Davis*  
19 *vs. Monroe County* case in 1999 is deliberate  
20 indifference, intentional conduct by the school  
21 officials themselves to a hostile environment. That's  
22 the only time when it rises to the level of federal  
23 actionable conduct.

24 The Department of Education's letter  
25 says instead a school is responsible for addressing

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1 harassing incidents about which it knows, all right,  
2 and knowledge is even lower than deliberate  
3 indifference, or reasonably should have known. That  
4 is a standard that the Supreme Court expressly  
5 rejected in the *Davis* case, that that would adopt a  
6 somewhat negligent standard for school officials.

7 And in rejecting that, it said there  
8 should be a strong presumption in favor of deference  
9 to the school districts on how they respond to any of  
10 these kind of harassing conducts.

11 And remember, most of this conduct, when  
12 it crosses from mere speech over to physical  
13 violence, is already actionable under state tort law  
14 and what have you.

15 The notion that that is sufficient to  
16 rise to the level of federal intervention was  
17 rejected by the Supreme Court in another significant  
18 case, *United States vs. Morrison*.

19 So I think what the Department here is  
20 doing, is expanding through a spending hook, a  
21 regulatory regime that Congress would not have  
22 authority to pass on its own.

23 CHAIRMAN CASTRO: I am going to ask a  
24 question, then it will be Commissioner Heriot,  
25 Commissioner Yaki, and Commissioner Titus. Before I

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1 ask my question, I just want to ask members of the  
2 staff and Commissioners who are on stage as much as  
3 possible try to limit your movement; it's a little  
4 distracting and it is important for us to stay up  
5 here and not direct questions to the panel unless  
6 it's in this open forum, although I know folks will  
7 have to get up at some point and understand that. If  
8 you could do that with the least amount of  
9 disruption, that would be appreciated.

10 Professor Clegg, you had mentioned in  
11 your comments, I'm sorry, Mr. Clegg, that you did not  
12 want to see an expansion of coverage for protections  
13 for LGBT, if I understand correctly, because you  
14 didn't want to see a whipsaw effect occurring.

15 But isn't it true that you could make  
16 that whipsaw argument for any effort to expand the  
17 protected classes in the past, whether it was race,  
18 national origin, disability status, and should that  
19 be the standard by which we decide whether or not we  
20 are going to protect our citizens and residents?

21 MR. CLEGG: I think that it is going to  
22 depend on the specific situation. Let me take the  
23 most dramatic example, and that would be racial  
24 discrimination.

25 There you had — 50 years ago — a

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1 situation where school systems and state governments  
2 were themselves deliberately discriminating on the  
3 basis of race. They were not going to change that  
4 policy, absent the intervention of the federal  
5 government, and in light of Supreme Court case law,  
6 as it was developing, it was also very unlikely that  
7 there was going to be very much back and forth once  
8 the federal government intervened and said you cannot  
9 engage in racial discrimination.

10 That's very different than the situation  
11 now. You don't have the situation now where school  
12 districts are deliberately harassing or bullying  
13 students on the basis of sexual orientation. The  
14 problem is one of student on student bullying and  
15 harassment, and there has been no showing here today  
16 that the school districts are systematically  
17 uninterested or unsupportive of stopping that kind of  
18 bullying and harassment.

19 The problem now instead is one of line-  
20 drawing, as I discuss in my statement and has been  
21 discussed by this panel. That kind of nuanced line-  
22 drawing is something where reasonable people can  
23 differ, and where people are going to draw the lines  
24 differently, depending on local circumstances. And  
25 where getting the federal government involved — and

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1 saying that no, this is where, here in our  
2 guidelines, here is where you should draw the line in  
3 our administration — will predictably be a source of  
4 controversy and will likely be changed when a, say,  
5 liberal Democratic administration is replaced by a  
6 conservative republican one.

7 So I think that the whipsaw danger —  
8 which is only one of the problems that I have  
9 identified in this area, for why the federal  
10 government shouldn't get involved and will actually  
11 be unhelpful if it gets involved — is a much more  
12 significant problem in this area than in the school  
13 desegregation context.

14 CHAIRMAN CASTRO: And I will reserve my  
15 follow-up question if we have time at the end. I will  
16 ask Commissioner Heriot to please ask her question.

17 COMMISSIONER HERIOT: I am not sure  
18 anybody is going to be able to answer my question,  
19 but Ms. Byard, you are probably my best shot on this  
20 one.

21 The emphasis of the Department's policy  
22 is on training and not so much on punishment, which  
23 kind of surprised me when I looked at the letter.

24 The Dear Colleague Letter repeatedly  
25 says that punishing bullies is not enough, that there

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1 is some need to train.

2 I understand that GLSEN provides some of  
3 that training, is that right?

4 MS. BYARD: They work in different parts  
5 of the country, primarily professional development  
6 work with school staff, so we do. We have done that  
7 for the entire district, the City of Rochester and in  
8 other places.

9 COMMISSIONER HERIOT: It's the resource  
10 allocation issue that interests me, the kind of  
11 training and such that you provide. Is this like a  
12 day-long program, are you talking to teachers, are  
13 you talking to students, are you talking to  
14 administrators?

15 MS. BYARD: Well, I am happy to talk  
16 with you about our training work, but on the other  
17 hand, that's actually not the request we have of you  
18 for action.

19 We do not seek that level of -- what we  
20 ask for in terms of the Safe Schools Improvement Act  
21 and non-discrimination protection, is regarding  
22 taking a standard that has been developed in the  
23 laboratory of the states to which my colleague Mr.  
24 Eastman referred, and which is having a salutary  
25 effect on the health and well-being of young people

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1 who are experiencing harm, by promoting effective  
2 action --

3 COMMISSIONER HERIOT: But it's not a  
4 question of what you are asking for -- I am asking  
5 you whether you provide that training and what kind  
6 of training it is that you provide.

7 MS. BYARD: Yes, we actually provide  
8 professional development training to districts across  
9 the country, and they have resulted in fact in higher  
10 rates of intervention in the kinds of behavior that  
11 currently harm young people, and we are very proud of  
12 the --

13 COMMISSIONER HERIOT: Do you charge for  
14 that training?

15 CHAIRMAN CASTRO: Commissioner Heriot --

16 MS. BYARD: In general, actually we  
17 leverage private resources to make things available.  
18 We recognize that districts --

19 COMMISSIONER HERIOT: You said in  
20 general. Does that mean that you sometimes charge for  
21 those?

22 MS. BYARD: I really feel like you are  
23 saying -- schools pay for resources that help them do  
24 a better job.

25 COMMISSIONER HERIOT: Do you charge for

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1 your services?

2 MS. BYARD: And -- at times we do.

3 CHAIRMAN CASTRO: Commissioner Heriot,  
4 we are going to move on to another Commissioner's  
5 questions.

6 MS. BYARD: But I would appreciate just  
7 the point to say --

8 COMMISSIONER HERIOT: Do you charge?

9 MS. BYARD: I have said yes --

10 CHAIRMAN CASTRO: Commissioner.

11 MS. BYARD: we do on occasion charge,  
12 but on the other hand, I would also point out that  
13 the thing that federal action would do is set a floor  
14 of protections through policy language that has been  
15 developed in the states, and is having a beneficial  
16 effect.

17 The way that districts then move on to  
18 those next levels of implementation appropriate to  
19 their local area is their own decision. They would  
20 then be responsible for reporting on the impact of  
21 their policy, and that is the action where federal  
22 leadership could have a beneficial effect for young  
23 people who are suffering today. Thank you.

24 CHAIRMAN CASTRO: We will ask members of  
25 the audience to please turn off your cell phones.

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1 They have gone off several times and please do that  
2 if you haven't already done so.

3

4 The Chair recognizes Commissioner Yaki.

5 COMMISSIONER YAKI: Well actually,  
6 Commissioner Titus hasn't gone yet.

7 CHAIRMAN CASTRO: Okay. Commissioner  
8 Titus.

9 COMMISSIONER TITUS: Okay. Thank you. We  
10 have heard evidence from difference ones of you and  
11 then the previous panel that technical assistance,  
12 teacher training, developing anti-bullying policies  
13 in school have all helped to lower the rate of  
14 bullying in those particular situations.

15 Most of the testimony, though, has  
16 focused on what we do after the fact, after bullying  
17 or harassment occurs, how do we deal with the  
18 situation.

19 I'd like to take a step back, if you  
20 would help me. Mr. Clegg kind of scoffs at the notion  
21 that statistical evidence compiled and presented by  
22 top-notch social scientists suggests that this is  
23 getting to be a more serious problem by saying well,  
24 maybe just technological developments allow more  
25 people to report it.

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1 I don't really think that's the case. I  
2 think it is an increasing problem, so I'd like to  
3 talk about some of the societal conditions that have  
4 led to this increase, because I believe they are out  
5 there.

6 Maybe Ms. Byard, or maybe Professor  
7 Herek could address that?

8 MS. BYARD: Sure. I think that what is  
9 clear is that in recent years, as LGBT life in this  
10 country has become more visible, we have seen it  
11 become an increasing subject of debate.

12 Many of GLSEN's members are teachers and  
13 school principals, and the fact is that what you see  
14 in the headlines shows up in the hallways.

15 Now the problem is not the debate  
16 itself, it is the environment of hostility, the fact  
17 that there are legislative efforts to clamp down on  
18 speech related to LGBT people in our schools, there  
19 are eight states in this country where there is  
20 legislative language that prohibits the positive  
21 discussion of homosexuality in a public school, and  
22 there is an effort today to pass such a statute in  
23 the state of Tennessee.

24 In that environment, it is very  
25 difficult to make it clear to teachers that they

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1 should intervene. We have seen specific concerns in  
2 the Anoka-Hennepin district of Minnesota, that the  
3 prohibitive statutory language about any discussion  
4 by school faculty of homosexuality stands in the way  
5 of effective response by adults, to behavior that  
6 clearly crosses the line into harmful behavior  
7 directed at young people.

8 We want to be very clear about what we  
9 are here to discuss. It is the appropriate role of  
10 the government to set the floor, the minimum standard  
11 to which districts must adhere.

12 They must make it clear that the adults  
13 who run our schools have to protect all children,  
14 including those who have been singled out on the  
15 basis of sexual orientation or gender identity.

16 COMMISSIONER TITUS: Thank you, just  
17 real quick -- oh excuse me.

18 CHAIRMAN CASTRO: We will come back.

19 COMMISSIONER TITUS: Okay.

20 CHAIRMAN CASTRO: The next -- I'm sorry.  
21 Okay. Sure, go ahead.

22 MR. CLEGG: The point is, you know,  
23 what's really relevant here is not just whether there  
24 has been an increase in the reported instances of  
25 harassment on the basis of sexual orientation, but

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1 whether there has been an increase in  
2 unresponsiveness among local school districts.

3 And I don't think that any of the  
4 statistics or the thousands of pages that have been  
5 submitted into the record here address that question.

6 CHAIRMAN CASTRO: We will go to  
7 Commissioner Yaki, then to Vice Chair Thernstrom,  
8 then to the individual delegated the authority of  
9 staff director.

10 COMMISSIONER YAKI: Thank you very much,  
11 Mr. Chair. This is directed at Ms. Graves. We have  
12 heard a lot about -- and one quick comment, we have  
13 heard a lot about the inability to have the right  
14 data, and I would just submit that part of our  
15 problem and part of why we are here today, is to try  
16 and gather that data.

17 Part of the challenge, of course, is  
18 that, as an unprotected class, agencies are not  
19 required to gather that kind of data for us to  
20 analyze.

21 Ms. Graves, I wanted you to sort of  
22 answer some of the questions posed by Mr. Eastman and  
23 some of my colleagues over on the other -- down the  
24 dais from me, having to do with the reach of the  
25 federal government, the ability of the Fourteenth

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1 Amendment and the power of Congress to enact laws to  
2 create a protected class, to do the sorts of things  
3 that would allow us not to have to tap dance on the  
4 head of an opinion here or there in order to grab  
5 jurisdiction on this.

6 But what is your view of the Fourteenth  
7 Amendment, and Congress's enabling power under that  
8 to reach a protected class?

9 MS. GRAVES: Thank you. And I agree that  
10 there is a need for additional data as well, and one  
11 of our recommendations is that there be additional  
12 data in the civil rights data collection that takes  
13 into account bullying and harassment based on sexual  
14 orientation, which it currently does not.

15 But in response to some of the points  
16 made by Mr. Eastman, I mean I think that some of the  
17 questions that he raised have really already been  
18 answered by the Supreme Court's jurisprudence.

19 You know, there's no question that  
20 there's heightened protection under the Fourteenth  
21 Amendment for sex discrimination. There's no question  
22 that there's protection for sexual orientation.

23 And you know, many times Congress has  
24 said that Title IX, through Congress's spending  
25 clause authority, is -- it's valid to say that you

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1 cannot misuse federal dollars to engage in sex  
2 discrimination.

3 So to the extent that, for example, the  
4 Student Non-Discrimination Act would make explicit,  
5 similar to the way that Title IX and Title VI in the  
6 rehab act do, that you cannot misuse federal dollars  
7 to discriminate based on sexual orientation or gender  
8 identity, and that's another valid exercise of  
9 Congress's powers, both under section five and the  
10 spending clause.

11 CHAIRMAN CASTRO: The Chair recognizes  
12 Vice Chair Thernstrom.

13 VICE CHAIR THERNSTROM: Let me address  
14 this question to Professor Eastman, and to Mr. Clegg  
15 if he wants to comment as well.

16 I am - and, by the way, I second all the  
17 questions about the data. But I am concerned about  
18 free speech issues. And of course what we want to  
19 tolerate depends on specifically what is being said  
20 and the age of the students who are involved.

21 I mean, it's different to be a second  
22 grader than it is to be somebody in their junior year  
23 in high school in terms of what you want, it would  
24 seem to me, in allowable speech.

25 But one of my concerns is that it seems

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1 to me possible, in an effort to get rid of ugly  
2 speech, of which there is a lot between students,  
3 that that effort can have a ripple effect in the  
4 schools such that students become nervous about  
5 saying controversial things on political matters,  
6 let's say, where they maybe disagree, where  
7 sensibilities may be ruffled, where you are talking  
8 about basic values taught in the home, and a student  
9 may be nervous about bringing those values to the  
10 classroom, or to discussions with other children.

11 And I wondered if you wanted, and  
12 perhaps Roger Clegg as well, to respond to that  
13 concern on my part.

14 MR. EASTMAN: I think it is a very  
15 serious concern, and something that Professor Meyer  
16 said earlier, only highlights it, in his discussion  
17 of how gays and lesbians are more susceptible to the  
18 stressor of harassment in speech, he said one of the  
19 school districts' responses must be to affirmatively  
20 support homosexuality if people are making statements  
21 on the campus that disagrees with that proposition,  
22 that all of a sudden is going to be taken as conduct  
23 that leads to harassment that invokes federal  
24 intervention and training programs and what have you.

25 It is a very dangerous slope to head

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1 down, on such a contested issue as this, to basically  
2 tell people that, if you engage in such speech, that  
3 some people might interpret as harassment because you  
4 don't like the lifestyle or the conduct or what have  
5 you, that will then lead to federal intervention that  
6 will lead to training programs that will lead to  
7 affirmative responses by school districts supporting  
8 this conduct rather than opposing it or saying what  
9 have you.

10  
11 That's where the dangerous slippery  
12 slope is, and we see it happening in a number of the  
13 cases that have already hit the trial court levels,  
14 and I think it's a real serious concern.

15 As I understand it, there's going to be  
16 even more discussion about that at the next panel,  
17 but I think it's a very serious concern and it's one  
18 that we ought to be very cautious about allowing an  
19 overreach by the federal government on this issue, as  
20 we try and grapple with how to get that balance  
21 right. It's not something that is going to come out  
22 of Washington, D.C.

23 MR. CLEGG: May I answer that?

24 [portion inaudible]

25 VICE CHAIR THERNSTROM: Sure. But I

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1 would love for Mr. Sasser to answer it.

2 MR. CLEGG: Just to say that I agree  
3 with your concern, I agree with what Mr. Eastman  
4 said, and you know we have had discussion this  
5 morning of different, large animals in the room.-And  
6 so, let's be honest, I think that part of what's  
7 going on here, part of what's being pushed, is an  
8 agenda that seeks to use the power of the federal  
9 government to vilify and marginalize people who  
10 believe that gay sex is a sin. And it doesn't want  
11 that kind of thought to go unpunished.

12 MR. SASSER: What I'll say is that this  
13 is really -- it should be treated no differently than  
14 Mary Beth Tinker when she wore her black armband in  
15 Des Moines. There were lots of veterans in that  
16 community, lots of children of soldiers who died in  
17 Vietnam and who were serving in Vietnam. They were  
18 extremely upset. They were incredibly impacted  
19 emotionally by seeing those black armbands. But we  
20 can't take away Mary Beth Tinker's right to wear the  
21 armband, in the same way with the students in the  
22 *Burnside* case in 1966, when they were wearing their  
23 freedom buttons demanding equality.

24 That upset some people. It was something  
25 that the government maybe didn't agree with, with

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1 their freedom button message, but we can't stamp out  
2 those messages as well.

3 And I think that's what is really at issue  
4 here, is are we going to use the government to stamp  
5 out thoughts and beliefs and speech with which the  
6 government disagrees. That's a very dangerous game,  
7 because it's easy to do that when it's the speech  
8 that you favor, but it opens the door when it comes  
9 time when it's your speech that's targeted, and we  
10 have to stand up for everybody, because if we don't,  
11 then your speech is next.

12 CHAIRMAN CASTRO: Thank you Mr. Sasser.

13 MR. MEYER: Mr. Chairman.

14 CHAIRMAN CASTRO: We are going to -- we  
15 are going to --

16 MR. MEYER: May I just correct the  
17 quote?

18 CHAIRMAN CASTRO: Okay, one -- go ahead  
19 Professor Meyer.

20 MR. MEYER: I think Professor Eastman  
21 quoted my testimony which is he misunderstood it.  
22 what I was talking about is not about the school  
23 district saying that it is okay or not okay to be  
24 gay, and in fact nothing in my testimony, and I think  
25 in the other people here, is about speech at all.

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1           What I was talking about is about  
2 schools supporting affirmatively a gay student, not  
3 by taking sides about if it's okay or not, but  
4 against the types of evidence that I have quoted  
5 about being injured, about physical assault, about  
6 rape, about being threatened, about having their  
7 property stolen, about being threatened with a knife  
8 or a weapon.

9           So these are not issues about whether  
10 somebody, as Mr. Clegg referred to before, one  
11 student thinking it's a sin and another student  
12 thinking that it's not a sin.

13           I have -- I'm totally in agreement with  
14 them about the speech part of it. But we are talking  
15 about very severe harm that is conducted and that is  
16 where I think -- and I agree with Ms. Byard -- the  
17 school has to have a role in ensuring that the  
18 students have an opportunity to learn.

19           CHAIRMAN CASTRO: Thank you, Professor  
20 Meyer. We are going to have a question from Ms.  
21 Tolhurst, the individual delegated the authority of  
22 staff director, followed by Commissioner Heriot,  
23 Commissioner Achtenberg, and Commissioner Titus for  
24 her follow-up question, and then I will indicate who  
25 else will come after that. Ms. Tolhurst?

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1 MS. TOLHURST: Thank you. This is for  
2 Professors Herek and Meyer. And I have read both of  
3 your written statements and I should thank all the  
4 panelists for providing us a great deal of reading  
5 material.

6 In both of your statements, you  
7 addressed the idea that identity-based bullying, and  
8 the social stigma attached to it, has a greater  
9 impact on teens than more general forms of bullying.

10 You were both addressing LGBT students.  
11 Would you say the same holds true for students  
12 bullied based on their race, religion, disability or  
13 gender?

14 MR. HEREK: Well, at least one of the  
15 studies that I cited, which was from the California  
16 Healthy Kids Study, did look at those other factors,  
17 and yes, the comparison was between kids who had been  
18 bullied based on their sexual orientation, perceived  
19 or actual, versus kids who were bullied for reasons  
20 that weren't related to identity.

21 And there we saw the difference. My  
22 recollection of that study is that they did find  
23 other -- that being targeted as a member of a  
24 particular group, a racial group for example, is more  
25 -- is associated with greater harm than being

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1 targeted for, again, what we might call routine sort  
2 of violence.

3 I would say there's a parallel there in  
4 what we have seen in research with adults, which is  
5 that we see, for example, that adult lesbians and gay  
6 men who have experienced a hate crime in recent years  
7 because of their sexual orientation show greater  
8 psychological distress and more problems than other  
9 comparable lesbians and gay men who have experienced  
10 comparable crimes of violence but not based on their  
11 sexual orientation.

12 So there does seem to be an added harm  
13 that is associated with victimization that is  
14 associated with one's sexual orientation and I  
15 believe some other data would say with other sorts of  
16 identities as well.

17 CHAIRMAN CASTRO: Commissioner Heriot.

18 MR. MEYER: I just wanted to --

19 CHAIRMAN CASTRO: I'm sorry.

20 MR. MEYER: I just wanted to answer. I  
21 think that this has been shown with regard to other  
22 types of groups, and the reason behind it, as I said,  
23 is because of the symbolic value that is involved in  
24 something that is such a hate crime.

25

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1           And by the way, this was addressed by  
2 the Supreme Court in discussing the issue of hate  
3 crime and whether there can be added punishment for a  
4 hate crime.

5           An opinion written by Chief Justice  
6 Rehnquist actually acknowledged that social science  
7 finding about the added harm to the individual in  
8 society that comes from hate crimes because of the  
9 added hate aspect.

10           CHAIRMAN     CASTRO:           Thank     you.  
11 Commissioner Heriot?

12           COMMISSIONER HERIOT:     Thank you, my  
13 question is also for Drs. Herek and Meyer. I have  
14 just barely started to look at the empirical  
15 literature, but so far I am thinking there might be a  
16 tension here. On the one hand, there's the I'm okay,  
17 you're okay, everybody's okay, or almost everybody's  
18 okay line in the literature, and I'm thinking of the  
19 work of Dr. Rich Savin-Williams, and if I understand  
20 him, he is looking at the data, I assume very similar  
21 data to what you are looking at, and his point is  
22 that if you take the bisexual community out of the  
23 equation, you really don't run across higher mental  
24 health issues or higher suicide rates either, the  
25 rates are about the same as the heterosexual

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1 community.

2           And from that he concludes that this is  
3 just a normal sexual variant and it's all very  
4 normal, and everything's fine. On the other hand,  
5 there is the literature that I believe you have  
6 contributed to that concludes that the lesbian and  
7 gay communities do have higher rates of suicide and  
8 mental health issues. Can you reconcile that for me,  
9 is there something that you can point me to that  
10 would help me sort that out?

11           MR. HEREK: Yes. I think, actually I  
12 think Professor Meyer's work speaks more directly to  
13 that point.

14           MR. MEYER: Yes, as I said, there are  
15 different studies and you are doing different things  
16 when you are looking at different problems.

17           What Professor Savin-Williams was  
18 talking about is the fact that there are in fact  
19 areas in the country where gay youth are more  
20 accepted, they have less of those stressors that I  
21 was describing. He works particularly around Cornell  
22 University area, with gay youth there.

23           And he has shown that they are doing  
24 fine, which is consistent with what I have said and  
25 what Professor Herek said, that when the environment

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1 is supportive, when the parents, when the schools are  
2 supportive, these kids do very well.

3 In terms of the finding about suicide in  
4 particular that you quoted, it is true that bisexual  
5 youth have more problems than gay-identified youth,  
6 but both bisexual and gay youth have much more  
7 experiences of suicide ideation as well as serious  
8 suicide attempts, than heterosexual youth.

9 And this has been shown in many, many  
10 studies. There is actually a meta-analysis which, as  
11 I said, this is the kind of evidence that we like to  
12 see, where a researcher takes an accumulation of  
13 studies and looks at what the total shows, and this  
14 is going to be published soon by Marshall and shows  
15 over those many sets of studies.

16 COMMISSIONER HERIOT: My understanding  
17 is he found the suicide rates were actually the same.  
18 This does suggest that the bisexual community is  
19 different than the gay and lesbian community in this  
20 so we are dealing with a very complex problem here,  
21 probably more complex than the notion of bullying  
22 leads to suicide.

23 MR. MEYER: No, that is wrong. That was  
24 not the finding. The finding is that both gay and  
25 lesbian and bisexuals have more than heterosexual

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1 peers. But you are right that the bisexuals have more  
2 than the others, but they both have more than  
3 heterosexual peers.

4 COMMISSIONER HERIOT: Then we are going  
5 back to the --

6 CHAIRMAN CASTRO: No, Commissioner  
7 Heriot, I'm sorry I am going to once again have to  
8 interrupt you. We will try to come back to you at the  
9 end.

10 Commissioner Achtenberg will be followed  
11 by Commissioner Titus and Commissioner Gaziano, by  
12 Commissioner Yaki and Commissioner Kirsanow.

13 COMMISSIONER ACHTENBERG: Thank you, Mr.  
14 Chairman. This is going to be a question to Ms.  
15 Byard. I want to agree with Mr. Sasser that, if this  
16 were a case of training students to hold particular  
17 views, I would be vehemently against that for the  
18 particular reasons that you outlined in your  
19 testimony: forced professions are to be resisted at  
20 every turn; they shouldn't be the manifestation of  
21 the government, or private parties for that matter.

22 So I couldn't agree with you more. Nor  
23 would I disagree with the notion that, if this were  
24 an effort to get rid of ugly speech, we should turn  
25 away and run away as far and as fast as we could,

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1 because the government has no business in trying to  
2 outlaw ugly speech, no matter how offensive, provided  
3 it's not a precursor to ugly, damaging action.

4 Ms. Byard, could you talk a little bit  
5 about the training that we have heard so much about,  
6 and discuss the extent to which it forces students to  
7 hold or to manifest particular views or it is an  
8 effort to rid the public sphere of ugly speech?

9 MS. BYARD: I just want to say one thing  
10 first. It's hard to know what training people are  
11 referring to, in part because districts that have  
12 effective anti-bullying and anti-harassment policy  
13 that specifically address sexual orientation and  
14 gender identity, seek professional opportunities from  
15 a wide range of places such as --

16 COMMISSIONER ACHTENBERG: But just  
17 comment on whatever training you offer in this regard  
18 please.

19 MS. BYARD: Sure. The purpose of  
20 training for example, work that we did actually in  
21 partnership with the ADL in the City of New York, the  
22 respect for all --

23 COMMISSIONER ACHTENBERG: I'm sorry,  
24 with whom?

25 MS. BYARD: Sorry, the Anti-Defamation

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1 League.

2 COMMISSIONER ACHTENBERG: Anti-  
3 Defamation League, thank you.

4 MS. BYARD: GLSEN and the Anti-  
5 Defamation League were among the partners that  
6 provided district trainings in the City of New York,  
7 trainings that were designed to prepare school staff  
8 to respond effectively to the kinds of behaviors that  
9 could have a detrimental effect on student life.

10 And I think the follow-up issue here,  
11 and as I alluded to before, what we found was that  
12 these trainings over time, tracking the participants,  
13 actually had a good effect in terms of the ways in  
14 which those school staff responded to things  
15 happening in their schools.

16 But I would note very, very clearly and  
17 firmly, that all of this is about an issue of  
18 behavior, not belief. We are talking about efforts to  
19 ensure that schools as entities effectively act to  
20 deal with the hostile school environment the LGBT  
21 students currently face, and I would submit that we  
22 do not need to think that the student is in imminent  
23 danger of taking their own life to agree that that  
24 student is worthy of equal protection. I would say  
25 that the most important thing here is that there is

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1 significant common ground on the need to address the  
2 violence and harassment that young people face.

3 I was proud to be on panels with the  
4 head of the Christian Educators Association on this  
5 topic. I would also submit that ugly speech,  
6 including the words faggot and dyke, do not unto  
7 themselves constitute bullying or harassment. I want  
8 to be very clear about this. There is a context.

9 And the definition that has emerged at  
10 the state level that is showing a good effect in  
11 schools, for bullying and harassment, it's separate  
12 questions, includes the concept that the student has  
13 a reasonable fear of physical harm, as a result of  
14 what they are facing, and even a word as ugly as  
15 faggot or dyke, because I do not want us to lose  
16 sight about what we are actually talking about, has  
17 to be used in a context where it produces that  
18 expectation in a student in order to constitute  
19 bullying, or to constitute harassment.

20 CHAIRMAN CASTRO: The Chair recognizes  
21 Commissioner Titus.

22 COMMISSIONER TITUS: Thank you. I was  
23 talking earlier about what are the conditions that  
24 have led to the increase in bullying, but some other  
25 things have been said so I will just leave that.

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1 I am getting the impression that some of  
2 the members of the panel think that establishing a  
3 federal policy against harassment or bullying of LGBT  
4 students will somehow have a chilling effect on what  
5 students can say when they go to school about  
6 politics or about religion, and it will have a  
7 negative impact on local school policy.

8 But, and yet, allowing the states to do  
9 it, which seems to be the argument, the federal  
10 government doesn't do it, the states will, passing  
11 those laws doesn't seem to have that kind of negative  
12 effect on children or school districts, and I just  
13 don't quite get that, why it would make a difference.

14 Furthermore, I would like to ask Mr.  
15 Sasser, you keep citing the *Tinker* case but the  
16 *Tinker* case is a situation where the system worked.  
17 The First Amendment was protected. It was not  
18 popular, but the individual was protected. What makes  
19 you think the system would work then, and it wouldn't  
20 work now?

21 MR. SASSER: Well, actually, the problem  
22 with the system now is that the school officials are  
23 actually not following the clearly-established law.

24 If you look in my paper, you will see  
25 cases from just in recent years where you have a

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1 student in California, a person who had a Bible verse  
2 that referenced homosexuality in probably not a way  
3 that some people would appreciate, printed on a t-  
4 shirt and he was banned and he was discriminated  
5 against, not just by his peers, but by the actual  
6 government apparatus, the government officials  
7 themselves, inflicting that type of harassment and  
8 intimidation on him.

9 You have students who want --

10

11 COMMISSIONER TITUS: That was a local  
12 school board that did that, right, that wasn't a  
13 national intervention?

14 MR. SASSER: Well, that's exactly right.  
15 What I am saying is, though, that this problem is  
16 pervasive and ongoing, that there's a constant  
17 problem of harassment and intimidation on students of  
18 faith when they express sentiments that may disagree  
19 with official school orthodoxy that's in favor of,  
20 for example, homosexuality.

21 So that when this training happens and  
22 the teachers are there or the students receive  
23 various instruction and training, they are being  
24 taught that their beliefs, what they believe, is  
25 wrong, and they are intimidated and harassed into not

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1 wanting to express their beliefs, and this is not  
2 based upon conjecture. These are cases that we deal  
3 with on a daily basis.

4 CHAIRMAN CASTRO: The Chair recognizes  
5 Commissioner Gaziano.

6 COMMISSIONER GAZIANO: Hopefully my  
7 question follows nicely from Commissioner Titus's,  
8 because I am going to use one of the examples in your  
9 testimony. And I wonder whether it was -- I think you  
10 had two examples where a student wanted to wear a t-  
11 shirt that was deemed offensive to the message that  
12 the school was trying to convey, and the day of  
13 silence message that the school was trying to convey.

14 And I might disagree with some people  
15 who have argued that the schools ought not to teach  
16 morality or values. I actually think it's quite  
17 important for the schools to teach morality and  
18 values, including the western value of tolerance.

19 But what seemed problematic about the  
20 school district that -- the school that prohibited  
21 the student from wearing that t-shirt, is that, one,  
22 it violated the First Amendment, so that's an  
23 important value too; and number two, that doesn't  
24 teach the student real tolerance. Real tolerance that  
25 I want to be taught is the kind of tolerance that

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1 allows dissent, and if that is a real-world problem,  
2 that the school districts don't understand how to  
3 teach tolerance, I think it's much more likely, and I  
4 would like Mr. Clegg to answer this as well as you,  
5 Mr. Sasser, much more likely that we can straighten  
6 them out at the local level and explain to them what  
7 the First Amendment requires and what true tolerance  
8 is about, that I want taught.

9 But that if the federal government is  
10 involved, they resort to zero tolerance policies, and  
11 they hide behind -- they are either more resistant to  
12 teaching proper tolerance. Is that consistent with  
13 your all explanation?

14 MR. SASSER: Well, what I have seen in  
15 my practice is day after day, you have school  
16 districts who, out of fear for a loss of funding or  
17 whatever it may be, that they have to go around and  
18 stamp out any particular dissenting speech lest it  
19 lead to, nip it in the bud, lest it lead to some sort  
20 of feelings, unwanted feelings towards a particular  
21 student.

22 So, the problem that we have is one of  
23 lack of tolerance. The tolerance that we need, the  
24 value that we need is that the Constitution and the  
25 First Amendment protect all people, allow free and

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1 open debate on controversial topics, and the  
2 government's not going to put its thumb on the scale  
3 of one side or the other.

4 It's perfectly okay, as the en banc  
5 decision said, and the Supreme Court said, it's  
6 perfectly okay to teach uncontroversial values like  
7 being kind to your neighbor, and that the  
8 Constitution is a good thing, we love America and  
9 American exceptionalism and things of that nature,  
10 but what is not okay is to try to intimidate students  
11 into not expressing their beliefs even when the  
12 government doesn't agree with those messages.

13 And in this case it's about intimidating  
14 and harassing students who express religious  
15 sentiments. That's an ongoing sport that happens in  
16 school districts today. They intimidate today  
17 students who are engaging in religious speech, and we  
18 need more tolerance of that, not more clamping down.

19 CHAIRMAN CASTRO: Mr. Clegg.

20 MR. CLEGG: I agree, Commissioner  
21 Gaziano, with what you said and with what my co-  
22 panelist just said now. Again, this is an area — as  
23 we are learning more and more this morning — that  
24 has a lot of difficult line-drawing issues in it.

25

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1           Everybody seems to agree that those  
2 lines are best drawn by local governments, and I  
3 continue to hear nothing to suggest that local school  
4 boards are indifferent to drawing those lines in the  
5 right place.

6           I hear nothing that suggests that the  
7 federal government is going to play a helpful role in  
8 getting those lines drawn in the right place, and I  
9 continue to think that the federal government's  
10 involvement will actually make matters worse, because  
11 it's much more difficult for the federal government  
12 to draw these nuanced lines on the basis of local  
13 conditions, what was actually happening in the  
14 school, what the student actually said, all of that  
15 — much more difficult for the federal government to  
16 design a policy that is going to be sensitive to all  
17 of that — than leaving it to the local schools.

18           CHAIRMAN CASTRO: The Chair recognizes  
19 Commissioner Yaki.

20           COMMISSIONER YAKI: Thank you very much.  
21 I am somewhat confused by the discussion we have had  
22 over the last 15 minutes because, based on what I  
23 have heard, if we had this debate in 1963, we would  
24 still be talking about whether or not we should give  
25 equal rights to African Americans in this country.

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1 I mean, the idea that speech and conduct  
2 are not separate is well settled in constitutional  
3 law. They are completely separate.

4 The idea that a group of guys can sit  
5 around in white robes and burn a cross and say bad  
6 things to each other in a private thing, okay, they  
7 can do that. They can't go and do it outside a black  
8 church. They can't go and do it inside a black  
9 storeowner's location. This is -- we are not talking  
10 about the same thing.

11 This First Amendment discussion in some  
12 ways is really a red herring in terms of the speech/  
13 conduct separation that is well settled doctrine in  
14 American constitutional law.

15 I understand what you are saying. I am  
16 someone who is pretty much, Mr. Sasser, a First  
17 Amendment close to absolutist, *Cohen vs. California*,  
18 all those -- *Tinker* -- all those cases.

19 But the difference is, the difference is  
20 the distinction between someone talking -- going back  
21 to 1918, the difference between someone whispering to  
22 themselves in a theater, "fire," and someone  
23 screaming "fire" at the top of their lungs and  
24 causing a stampede and a panic.

25 There are consequences to speech that is

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1 aimed at conduct. And I think the -- what I want to  
2 hear, we have been talking about this a lot and I  
3 think that the testimony from Mr. Herek and Mr. Meyer  
4 has been illuminating, but I would like them to  
5 explain, again, because I don't think it -- it  
6 somehow hasn't resonated, I don't know why it hasn't.

7 But the fact is that we are not talking  
8 about someone who just casually says, well you know,  
9 I just hate blankety blanks, or I hate blankety  
10 blanks. That is not what we are talking about.

11 That's not what causes these  
12 debilitating problems for young people. Could you  
13 elaborate a little bit about it's not sort of the  
14 isolated person who kind of walks down the street and  
15 someone says I hate blankety blank. Ms. Byard, I  
16 can't even say those words. It's one of those things  
17 where I can't even say them.

18  
19 But Mr. Herek and Mr. Meyer, could you  
20 talk about what is, I guess, what is bullying? What  
21 is the impact of bullying, on the psyche, on the  
22 emotional defenses of a young person that is so  
23 different, that is why we are talking about it here  
24 today, because I think somehow, people are missing  
25 this. We are wrapping this up around the American

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1 flag, but the American flag is the Fourteenth  
2 Amendment as well --

3 CHAIRMAN CASTRO: Please, go ahead and  
4 answer.

5 MR. HEREK: Well yes, what we are  
6 talking about is children and youth who aren't simply  
7 having a reasoned discussion or disagreeing about a  
8 philosophical or religious point. What we are talking  
9 about is kids who are feeling that their safety --  
10 that they are not safe. They are feeling that they  
11 are going to be subjected to physical violence and in  
12 fact sometimes have been subjected to physical  
13 violence, and that this is something that pervades  
14 their life, often something that isn't even  
15 associated with a single perpetrator, but is  
16 associated with multiple members of their peer group  
17 who are harassing them and teasing them in a  
18 merciless way on an ongoing basis.

19 And, as Professor Meyer has said, these  
20 sorts of things are called stressors, and in the  
21 social scientific sense what we mean is that they do  
22 require the individual to respond.

23 And we know that people do what we call  
24 -- the term we use is coping, when someone feels that  
25 they have the resources needed to respond to

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1 stressors. We all face stressors all the time.

2           The problem occurs when people don't  
3 feel that they have the necessary resources to deal  
4 with the stressor, and that's where we end up having  
5 this experience where people actually have very  
6 negative consequences.

7           And so what we see in the school  
8 situation is that you have kids who probably could  
9 deal with occasional teasing or even namecalling or  
10 something like that, but this is something that often  
11 ends up being very pervasive and it's something that  
12 confronts them on a frequent basis, sometimes on a  
13 daily basis, and so that just requires huge amounts  
14 of psychological resources to respond to. It requires  
15 social support. It requires assistance from others  
16 and often what we see in the research is that the  
17 kids are saying that they don't have that. They don't  
18 -- not only are they experiencing this widespread  
19 harassment and teasing and brutality, but they are  
20 also not getting support, teachers are not stopping  
21 it from happening, other authority figures are not  
22 stopping it, there doesn't seem to be anything  
23 happening.

24           They end up feeling very much like they  
25 are isolated, they are on the outside, the world is

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1 against them and in fact they are right in a sense,  
2 in their subjective world it is largely against them,  
3 and that's what we see when we are talking about  
4 these very negative outcomes.

5 MR. MEYER: One point to add to that,  
6 that the importance of understanding these issues as  
7 I said before when I talked about stigma, is the  
8 social context for this.

9 So for a Christian kid to display -- to show  
10 attitudes that are supported by his community around  
11 him or her, is not the same as for a gay kid who is  
12 not supported within this community and who feels  
13 that they are subject to disrespect and disdain and  
14 hatred.

15 It is not the same. The context matters  
16 here a lot and the context is the stigma that  
17 surrounds this person, and in the United States,  
18 being Christian is not a devalued social identity.

19 So the other panelist talked about  
20 evidence. As an epidemiologist I look for evidence. I  
21 don't see evidence that Christian kids are harassed,  
22 that they attempt suicide, that they are thrown out  
23 of their homes for their Christianity, that they are  
24 bullied by their peers because they are Christian. I  
25 don't see that.

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1           And I totally share your frustration  
2 because I keep hearing from the other side about  
3 speech, which we all are in agreement about. This is  
4 not about speech. I think we have said it many, many  
5 times and I don't know how else to say it. This is  
6 really about serious infringement on these people's  
7 lives.

8           CHAIRMAN CASTRO:    The Chair recognizes  
9 Commissioner Kirsanow.

10           COMMISSIONER KIRSANOW:    I think this  
11 question is probably best directed toward either Mr.  
12 Sasser or if Professor Eastman wants to jump in.

13           This is an issue that I think all  
14 panelists have resolved and agree want to be  
15 addressed. Everybody wants to address the issue. But  
16 I think there's at least a tertiary inquiry.

17           First is the jurisdictional standards,  
18 then whether or not in terms of remedial efficacy,  
19 such standards should emanate from the federal or  
20 state or local school district, and then third,  
21 presumably you get from the first two what is the  
22 standard that should be applied.

23           And when we talk about harassment, what  
24 I see in the jurisprudence, it seems as if the  
25 harassment standards have evolved or emanated from

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1 the Title VII sexual harassment standards that  
2 originally began in the private sector. Now they are  
3 also applicable to public sector employment, but  
4 again it's employment.

5 Is that in fact the right standard, even  
6 in public employment, to be had, when we have in  
7 terms of schools a certain pedagogical imperative. If  
8 you look at *New Hampshire v. Sweezey*, the Supreme  
9 Court has recognized that we hold institutions of  
10 higher learning, for example, to a different First  
11 Amendment standard.

12 We want to encourage the free flow of  
13 ideas. If certain types of speech, even within a  
14 certain penumbra, and I very seldom use that term,  
15 are prohibited or circumscribed, as much as we want  
16 to do so, does that then impede the free flow of  
17 ideas?

18 And Mr. Sasser, do you find in your  
19 litigation a different, not necessarily a heightened  
20 standard, but a different standard that is applied  
21 both prudentially and jurisprudentially in the  
22 educational environments?

23 MR. SASSER: Well, what I would say is  
24 that the educational environment is the key place for  
25 the marketplace of ideas and the exchange of various

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1 viewpoints on a wide range of topics.

2           What I will say is that one of the  
3 things that really disturbs me about Professor Meyer  
4 and Professor Herek's testimony is that they seem to  
5 base everything upon the feeling of the hearer.

6           Well the feeling of the hearer can't be  
7 an appropriate standard because that's tantamount to  
8 a heckler's veto, which is that someone in the crowd  
9 is so upset and incensed about what is said, they  
10 have such an emotional response internally, that we  
11 have to shut down the speaker. We don't shut down  
12 speakers because there happens to be a visceral  
13 reaction or a negative, even a deep negative  
14 reaction, in the hearer.

15           And what I will finally say, and then  
16 I'll turn it over to Professor Eastman, is this, that  
17 the Supreme Court was very clear that we have to be  
18 careful not to strangle the free mind at its source,  
19 and that's in our educational system, that freedom of  
20 speech is something that is so important that we are  
21 going to tolerate things that we wouldn't want to  
22 tolerate necessarily in our own living room, but we  
23 are going to have to in the schools, because that's  
24 where the speech rights are beginning, as our  
25 students are learning.

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1           Now there obviously are going to be  
2 things that are age-inappropriate that's for students  
3 not to be discussing, certain sexual topics, students  
4 obviously shouldn't be exposed to or talking about at  
5 very young ages in elementary school and  
6 kindergarten, shouldn't be sex education or sexual  
7 discussions there, obviously.

8           But for the most part students need to  
9 be free to disagree amongst themselves in respectful  
10 ways, in ways during non-instructional time that do  
11 not disrupt the educational environment. That's what  
12 the law is. It's very clear.

13           CHAIRMAN CASTRO: Professor Eastman to  
14 be brief and then Commissioner Titus will have the  
15 last question.

16           MR. EASTMAN: Sure, and I think it's  
17 important to see how the speech and the concept  
18 things overlap, so let me address when students come  
19 to school wearing t-shirts that say homosexual  
20 conduct is a sin, or take the religious connotation  
21 out, homosexual conduct is immoral, or homosexual  
22 conduct is against nature.

23           And a number of students wear that, and  
24 then somebody pushes one of the students who has  
25 self-identified as gay and lesbian, that conduct then

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1 results in the normal sanction by the school  
2 officials, to the bully who did the pushing who  
3 crossed over the line into violence.

4 But the message is then taken as part of  
5 the hostile environment, that ups the ante on what  
6 the school district's response has to be, and that's  
7 where the danger starts that Vice Chairman Thernstrom  
8 talked about, the danger into speech sanction or  
9 speech censorship because that becomes part of the  
10 backdrop that creates hostile environment. That's not  
11 just the discrimination by school districts that we  
12 are treating the conduct differently. That's covered  
13 by the civil rights statutes, but the consequences of  
14 that broader message that might be there, leading to  
15 the hostile environment claim, provides the direct  
16 connection with speech and that's where the danger  
17 is.

18 CHAIRMAN CASTRO: Thank you Professor  
19 Eastman. Commissioner Titus, you have the last  
20 question.

21 COMMISSIONER TITUS: Thank you. Mr.  
22 Clegg, I just seem to keep going back to you but I  
23 can't help it. You argue that one of the reasons we  
24 don't need a federal policy is that our schools don't  
25 have entrenched policies against sexual minority

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1 students. Well, I would like to ask Ms. Byard, what  
2 about the benign neglect or turning a blind eye or  
3 neutrality policies, those aren't specifically anti-  
4 minority, sexual minority students, but aren't they  
5 part of the problem?

6 MS. BYARD: If that scenario were true,  
7 and schools responded when conduct crossed the line  
8 into bullying and physical violence, we would not be  
9 here today. That is not what is happening.

10 Schools are not responding in a way  
11 sufficient to protect the educational access,  
12 physical well-being and emotional well-being of young  
13 people who are facing violence and harassment every  
14 day.

15 The conduct we are talking about as  
16 bullying involves the definition, involves fear of  
17 physical harm and harassment that we talk about is  
18 severe, pervasive and objectively offensive in ways  
19 that keep you from enjoying the benefits of going to  
20 school.

21 I would also like to note, for the  
22 amount of time that we have spent talking about  
23 religious issues here, that the definition for which  
24 GLSEN advocates includes religion among its protected  
25 categories. We have no interest in chilling speech.

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1 We want good schools where our children learn in a  
2 way where they can participate and compete in a  
3 diverse society and where everyone's child is  
4 afforded the same respect and opportunity.

5 But what we are here to discuss is the  
6 necessary federal response that would set a bottom  
7 line standard for safety, for anti-harassment  
8 policies that protect young people on the basis of  
9 race, religion, national origin, disability, sexual  
10 orientation, gender, and gender identity, and I would  
11 not wish to withhold that equal protection from any  
12 child, because I want it for my own.

13 CHAIRMAN CASTRO: Thank you. Thank you  
14 all. It is now 12:11. This panel is concluded. We  
15 appreciate the time and effort and the information  
16 you have shared with us. Thank you.

17 We will be back and starting at 1:00  
18 o'clock sharp, so I ask all panelists for the next  
19 panel, all Commissioners, and all audience members to  
20 be back in this room at 12:55 because we will start  
21 promptly at 1:00 o'clock. Thank you.

22 (Whereupon, the above-entitled  
23 meeting went off the record at 12:12 p.m., and  
24 resumed at 1:02 p.m.)

25 CHAIRMAN CASTRO: We are back after our

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1 lunch break. It is now 1:02 p.m. I want to welcome  
2 everyone to our Race and National Origin, Religion  
3 and Disability Panel.

4 PANEL 3: RACE/NATIONAL ORIGIN, RELIGION, AND  
5 DISABILITY

6 CHAIRMAN CASTRO: This afternoon's  
7 panelists are Paula Goldberg, Executive Director of  
8 the PACER Center, Helen Gym, Vice President of the  
9 Asian Americans United, Stuart Buck, Doctoral Fellow  
10 at the University of Arkansas, Kenneth Marcus,  
11 Executive Vice President of the Institute for Jewish  
12 and Community Research, Hilary Shelton, Senior Vice  
13 President of Advocacy for the NAACP, and Rajdeep  
14 Singh, Director of Law and Policy for the Sikh  
15 Coalition.

16 You'll each have seven minutes to make  
17 your statements. As I said earlier, if you weren't  
18 here, there's a series of traffic lights here that  
19 have red, yellow, green, so we all know what that  
20 means.

21 When yellow comes on, you've got two  
22 minutes left, and we ask you to wrap up with red.  
23 Yes, I'm going to be rude and interrupt folks in the  
24 middle of their statements, but I hope that won't  
25 happen.

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1           Thereafter, we'll have 60 minutes of  
2 discussion.

3           I now ask all the panelists to please  
4 raise your right hand and swear or affirm that the  
5 information you're about to provide is true and  
6 accurate to the best of your knowledge and belief.  
7 Is that so?

8           (CHORUS OF YESES.)

9           Let the record reflect they've all said  
10 yes.

11           So, we will begin our questioning -- our  
12 statements this morning with Ms. Goldberg. Please  
13 begin.

14           MS. GOLDBERG:       My name is Paula  
15 Goldberg, and I am the Executive Director and Founder  
16 of PACER Center, a national parent center in  
17 Minnesota that provides information and resources to  
18 parents of children with all disabilities.

19           PACER began its national bullying  
20 prevention center six years ago, after receiving  
21 numerous calls from parents about their children with  
22 disabilities being bullied.

23           PACER's National Bullying Prevention  
24 Center has since expanded to serve all children, and  
25 PACER is also the founder of National Bullying

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1 Prevention Month, which is in October.

2 I would like to thank members of this  
3 Commission for inviting me today, and I would also  
4 like to recognize Commissioner Dina Titus for her  
5 being an advocate for her entire career in Nevada for  
6 people with disabilities. And the Nevada Parent  
7 Information Center has also partnered with PACER on  
8 bullying issues.

9 I want to begin by sharing just several  
10 stories about children with disabilities. A month  
11 ago, I personally received a call from a mother who  
12 has two sons with Asperger's Syndrome. She shared a  
13 horrific story of three years of bullying and  
14 harassment against her sons and their family by 15 to  
15 20 teenagers.

16 The teenagers damaged the family home on  
17 many occasions, including one incident where five  
18 dozen eggs were thrown against the house the night  
19 before the funeral of the grandsons' -- their  
20 grandmother.

21 The teens also left feces on the steps  
22 of the house with a threatening note. When one of  
23 the sons went on his first date, the teens hung  
24 bloody tampons all over the car. The son has not  
25 dated since.

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1           The bullying also occurred at school,  
2           where one son was urinated on in the locker room, and  
3           the teenagers also cyberbullied the sons.     The  
4           bullying was so pervasive that the son went into a  
5           long-term depression.

6           The parent said that her family's life  
7           has been changed forever because of the teenagers who  
8           made a project to terrorize her two sons.     She said,  
9           "they took something from our family that we can  
10          never get back."

11          The parent talked to a school  
12          administrator who said that, if the family didn't  
13          like the bullying that was occurring, the son should  
14          leave the school, which they did.

15          The second story involves a 12-year-old  
16          girl with epilepsy who attended a small rural school  
17          where everyone had grown up together.

18          She had a seizure at school.     The girl  
19          was ostracized then by the entire school, including  
20          the school staff.     She was ordered to sit alone  
21          during class and lunch.

22          When she would walk into the bathroom,  
23          the girls would all fall down and imitate her  
24          seizures.     The girl's classmates would steal her  
25          books and homework, lock her in closets, and draw

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1 pictures of her having a seizure and then post them  
2 throughout the school.

3 After months and months of begging, her  
4 grandma finally agreed to homeschool her. Since this  
5 incident, the girl has had no friends and is ashamed  
6 of her disability.

7 A third very short story involves a 15-  
8 year-old boy with learning disabilities. He was  
9 bullied every Friday. Why? Because a group of  
10 students called Friday "beat up the retard day."

11 These are just several examples of the  
12 hundreds of stories PACER has heard from all over the  
13 country regarding bullying of children on the basis  
14 of disability.

15 Research demonstrates that children with  
16 disabilities are bullied more frequently than their  
17 peers without disabilities. In one study, 60 percent  
18 of students with disabilities reported being bullied,  
19 compared to only 25 percent of typical students.

20 Another report found that children with  
21 disabilities were 10 times more likely to be bullied  
22 than a typical student. In response to these  
23 alarming statistics and stories, PACER has developed  
24 innovative resources to educate all students with  
25 information on how to effectively respond to

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1 bullying.

2 PACER's elementary website,  
3 kidsagainstbullying.org, was designed first, and was  
4 so successful that, in 2009, PACER created a second  
5 website for teenagers called  
6 teensagainstbullying.org.

7 The websites focus on engaging  
8 bystanders to make a difference and have evolved to  
9 include classroom toolkits which educators and other  
10 professionals can download for free to use in  
11 educating students.

12 PACER's national bullying prevention  
13 website, [pacer.org/bullying](http://pacer.org/bullying), includes links to all  
14 these resources for parents, students, teachers, and  
15 the community.

16 PACER views bullying of children with  
17 disability and all bullying as a civil rights issue.

18 PACER recommends the following: enact a  
19 federal bullying law that enumerates the protected  
20 classes of disability, race, ethnicity, national  
21 origin, sex, and sexual orientation and gender  
22 expression.

23 PACER recognizes that bullying knows no  
24 boundaries, but that specific groups of students,  
25 especially students with disabilities, are more often

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1 targeted than their peers, and there needs to be  
2 prevention strategies to address their protected  
3 civil rights.

4 This law should be incorporated into the  
5 reauthorized Elementary and Secondary Education Act,  
6 and should include the following provisions:

7  
8 A) require training on bullying  
9 prevention for school administrators, educators,  
10 parents, and students. The stories that I share  
11 clearly demonstrate the need for increased training  
12 for professionals, so they are able to respond  
13 appropriately when bullying incidents occur.

14 B) Establish a nonprofit center in every  
15 state that can provide technical assistance and  
16 resources to parents, professionals, and students to  
17 prevent and respond to bullying. Two -- and also,  
18 I'm sorry, and collect data on bullying incidents.

19 Two, incorporate bullying prevention  
20 language into the Individuals With Disability  
21 Education Act and state special education laws also  
22 that bullying must be addressed in a student's  
23 individual education program, or IEP.

24 Three, urge states to require bullying  
25 prevention training to be included in teacher

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1 preparation courses, especially for elementary and  
2 secondary teachers and coaches.

3 Four, teach peer advocacy and support  
4 skills to students in all schools.

5 Five, implement initiatives that are  
6 school-wide, such as PBIS, which stands for Positive  
7 Behavior Intervention Support, to prevent bullying  
8 and creating a school culture and climate that is  
9 safe and respectful and encourages positive  
10 behaviors.

11 We recognize that bullying is a complex  
12 societal problem, and that there are no simple  
13 solutions. However, we believe we can prevent  
14 bullying by systematically engaging and educating  
15 students, parents, school professionals, and the  
16 community.

17 We believe that we can and must prevent  
18 bullying. The end of bullying begins with everyone  
19 in this room.

20 Thank you.

21 CHAIRMAN CASTRO: Thank you, Ms.  
22 Goldberg.

23 Ms. Gym?

24 MS. GYM: Good afternoon. On December  
25 3rd, 2009, more than two dozen Asian immigrant

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1 students were beaten in a series of assaults at South  
2 Philadelphia High School.

3 The assaults began before 9:00 a.m.,  
4 when teachers reported groups of students roaming the  
5 hallways looking for Asian students. In one  
6 classroom, a dozen students rushed inside and  
7 assaulted an Asian student, reportedly beating him  
8 and throwing a desk on top of him.

9 Before 11:00 a.m., there was a rush of  
10 20 to 40 students onto a hallway where immigrant  
11 students took classes. While school police held the  
12 crowd back, teachers hurried students into classrooms  
13 and locked their doors.

14 At lunchtime, Asian immigrant students  
15 expressed fear of going to the cafeteria, but their  
16 request to remain in their classroom was denied by  
17 the school principal, who ordered them downstairs  
18 where they were subsequently attacked by more than 60  
19 to 70 students, and security cameras showed other  
20 students egging them on.

21 Around 1:00 p.m., a group of three to  
22 five students dragged an Asian girl down the  
23 stairwell by her hair.

24 After school, 10 Asian students  
25 requested to remain in the building, expressing fear

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1 of larger-than-usual crowds that had amassed on  
2 street corners.

3 They were ordered outside and, although  
4 the school principal offered to walk them home, she  
5 quickly dropped from sight.

6 A crowd of more than 100 chased them,  
7 cornered, and surrounded the students, most of them  
8 young girls, as 20 to 40 of their peers beat them.

9 At the end of the day, more than two  
10 dozen Asian immigrant students had been assaulted,  
11 many more were terrorized, and 13 went to the  
12 emergency room for treatment.

13 Afterwards, a regional superintendent  
14 told the media that -- shrugged the day off as a  
15 blip, and the District Safety Chief and school  
16 principal reported that a minor incident had happened  
17 off school grounds and no students were injured.

18 As shocking as the events of this day  
19 were, they were far from isolated. For more than a  
20 year, Asian Americans United, along with the Asian  
21 American Legal Defense and Education Fund and a  
22 number of community advocates, have been raising  
23 alarm bells about increasing anti-Asian, anti-  
24 immigrant violence at South Philadelphia High School.

25 My own involvement began in October 2008

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1 after five immigrant students were severely beaten in  
2 the subway by dozens of their classmates. Twenty  
3 Chinese youth met with community leaders and  
4 requested their involvement.

5 Over the ensuing months, we documented  
6 dozens of incidents from multi-student assaults to  
7 random beatings, threats, and intimidation, racial  
8 slurs, and near-constant harassment and ridicule for  
9 students who are Asian and recent immigrants.

10 The harassment did not just come from  
11 students. Yo, Dragon ball. Hey, Chinese. Speak  
12 English. Those were some of the comments students  
13 reported that staff members said to them.

14 Staff members who also turned their  
15 faces away when classmates threw food at them in the  
16 cafeteria or shoved them out of line, a staff member  
17 who mimicked Asian students' accents in front of  
18 others, security personnel who failed to investigate  
19 reported complaints, or worse, refused to file  
20 incident reports unless students spoke English to  
21 them, and who failed to call for translation  
22 assistance for concerned parents and families.

23 As one student said, "as soon as we  
24 opened our mouths, we were treated like animals."

25 In response to the October 2008

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1 beatings, immigrant students began organizing to  
2 raise their concerns. They formed a Chinese Student  
3 Association. One immigrant student leader volunteered  
4 on the school's Safety Task Force.

5 Community advocates and students met on  
6 multiple occasions with administrators and school and  
7 district leaders about addressing the anti-Asian,  
8 anti-immigrant climate, but the reaction we  
9 experienced was stubborn resistance, denial, and  
10 delay.

11 When the December 2009 violence  
12 happened, these students did the unexpected,  
13 therefore. They boycotted their school.

14 For eight days, more than 50 and upwards  
15 of up to 70 to 80 students met every single day for  
16 eight hours a day to analyze the situation at their  
17 school, document the violence, and work on solutions.

18 They called for recognition about racial  
19 and anti-immigrant bias against them, a responsible  
20 and responsive safety plan, dialogue among staff and  
21 students, curriculum and, above all, moral leadership  
22 from the adults who are charged to serve them.

23 In our 25 years in working with Asian  
24 youth in our public schools, many of whom are recent  
25 immigrants, we have been repeatedly struck by the

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1 failure of schools to recognize and address violence  
2 in general and anti-Asian, anti-immigrant violence in  
3 particular.

4 In the 1980s, Southeast Asian students  
5 were targeted in rampant violence at another  
6 Philadelphia public school. Even when one Vietnamese  
7 student had his neck broken in an attack, the school  
8 remained unresponsive to addressing anti-Asian bias.

9 Years of advocacy eventually resulted in  
10 the creation of an office of multi-Cultural  
11 Curriculum and the hiring of Latino and Asian-  
12 American curriculum specialists who provided  
13 curricular and academic resources, as well as  
14 training for staff and schools.

15 Today, over the past decade, we now see  
16 that the district has disbanded its Asian and Latino  
17 studies curriculum offices, and its current anti-  
18 harassment policy does little more than reiterate  
19 that students and individuals are prohibited from  
20 harassing others, rather than creating a fuller  
21 context for helping schools understand that.

22 One would have hoped that the attacks on  
23 December 2009 would have served as a wake-up call to  
24 address serious anti-immigrant, anti-Asian violence  
25 within the institution at the school.

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1           Instead, school and district officials  
2 denied that the attacks against Asian immigrant youth  
3 had anything to do with race, failed to communicate  
4 with student victims and families, refused to hold  
5 adults in the school accountable, and even retaliated  
6 against Asian immigrant victims.

7           Through the rest of the year, we  
8 documented more than half a dozen continued violent  
9 incidents against Asian students, physical assaults  
10 that is, and more than a dozen harassment incidents.

11           As appalling as the December 2009  
12 attacks were, it was the egregious conduct of school  
13 officials in the months leading up to that day and in  
14 the months following that warranted federal  
15 intervention.

16           It is this experience which has shaped  
17 our firm belief in the necessity of federal  
18 intervention in bias-based harassment at schools, and  
19 the valuable role that the US Department of Justice  
20 has in this collaboration with communities to  
21 implement at South Philadelphia High School what we  
22 hope is a groundbreaking settlement agreement to  
23 address bias in schools across the country.

24           But I would like to address the  
25 Commission around two central points. First, schools

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1 and district officials bear responsibility for not  
2 addressing a pervasive climate of bias and  
3 harassment. This is not solely or even primarily a  
4 student-to-student problem.

5 Second, there is a difference between  
6 bias-based harassment and generalized violence and  
7 bullying in schools, and each requires a different  
8 approach towards remediation.

9 The US Department of Justice settlement  
10 charged the school district of Philadelphia with  
11 deliberate indifference, and here's how it played  
12 out: denial of anti-Asian, anti-immigrant bias.

13 On repeated occasions, district  
14 officials denied that the targeted violence was  
15 racial. They blamed a few bad apples, violent homes  
16 and communities, gangs, and a general pandemic of  
17 violence in society.

18 When community members raised concerns  
19 about racial bias and slurs, their concerns were  
20 characterized as emotions and sensitivities unrelated  
21 to physical attacks, or worse, as part of quote "an  
22 Asian agenda," according to the school principal at  
23 the time.

24 There was a failure to investigate and  
25 document incidences; district officials repeatedly

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1 failed to investigate incidences of violence  
2 documented against them.

3 Students who reported complaints often  
4 found that those reports were dismissed, therefore,  
5 as accidents, mutual fighting, or misunderstanding.

6 The district failed to translate  
7 documents or provide students and families with  
8 interpretation. Students reported that school  
9 security did not offer translation assistance to  
10 students who made complaints, and therefore, did not  
11 investigate them, or only heard the perspective of  
12 the English-speaking students.

13 School and district officials also  
14 spread misunderstandings about English language  
15 classes offered to students, referring to such  
16 programs as a dynasty that "needed to be broken up,"  
17 or implied that language services were special  
18 privileges or desire for segregation.

19 CHAIRMAN CASTRO: Thank you, Ms. Gym.

20 Mr. Buck?

21 MS. GYM: Oh, I'm sorry.

22 CHAIRMAN CASTRO: It's okay. Well,  
23 we'll come back and ask you some questions, so.  
24 Thank you.

25 MR. BUCK: Thank you. I'm Stuart Buck,

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1 a doctoral fellow at the University of Arkansas, and  
2 I wrote the book, Acting White. It was published by  
3 Yale University Press last year. So I was asked to  
4 talk about the "acting white" criticism as a possible  
5 form of intra-racial bullying.

6 First of all, what is acting white?  
7 "Acting white" is when a black student accuses a  
8 fellow classmate of "acting white" or trying to be  
9 white because of that classmate's behavior.

10 And that behavior could include  
11 schoolwork, showing too much excitement about  
12 schoolwork or studying too hard, but it can also  
13 include cultural patterns of behavior such as how  
14 someone dresses, how they talk, what sort of music  
15 they listen to, and the like.

16 There is a recent example that made the  
17 newspaper in Norfolk, Virginia. Ixavion Wright  
18 graduated first in his class at Lake Taylor High  
19 School there. He told the local newspaper that he  
20 thinks "the `acting white' pressure influenced other  
21 students. They feel they're supposed to be cool, and  
22 cool is not supposed to be making good grades in  
23 school. As I've gone through my whole school career,  
24 people have called me white because I've made good  
25 grades and didn't conform to the stereotype."

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1           Another example from Mesa, Arizona that  
2 also made the local newspaper, a girl named Alexandra  
3 Gray said, "All my life, I've been accused of `acting  
4 white.' Just because you are articulate or take AP  
5 classes, kids want to say that, but I'm only being  
6 me. I'm only being myself."

7           And another incident from Florida,  
8 Clarence Stephen, the 2004 valedictorian at Seminole  
9 High School in Orlando, heard his black classmates  
10 say that he was "a white boy in a black man's body."

11           Now, these are just anecdotes, of  
12 course. So what about more systematic evidence?

13           I've found more than a dozen scholarly  
14 studies from 1970 to the present day demonstrating  
15 that the "acting white" criticism does affect some  
16 black schoolchildren, not all. To be sure, I admit  
17 it's impossible to find the exact rate at which  
18 "acting white" occurs. The rate surely differs  
19 widely, depending on the time and place, and many  
20 such incidents might never be reported in the first  
21 place.

22           But a few of the studies, one recent  
23 study surveyed 166 gifted black students in Ohio and  
24 found that two-thirds of them reported that they knew  
25 someone who was ridiculed for doing well in school,

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1 that most students thought of "acting white" as being  
2 smart, and that most students defined "acting black"  
3 as being dumb and pretending not to care about  
4 school.

5 Ronald Ferguson of Harvard did a survey  
6 of 20 high schools in eight states. He found that,  
7 in integrated schools, almost half of the A students  
8 reported that they were sometimes or always accused  
9 of "acting white".

10 In a 1996 book, psychology professor  
11 Laurence Steinberg reported on the results of a  
12 multi-year study that surveyed some 20,000 high  
13 school students.

14 In his words, "we heard variations on  
15 the 'acting white' theme many, many times over the  
16 course of our interviews with high school students.  
17 As a result, many black students are forced to choose  
18 between doing well in school and having friends."

19 The most recent and systematic evidence  
20 comes from Roland Fryer, an African-American  
21 economist at Harvard. He found in a large and  
22 nationally representative survey that, while white  
23 students' popularity grew along with their GPA, kind  
24 of a steady curve upwards, black students with a 3.5  
25 GPA or higher suffered a huge hit to their

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1 popularity.

2 In his words, "A black student with a  
3 4.0 has an average one-and-a-half fewer friends of  
4 the same ethnicity than a white student with the same  
5 GPA."

6 Now, to be sure, this study is about  
7 popularity in general, not about specific bullying  
8 incidents, but it does shed light on the unfortunate  
9 fact that academic success sometimes can be penalized  
10 by one's peers.

11 Now, interestingly, he found that the  
12 "acting white" criticism seems to have a stronger  
13 effect on boys, which possibly could help explain why  
14 black boys graduate from high school at a lower rate  
15 than black girls.

16 In his words, "Popularity begins to  
17 decrease at lower GPAs for young black men than young  
18 black women, at 3.25 GPA compared to a 3.5, and the  
19 rate at which males lose friends after this point is  
20 far greater.

21 "As a result, black male high achievers  
22 have notably fewer friends than do female ones."

23 Now, I want to emphasize and clarify  
24 that there are many students from all races who  
25 criticize nerds or geeks or who act in some way

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1 antagonistic towards the world of school, and this  
2 has been an unfortunate kind of anti-intellectual  
3 bent to American life for many decades.

4 Fifty years ago, the sociologist James  
5 Coleman found in his book, The Adolescent Society,  
6 that in white high schools in Illinois, boys were  
7 prized for their cars or athletic ability and girls  
8 were valued mainly for their physical beauty, nice  
9 clothes, and an enticing manner, in his words.

10 So he found that "The adolescent  
11 subcultures in these schools exerts a rather strong  
12 deterrent to academic achievement."

13 And more recently, Laurence Steinberg,  
14 who I've already cited, found in his study of some  
15 20,000 students that adolescent peer culture in  
16 contemporary America demeans academic success and  
17 scorns students who try to do well in school.

18 Still, the "acting white" accusation  
19 could be more devastating than the "nerd" or "geek"  
20 labels. One black scholar recently pointed out that  
21 a student who's accused of "acting white" is  
22 essentially being told they do not belong in the  
23 black race, and she even said, her emphasis, "`Acting  
24 white' is the most negative accusation that can be  
25 hurled at black adolescents."

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1           So, as far as I know, there's been only  
2 one federal lawsuit alleging that the "acting white"  
3 criticism was so pervasive that it created a hostile  
4 racial environment in violation of federal law, and  
5 that lawsuit was settled out of court for \$150,000 as  
6 reported, and the citation's in my written statement.

7           As reported in South Carolina Lawyers  
8 Weekly, the plaintiff's lawyer said, you have a  
9 culture where to act like you want to do well in  
10 school is considered "acting white," and that's part  
11 of why we're saying that it was racial, even though  
12 the students were all the same race, because they  
13 weren't acting how the others thought they should be  
14 acting as members of that race.

15           So I guess the further question is,  
16 should the law be involved here? However you answer  
17 that question, I think the answer ought to be the  
18 same as your answer to the question of sexual  
19 orientation discrimination that was discussed this  
20 morning.

21           And I say this because, as I read the  
22 statutes, the statutory prohibitions on sex  
23 discrimination and race discrimination are exactly  
24 parallel to each other. They're practically  
25 verbatim, except that one says race and the other

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1 says sex.

2 So if you think that sex discrimination  
3 should include discrimination against someone not  
4 merely for their sex in and of itself, but for  
5 displaying a particular pattern of behavior and  
6 preferences along with -- that's deemed inappropriate  
7 for that sex, then, likewise, it seems you ought to  
8 interpret the ban on race discrimination as including  
9 acts of discrimination, and it could be white or  
10 black or any other race, that are aimed at a  
11 particular student, not for the race in and of  
12 itself, but for acting in a way that is deemed  
13 inappropriate for that particular race.

14 So I think the answers to those two  
15 questions ought to be kind of parallel, just like the  
16 statutes are.

17 So that's all I have, and I thank you  
18 for inviting me.

19 CHAIRMAN CASTRO: Thank you, Mr. Buck.

20 Mr. Marcus?

21 MR. MARCUS: Thank you. Chairman  
22 Castro, Vice Chair Thernstrom, and members of the  
23 Commission, it's a pleasure to appear before you  
24 today on an occasion where I cannot be blamed for  
25 anything that goes wrong here at the Commission for

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1 once.

2 (Laughter.)

3 I have been asked to address harassment  
4 and bullying of religious minorities today, and I  
5 appreciate your including within this briefing the  
6 topic of religious harassment, an understudied topic,  
7 because I believe that any comprehensive approach to  
8 the problem of bullying and harassment needs to  
9 include a discussion of religious minorities.

10 Today I will urge the Commission to  
11 recommend that Congress introduce legislation that  
12 would prohibit harassment of religious minorities,  
13 which surprisingly still is not barred by federal  
14 civil rights law.

15 In my experience, the best way of  
16 understanding the problem of religious harassment is  
17 by way of examples, so I will give you just a few.

18 The first one that came to my attention  
19 when I was Acting Head of the Office for Civil Rights  
20 a few years ago involved a Sikh seventh-grade student  
21 in New Jersey who faced serious and repeated  
22 harassment at his school.

23 This included taunts of Osama, and a  
24 physical assault on the school grounds that resulted  
25 in head injuries.

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1           In Pennsylvania, a Sikh eighth-grader  
2 was called Bin Laden, told to go back to turban land,  
3 and had his religious head covering yanked, again,  
4 because students conflated his religious identity  
5 with those responsible for the 9/11 attacks.

6           According to a 2007 report, nearly one  
7 in five New York City Sikh students were harassed  
8 because they were misidentified as terrorists.

9           Mr. Chairman, I hope I'm not swimming  
10 too much in Mr. Singh's lane. There are many other  
11 examples that could be raised.

12           In a different incident, a Muslim junior  
13 high school student reported being beaten until he  
14 bled at a Staten Island middle school.

15           "They punched me," he reported. "They spit in  
16 my face. They tripped me on the floor, they kicked  
17 me with their feet, and they punched me. And as they  
18 were kicking and laughing," he said, "they kept  
19 saying, `You F-ing terrorist, F-ing Muslim, you F-ing  
20 terrorist.'"

21           This young man reported being kicked so  
22 hard in the groin that he bled in his urine.

23           In another incident, students at a  
24 different school allegedly yanked a 13-year-old  
25 Muslim girl's head scarf and beat her. "They just

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1 attacked me," she said. "They called me terrorist.  
2 They called me Muslim. I am afraid that they will  
3 come back and beat me again."

4 Over the last few years, we've seen some  
5 schools that have had "Kick a Jew Day" on school  
6 grounds during school hours. Some of these events  
7 may have been inspired by a 2005 television episode  
8 called "Kick a Ginger Day" on the South Park  
9 television program, which has mutated into scores, if  
10 not hundreds, of facebook "Kick a Jew" pages, which  
11 have been enacted by dozens of students on some  
12 school grounds.

13 These incidents are sadly representative  
14 of a host of problems that were faced -- that we're  
15 facing around the country. In some cases, school  
16 administrators or law enforcement officials take  
17 prompt and effective action. In other cases, they do  
18 not.

19 What I would argue is that whatever  
20 apparatus that we have to deal with harassment of  
21 other minority groups, we should have the same degree  
22 of protection for religious minority students, and  
23 yet we don't.

24 There is a gap in federal civil rights  
25 law which has allowed these incidents to occur, and

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1 this Commission can play an important role in fixing  
2 it.

3 To this day, Congress has never acted to  
4 prohibit religious discrimination in federally-  
5 assisted programs and activities such as elementary  
6 and secondary schools.

7 Title 6 of the Civil Rights Act of 1964  
8 prohibits discrimination on the basis of race, color,  
9 or national origin in federally-assisted programs or  
10 activities. This list of classifications has been  
11 expanded by legislation over the years to include  
12 discrimination on the basis of sex, disability, age,  
13 and even membership in certain patriotic youth  
14 organizations like the Boy Scouts of America, but has  
15 not been included -- has not been expanded to include  
16 religion.

17 Now, there is an exception. There is a  
18 difficult problem that arises with respect to what  
19 one might call ethno-religious groups, that is to  
20 say, groups that have both religious and ethnic  
21 attributes.

22 The Office for Civil Rights at the  
23 Department of Education has gone back and forth over  
24 this issue during the years. For most of the Office  
25 for Civil Rights' history, when it got complaints

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1 from groups like Jews, it would say, I'm sorry, Jews  
2 are members of a religious group, we do not have  
3 jurisdiction.

4 In 2004, when I headed the Office for  
5 Civil Rights, I issued guidance which said that, if a  
6 group like Jews or Sikhs that have both ethnic and  
7 also religious characteristics faced discrimination  
8 based on ethnic or ancestral attributes, OCR needs to  
9 move forward. That policy was essentially  
10 disregarded for several years after my departure.

11 I'm pleased to say that in October of  
12 this year, Assistant Secretary Russlynn Ali included  
13 a very important provision in her Dear Colleague  
14 Letter which established once again that OCR will  
15 address ethnic or ancestral discrimination against  
16 groups like Jews or Sikhs. I think that was a very  
17 important development for which Assistant Secretary  
18 Ali should be commended.

19 However, that policy remains an informal  
20 guidance. It is not permanent in the way -- or  
21 durable in the way that legislation is. It could be  
22 disregarded by future administrations in the same way  
23 that the 2004 policy was disregarded between 2004 and  
24 2010. Moreover, it has an enormous loophole for  
25 students who face discrimination on purely religious

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1 grounds.

2           There is, I would argue, no reason why a  
3 school should escape any sort of overview or  
4 oversight on the grounds that the hostile environment  
5 that it permits is merely religious and not racial or  
6 ethnic. There are many other reasons why I think  
7 legislation would be appropriate here, and I would  
8 suggest that the written submission describes those  
9 reasons in greater length.

10           I would suggest that, while  
11 administrative action like Assistant Secretary Ali's  
12 is helpful, it is really only Congress that can  
13 provide the fix that's required here, and that this  
14 Commission can play a very important role by  
15 recommending that legislation.

16           CHAIRMAN CASTRO: Thank you, Mr. Marcus.

17           MR. MARCUS: My pleasure.

18           CHAIRMAN CASTRO: We'll come back and  
19 ask you some questions.

20           Mr. Shelton?

21           MR. SHELTON: Thank you, Chairman  
22 Castro, and members of the US Commission on Civil  
23 Rights for holding this important briefing and for  
24 inviting me to participate. The NAACP greatly  
25 appreciates the opportunity to voice our thoughts and

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1 concerns on this crucial issue.

2           Founded more than 102 years ago in 1909,  
3 the NAACP is our nation's oldest and largest  
4 grassroots-based civil rights organization. We  
5 currently have more than 2200 membership units across  
6 the nation, with members in each and every of the 50  
7 states throughout our country.

8           For over 15 years now, I have served as  
9 the Director of the NAACP's Washington Bureau, the  
10 federal, legislative, and national public policy arm  
11 of this organization.

12           For nearly 46 years after the enactment  
13 of the landmark Civil Rights Act of 1964, and despite  
14 a number of groundbreaking laws since then, including  
15 the Voting Rights Act of '65 and the Fair Housing Act  
16 of '68, harassment and bullying on the basis of race  
17 is still prevalent in our nation today.

18           Members and friends of the NAACP know  
19 all too well the insidious taunts and harassing  
20 comments and bullies based solely on our race or  
21 ethnic background. Bullying and racial harassment  
22 ruins individuals' lives, decimates families, and can  
23 break apart whole communities.

24           Is it because of these ongoing problems  
25 associated with bullying that the NAACP is so

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1 appreciative to this Commission looking at all the  
2 approaches being employed by the federal government,  
3 including the US Department of Education, the US  
4 Department of Justice. Bullying and harassment based  
5 on race, ethnicity, national origin, sex, disability,  
6 or sexual orientation is so damaging that we need an  
7 aggressive, coordinated response.

8 Furthermore, with the advent of new  
9 technologies, including cellphones, texting, emails,  
10 and social media tools such as Facebook and Twitter,  
11 to name a few, there seem to be new avenues for  
12 bullies to take in their quest to make the lives of  
13 others absolutely miserable.

14 As such, the NAACP commends and  
15 appreciates the US Department of Education,  
16 Department of Justice, and of course, this  
17 Commission, as well as various other government and  
18 non-government organizations for aggressively  
19 pursuing the laws in an attempt to protect our  
20 children.

21 Yet, sadly, there always seems to be a  
22 case in which their efforts fall short. Take for  
23 example the case of Derrion Albert. Derrion was a  
24 16-year-old junior and high school student at  
25 Christian Fenger Academy High School on Chicago's

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1 South Side when he was beaten to death.

2 Although the location of this beating was  
3 outside the school grounds, it has been reported that  
4 he had been bullied and harassed by the two opposing  
5 gangs on school property during school hours for some  
6 time.

7 Derrion's death serves as a tragic  
8 reminder of the dangerous and sometimes lethal  
9 repercussions of bullying and harassment.

10 I've been asked to give my opinion and  
11 that of the NAACP on the extent of the problem.  
12 Because many victims of bullying and harassment are  
13 oftentimes too frightened to come forward, suffice it  
14 to say that cases such as Derrion's offer proof that  
15 bullying is alive and prevalent in our nation's  
16 schools.

17 On October 26, 2010, Russlynn Ali, the  
18 Assistant Secretary of Civil Rights at the US  
19 Department of Education, issued a Dear Colleague  
20 Letter to schools outlining which actions would  
21 instigate actions by the US Department of Education  
22 or the US Department of Justice.

23 In her letter, Assistant Secretary Ali  
24 was careful to point out how -- and I quote, "that  
25 even when bullying or harassment is not a civil

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1 rights violation, schools should still seek to  
2 prevent it in order to protect students from the  
3 physical and emotional harm that it may cause."

4 She went on in her letter to state to  
5 school boards, and I again quote, "that if an  
6 investigation reveals that discriminatory harassment  
7 has occurred, a school must make prompt and effective  
8 steps reasonably calculated to end the harassment,  
9 eliminate any hostile environment and its effects,  
10 and prevent the harassment from reoccurring."

11 Yet a careful review of Assistant  
12 Secretary Ali's letter demonstrates, and what the  
13 NAACP believes to be true, that punishment is not  
14 always the answer.

15 In fact, the NAACP firmly advocates a  
16 comprehensive or holistic approach to eliminate and  
17 discourage bullying, which not only educates the  
18 victims of his or her rights and helps him or her to  
19 heal, but investigates, determines, and eliminates  
20 the roots behind the actions of the bully.

21 Mr. Chairman, bullying and harassment is  
22 a real problem in our schools, and one that needs to  
23 be dealt with effectively. We need a response to  
24 this at the root of the problem if we are to  
25 completely eliminate it once and for all.

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1           And because bullying affects individuals  
2 as well as families and whole communities, we need a  
3 response that allows input from all who have been and  
4 might be affected.

5           Thus, the NAACP supports the  
6 establishment of anti-bullying programs to put a  
7 structure in place. That structure would, number  
8 one, determine the extent of the problem, the damage  
9 done to the victim or victims, and determine an  
10 appropriate recourse.

11           Number two, offer support for victims --  
12 or victim or victims so that he or she or they may be  
13 able to fully heal and move beyond the incident.

14           And three, provide the services to the  
15 perpetrators and ensure that they stop their abusive  
16 behavior while being mindful of their age and stage  
17 of their development.

18           If the war on drugs has taught us  
19 anything, it's that blanket incarceration and zero  
20 tolerance can easily result in a racially disparate  
21 implementation of the law, which only further  
22 decimates our people and our neighborhoods.

23           Rather, the NAACP would like to see  
24 school districts establish groups and committees made  
25 up of teachers, counselors, administrators, as well

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1 as community representatives and people from local  
2 advocacy organizations who are familiar with  
3 resources, whether they are educational, health-  
4 based, or others, to help the bully realize the  
5 hurtfulness of his or her actions and eliminate the  
6 root causes.

7 I suspect the Department of Justice and  
8 the Department of Education already have resources to  
9 assist in the establishment of such groups, but if  
10 not, we would certainly support legislation to assist  
11 in the creation of such interventions.

12 Chairman Castro, members of the  
13 Commission, I again thank you for your attention to  
14 this very important issue. School-based bullying,  
15 whether it is due to an individual's race, ethnicity,  
16 national origin, sex, disability, or sexual  
17 orientation, is not only hurtful but dangerous.

18 As well, it should be eliminated if we  
19 are as a society to reach our full potential.

20 Again, I thank you very much and look  
21 forward to your questions.

22 CHAIRMAN CASTRO: Mr. Singh?

23 MR. SINGH: Thanks very much for  
24 convening this hearing. It's a privilege and a  
25 pleasure to be here.

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1           By way of background, the Sikh Coalition  
2           is the largest Sikh-American civil rights  
3           organization in the United States. We were  
4           constituted on the night of September 11th, 2001, in  
5           response to a torrent of hate crimes against Sikh  
6           Americans throughout the United States.

7           The Sikh religion was founded over five  
8           centuries ago in South Asia, and it's presently the  
9           fifth largest world religion with more than 25  
10          million adherents throughout the world.

11          Sikhs are distinguished by visible  
12          religious articles, including uncut hair, which Sikh  
13          males are required to keep covered with a turban.

14          Although the Sikh turban is a symbol of  
15          nobility and signifies a commitment to upholding  
16          freedom, justice, and dignity for all people, the  
17          physical appearance of a Sikh is often ignorantly  
18          conflated with images of foreign terrorists, some of  
19          whom also wear turbans and many of whom have received  
20          copious publicity in the mainstream media in the  
21          aftermath of the 9/11 attacks.

22          As a consequence, Sikhs in the United  
23          States are ridiculed and stereotyped because of their  
24          appearance and subjected to bias crimes, racial  
25          profiling, employment discrimination, and school

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1 bullying.

2 In the course of offering this  
3 testimony, we are guided by a belief that all  
4 children, regardless of religion, race, sex,  
5 disability, national origin, and sexual orientation  
6 have the right to enjoy a safe and healthy learning  
7 environment at school.

8 Our focus on the experiences of Sikh  
9 children is designed to highlight challenges and  
10 opportunities that implicate the fundamental rights  
11 of all our nation's children.

12 Now, in the course of the day, I'm sure  
13 you've heard of statistics which reinforce the fact  
14 that bullying is a severe and pervasive problem for  
15 many communities in this country. Our own studies,  
16 our own reports, are consistent with these findings.

17 A Sikh Coalition community survey  
18 published in 2007 revealed that 62 percent of turban-  
19 wearing Sikh students in the Queens borough, the very  
20 multi-cultural diverse Queens borough of New York  
21 City, experienced bias-based bullying, and that 42  
22 percent of them had been hit or involuntarily touched  
23 because of their turbans.

24 A similar survey published last year  
25 found that 74 percent of turbaned Sikh boys in the

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1 San Francisco Bay area suffered bias-based bullying  
2 and harassment.

3 Now, what does this mean in human terms?  
4 I offer to you the personal testimony, in their own  
5 words, of two individuals who we have worked with in  
6 the last several years. One is Mr. Gurwinder Singh,  
7 a young man from New York City.

8 Again, speaking in his own words, "I  
9 grew up in Richmond Hill, in Queens, and ever since I  
10 can remember, I've been treated differently.

11 "It wasn't exactly bullying that started  
12 in elementary school, but the other kids didn't look  
13 at me very much. I stood out from the rest of them  
14 because my uncut hair, tied in a topknot, made me  
15 look different.

16 "When I got to elementary school, they  
17 used to call me an egghead. Loneliness just became a  
18 part of my life. After 9/11, things became much  
19 worse. Kids called me names and would ask me things  
20 like, are you related to Osama Bin Laden? They  
21 called me a terrorist.

22 "Once on the bus ride home, someone  
23 pulled my turban off my hair. I had to walk home  
24 without my turban, and my hair was open, which was  
25 very embarrassing. I was crying and wondering what I

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1       could do."

2                       Now, if that wasn't bad enough for  
3 Gurwinder, subsequent to those experiences, one of  
4 his best friends turned on him, initially ignoring  
5 him, and then denying their friendship, but then  
6 ultimately leading a group of bullies one day as they  
7 chased Gurwinder through the city, eventually  
8 catching hold of Gurwinder and slamming his head  
9 against a metal pole.

10                      None of the bystanders helped him. They  
11 just watched as Gurwinder began bleeding profusely  
12 and nearly passed out.

13                      Now, in the interest of the time, as  
14 detailed more fully in our written testimony, our  
15 written statement, we have a statement from a mother,  
16 a Sikh mother in San Francisco named Upinder Kaur,  
17 who documents some of the experiences that her own  
18 son faced while going to school.

19                      Among other things, he had his turban  
20 ripped off, and she said, in one of our surveys,  
21 that, "As a mother, I will repent for the rest of my  
22 life that I cannot bring back my son's childhood. I  
23 think every child, every child has the right to grow  
24 up in a much healthier environment and achieve their  
25 full potential."

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1           Now, this is sort of a foundation for a  
2 discussion that we very much look forward to having  
3 about the need for federal intervention. The Sikh  
4 Coalition regards a safe and healthy learning  
5 environment as a fundamental human right for every  
6 child who attends school in the United States.

7           In light of our own experiences, in  
8 particular, in recent years with school officials in  
9 New York City, we believe that vigorous federal  
10 intervention is needed to hold schools and school  
11 districts accountable for their inactions and perhaps  
12 more importantly, their inaction.

13           Consider some of our experiences in New  
14 York City of late. Between 2007 and 2008, the Sikh  
15 community in New York City experienced a spate of  
16 brutal bias attacks against its children.

17           One student had his orbital bone broken  
18 at school. Another one had his turban set on fire by  
19 a bully. Two had their hair, which we're required to  
20 maintain uncut, forcibly cut by bullies.

21           Now, in response to this, our  
22 organization and a number of others undertook an  
23 effort to pass a Chancellor's Regulation, an  
24 administrative regulation in New York City that on  
25 paper is very strong and affords relief and redress

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1 mechanisms to students who have been bullied, for  
2 whatever reason.

3           However, the implementation has been  
4 quite poor. We conducted a survey over the last  
5 couple of years of teachers and, according to our  
6 survey results, only 14 percent, 14 percent of  
7 teachers and staff surveyed said that the regulation  
8 and some of the training diversity programs that are  
9 called for under the auspices of that regulation are  
10 effective or very effective.

11           Only 31 percent of the respondents said  
12 that students in their schools received diversity  
13 training, as mandated by the regulation. And perhaps  
14 worst of all, according to Pat Compton, a former  
15 teacher at a high school in New York City in  
16 Brooklyn, "Any staff training on harassment that my  
17 school did last year was conducted in a  
18 lackadaisical, perfunctory manner." Okay, this is a  
19 former teacher speaking about the non-implementation  
20 of the Chancellor's Regulation that we had hoped  
21 would afford redress to students in New York City.

22           In the interest of time, we will defer  
23 our discussion of recommendations, but we look  
24 forward to having that discussion.

25           CHAIRMAN CASTRO: Thank you, Mr. Singh.

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1           At this point, we're going to open it up  
2 to the Commissioners for questions, concise questions  
3 directed to a panelist.

4           The Chair recognizes Vice Chair  
5 Thernstrom, thereafter Commissioner Yaki and  
6 Commissioner Achtenberg.

7           VICE CHAIR THERNSTROM: Well, I have a  
8 lot of questions, and I hope we'll be able to go  
9 around several times, because I know I only have -- I  
10 should get closer to mine.

11           But I should start out directing my  
12 questions to only one of the panelists, and it will  
13 be to Stuart Buck.

14           This comes with a question and then a  
15 thought after that question on my part. The question  
16 is whether there's any difference in terms of the  
17 bullying you were talking about between integrated  
18 schools, you made your study, was it Roland Fryer's,  
19 he looked at only integrated schools, and whether  
20 there's any evidence that the same bullying doesn't  
21 go on in all-black schools.

22           But that leads me to a larger question  
23 here. It seems to me that a lot of what we've heard  
24 today suggests that more school choice, so that  
25 parents can send their children to schools where they

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1 think the children will be safer. And where -- and  
2 schools of choice are schools in which bullying can  
3 be thrown out and sent wherever, you can have  
4 different state and local arrangements to where  
5 bullies are sent and as to what kind of programs  
6 they're sent.

7 But so much of the testimony today seems  
8 to me indirectly an argument for vouchers. So, I get  
9 from my question -- what about all-black schools,  
10 which voucher schools, of course, could be, and is  
11 there the same kind of bullying, to a larger point  
12 about, a lot of the testimony doesn't end up as  
13 amounting to advocacy for much greater school choice.

14 CHAIRMAN CASTRO: Is that for Mr. Buck?

15 VICE CHAIR THERNSTROM: yes.

16 CHAIRMAN CASTRO: Okay.

17 VICE CHAIR THERNSTROM: Well, anybody  
18 else can weigh in.

19 MR. BUCK: Yes, actually, Roland Fryer  
20 in his work, and again, that doesn't deal  
21 specifically with bullying, it deals with the drop in  
22 popularity among high-achieving black students, but  
23 he found the effect was, I think, seven times greater  
24 in well-integrated schools, as opposed to largely  
25 black or largely white schools.

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1           And there are several other studies that  
2           have found kind of similar findings. In fact, the  
3           first study that even noticed the "acting white" kind  
4           of attitude was a 1970 book about a desegregated  
5           school. It was by four Arizona sociologists, and one  
6           student, for example, was asked, what pressures do  
7           you feel from the fact that you attended a  
8           desegregated school?

9           And he said, well, I participate in  
10          speech, and using the language of the time, he says,  
11          I'm the only Negro in the whole group. The Negroes  
12          accuse me of thinking I'm white.

13          And so the idea that some scholars have  
14          put forth is that, well, to quote a couple of  
15          scholars from Michigan, is that high achieving  
16          students of color in racially balanced schools appear  
17          most likely to be accused of "acting white" because  
18          their enrollment in advanced classes puts them in  
19          constant contact with white students, and at the same  
20          time, there's a large number of students of color who  
21          are in a position to notice and comment on the  
22          supposed defection. So it can sometimes ironically  
23          set up a sort of clash where students might be forced  
24          to kind of pick sides, at least, so they feel. That's  
25          not to say that integration is a bad idea at all.

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1 It's just to say that this might be one aspect of  
2 students' attitudes that might be important to  
3 address and to figure out how to handle and to  
4 combat. And as to your further point, I guess I  
5 suppose I agree. I mean, it seems a lot of the  
6 disputes and clashes that go on in schools, from  
7 bullying incidents to curriculum disputes and so  
8 forth, possibly occur because 90 percent of everyone  
9 is forced into the same school, and with different  
10 clashes of values, people want to see their own side  
11 prevail.

12 And so if you had more of a freer system  
13 for people to choose their own school, as is the case  
14 in Belgium, for example, over there, it's been seen  
15 as a way to allow people to sort themselves out and  
16 to find an environment that's more comfortable.

17 VICE CHAIR THERNSTROM: Well, as opposed  
18 to choose the students, and that's not something  
19 they're able to do, expel.

20 CHAIRMAN CASTRO: Commissioner Yaki?

21 COMMISSIONER YAKI: Yes. This is for  
22 Ms. Gym. I know that you didn't quite finish your  
23 statement. I think I know where you were headed, so  
24 let me see if I can help you get there.

25 What -- I'm curious as to what was the

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1 nature of the federal intervention, and how -- what  
2 has its effect been on the Asian-American student  
3 population at South Philadelphia?

4 MS. GYM: The US Department of Justice  
5 on December 15th filed a suit, and then a settlement  
6 agreement, with the School District of Philadelphia  
7 and the School Reform Commission.

8 Among the things that we felt that were  
9 covered in an important way was the establishment of  
10 an effective anti-harassment policy and procedures,  
11 including timely investigations as well as it also  
12 required anti-harassment and anti-bias training for  
13 staff and students.

14 It clarified issues of language access,  
15 so, for example, like at the school, there's a huge  
16 number of Nepali-Burmese students. The school  
17 district has one Nepali interpreter in the entire  
18 school district.

19 It clarified that language access is  
20 required at the school, so they can use an online  
21 telephone service, they can find other ways, they can  
22 train other people.

23 Victim services and counseling were  
24 among the things that were recommended, that a  
25 process kicks in for perpetrators, but there's

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1 nothing left for victims, and the appointment of an  
2 independent consultant and compliance monitor.

3 In terms of what the impact has been, I  
4 mean, the thing that I thought was most helpful is  
5 that, at the school that we experienced, there was  
6 such a lack of clarity about what was -- when did  
7 something rise to the point of being a problem?

8 And even today, people still think that  
9 it was not really an issue, this was a student-on-  
10 student problem, you know, it was isolated, I didn't  
11 hear about it.

12 So, you know, to some extent, like what  
13 we wanted to talk a little bit about and why we felt  
14 that the Justice Department settlement was really  
15 important was that there's a difference in some ways  
16 between bullying among students and harassment and  
17 how you handle bias-based harassment within a school.

18 So, for example, harassment at South  
19 Philadelphia High School caused students to drop out,  
20 to walk in groups for their safety. Even though one  
21 student was victimized, the whole group felt  
22 threatened by it.

23 Sources of bias go well beyond what  
24 bullying is, so it's not a personality conflict with  
25 that child and another child, so, for -- you know,

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1 peer mediation is a popular resource for conflict,  
2 but wholly inappropriate for bias, physical violence.

3 A punitive approach also fails to  
4 substantially address problems, because, you know,  
5 things like racial verbal attacks did not rise to  
6 that level.

7 There wasn't an understanding that you  
8 can punish one individual student, but if whole  
9 groups of students carry biased feelings towards  
10 whole other groups that cause them to act in a  
11 certain manner, then punishing one individual student  
12 on a case-by-case basis simply wasn't helping people  
13 identify patterns of bias.

14 CHAIRMAN CASTRO: Thank you.  
15 Commissioner Achtenberg, and after that, Commissioner  
16 Gaziano.

17 COMMISSIONER ACHTENBERG: Mr. Chairman,  
18 thank you.

19 Earlier this morning, we heard a number  
20 of witnesses express concern about federal  
21 intervention per se, and some speculated that the  
22 laws that seem to authorize federal intervention,  
23 whether it comes in the form of Title 6 or the ADA or  
24 Title 9 perhaps were, if not wrongly adopted, then to  
25 the extent that they have been validated by the

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1 courts as not being ultra vires, those decisions may  
2 have been false.

3 I'd like to ask Mr. Marcus, Mr. Shelton,  
4 and Mr. Singh, why your plea for federal  
5 intervention, in your case, Mr. Marcus, when it comes  
6 to religious-based discrimination, Mr. Shelton, in  
7 your plea for protection of all groups, and your  
8 similar plea, Mr. Singh, about protections for all  
9 groups and federal intervention, if that's what's  
10 required.

11 MR. MARCUS: Thank you, Commissioner  
12 Achtenberg. I would like to stress at the outset  
13 that I am not recommending any federal intervention  
14 on behalf of religious minorities beyond what is  
15 already provided for other groups. What I'm urging is  
16 only equal protection for religious minorities.

17 It would not require any degree of  
18 expansion of existing law, only the extension of  
19 existing law to cover groups that are protected under  
20 many other civil rights laws but not under Title 6.

21 So then the question becomes, I think,  
22 why is it important for religious minority groups to  
23 have that same protection which other groups have?

24 And what I would say is this. There are  
25 many, many schools that have existing policies that

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1 prohibit religious discrimination. That's widespread  
2 in the policies of school boards, of state education  
3 agencies, so on and so forth. It's also true with  
4 respect to accreditation agencies in the higher ed  
5 field.

6 The problem is that it is one thing to  
7 require teachers and administrators to refrain from  
8 discrimination and another thing to actually create  
9 an enforcement apparatus that will make them  
10 accountable if they don't.

11 And what I'm saying is that when you  
12 create an administrative apparatus that's available  
13 for some groups but not others, the excluded groups  
14 are not able to hold educators accountable when they  
15 fail to comply with policies of their schools.

16 COMMISSIONER ACHTENBERG: Thank you.

17 MR. SHELTON: Commissioner Achtenberg,  
18 first, I'd like to clarify that, as we're talking  
19 about federal intervention, that we would strongly  
20 oppose any use of school vouchers as a tool of  
21 achieving this goal. I know it's a little confusing  
22 earlier on how somehow that kind of went into  
23 consideration.

24 COMMISSIONER ACHTENBERG: I am very  
25 shocked to hear that.

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1 (Laughter.)

2 MR. SHELTON: It's so good to see you,  
3 yet again.

4 (Laughter.)

5 Well, let me say that, quite frankly,  
6 that as we talk about federal intervention, we're  
7 talking quite frankly about the creation of programs  
8 to help students understand what's going -- we're  
9 talking about a very young age, students that are in  
10 grade schools and in our high schools that for some  
11 reason take exception to those they perceive as being  
12 different.

13 One of the commonalities in all the  
14 descriptions that we've heard here is that, whether  
15 it's black students seeing other black students as  
16 somehow acting more white, which is not compliant  
17 with the type of behavior they're used to or they  
18 expect within their schools, or other behaviors,  
19 other differences in students, most of the bullying  
20 described here in this place is bullying against  
21 those who are perceived for one reason or another as  
22 being different.

23 Creating programs to help educate  
24 students and actually help prepare them for the  
25 differences not only in their schools but in the

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1 world is what we're talking about for federal  
2 intervention, educational programs that, again, help  
3 us understand each other better, and why this kind of  
4 behavior is so damaging.

5 I'm very fortunate that I have children  
6 from 7 to 16 that attend schools that put a lot of  
7 emphasis on diversity. They talk about how important  
8 the differences are between us and how we should  
9 celebrate those differences and not somehow ostracize  
10 each other because of that.

11 It is that kind of prevention, we  
12 believe, both by the federal government as well as  
13 programs that can be sponsored by non-governmental  
14 organizations that we'd see as being most successful  
15 in preventing the kind of bullying we're discussing  
16 today from occurring.

17 MR. SINGH: I share the sentiments  
18 expressed by Mr. Marcus. You know, we're not really  
19 looking for or pursuing an expansion of civil rights  
20 law. We're looking for parity with respect to the  
21 categories that are protected under existing law.

22 So, for example, religion is recognized  
23 as a protected category in the context of employment  
24 and accommodations under the Civil Rights Act.  
25 Similarly, it's afforded protection under the Hate

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1 Crimes Prevention Act.

2 But beyond sort of the legal argument,  
3 rather, we believe that federal intervention becomes  
4 a moral imperative when local, state, school  
5 officials, as similar to the ones that I described in  
6 my testimony in New York, you know, when they become  
7 sort of lackadaisical in their sort of obligations  
8 with respect to protecting children.

9 I would like to add, also, that many of  
10 the arguments that have been made about the  
11 appropriateness of affording federal protection to  
12 students in the bullying context were made during the  
13 civil rights movement, in opposition to efforts to  
14 afford minimal civil rights that we enjoy now under  
15 the Civil Rights Act. So, that is a point that we  
16 would like to underscore.

17 CHAIRMAN CASTRO: The Chair recognizes  
18 Commissioner Gaziano, and thereafter Commission  
19 Titus.

20 COMMISSIONER GAZIANO: Thank you all,  
21 too. And like in just the last panel, I would like  
22 to ask several of you questions. Maybe I'll get a  
23 second chance, but I think I'm going to address my  
24 first question.

25 Is it Ms. Gym?

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1 MS. GYM: Gym.

2 COMMISSIONER GAZIANO: Okay. I thought  
3 your testimony was very helpful, and you're a very  
4 effective advocate. It's very chilling to hear the  
5 incidents recounted, although most of us on the  
6 Commission have read and heard them before, and quite  
7 frankly, this is why it's so helpful to me, in  
8 contrast, in the situation you described in South  
9 Philadelphia, it was physical violence.

10 There was actual knowledge, there was no  
11 question, there was actual involvement by the school  
12 officials themselves in discriminating and denying  
13 rights. It was absolutely objectively unreasonable  
14 by anyone's standard. It was pervasive, by the  
15 number of students involved.

16 And yet we asked for months for  
17 information from the Justice Department on what they  
18 were going to do, and we got a big goose egg.

19 Now, maybe they were really acting fast,  
20 and I expect since you're pleased with the final  
21 resolution, you are going to be less likely to -- but  
22 I read some of the news reports, and it seemed like  
23 there was a lot of impatience in the community, and  
24 one of the -- it is undoubtedly the federal  
25 government's role to serve as a backstop to enforce

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1 the non-discrimination where there really is  
2 bullying, but here are my two concerns, and I wonder  
3 if you could address them.

4 One is that, when you call everything  
5 bullying, you kind of dumb down real bullying. And  
6 secondly, whether it really will distract the federal  
7 government from moving swiftly in incidents like  
8 yours, or if there was a situation similar to what  
9 PACER has described for disabled that are equally  
10 chilling, if they are told that they really need to  
11 police teasing that some people consider -- or  
12 wearing t-shirts that someone doesn't like.

13 How long did the investigation run? How  
14 many months was it before you got some sort of  
15 response back from the Justice Department?

16 MS. GYM: We filed on January 19th, and  
17 federal investigators were at the school beginning  
18 their interviews by the end of February. So I'm not  
19 really familiar at all with any federal processes of  
20 any sort, so this was our first experience.

21 COMMISSIONER GAZIANO: And when was the  
22 final settlement?

23 MS. GYM: The final settlement was in  
24 December of 2010. There was a letter of intent --  
25 I'm sorry, I'm not sure what the exact title was,

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1 that was delivered to the school district in the  
2 summer that indicated that they had found -- a  
3 finding of merit, that's right, a finding of merit  
4 toward the school district in the summer.

5 The school district began to move once  
6 the finding of merit was delivered to them, and then  
7 began to -- for example, they passed a brand-new  
8 harassment policy. They replaced the principal of  
9 the school. They hired a consultant to work with  
10 them. They presented different programs that they  
11 had done.

12 And I think that that might have -- I  
13 don't know -- what we were worried about is that we  
14 weren't sure how complicated that made it for the  
15 federal government.

16 And what we were trying to present to  
17 them was that the essential issue of harassment  
18 within the school, of training for students, I think  
19 that they did that for literally five minutes. They  
20 had a five-minute training for students on  
21 harassment, and then another one that followed up at  
22 ten minutes.

23 So that those were not valid, they  
24 weren't sincere efforts, that there was a real need  
25 to take a look at harassment and not to kind of gloss

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1 over it, and that the school district's harassment  
2 policy itself was deeply flawed because it  
3 essentially reiterated the Fourteenth Amendment,  
4 which just said, please don't harass anybody based on  
5 their race.

6 So, you know, it was hard for us to  
7 understand what -- exactly what the process was  
8 happening, and what I'd like to commend the US  
9 Department of Justice for a bit is that they were in  
10 contact with us.

11 We were deeply afraid that once we filed  
12 with them in January that we would hear nothing back  
13 from them ever at any point in time, and you know, we  
14 would just write it off.

15 But they ended up collaborating with the  
16 state Human Relations Commission where we also filed  
17 another -- a separate complaint as well just in case  
18 things weren't -- you know, we weren't sure what was  
19 going to happen.

20 And they ended up collaborating and  
21 collapsing the settlements agreements together. They  
22 had a little -- a stronger statement actually from  
23 the State Department of Human Relations in terms of  
24 their findings. But, you know, the settlement  
25 agreement is the same.

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1 COMMISSIONER GAZIANO: Thank you.

2 MS. GYM: Thank you very much.

3 CHAIRMAN CASTRO: Thank you. The Chair  
4 recognizes Commission Titus, who will be followed by  
5 Commissioner Heriot. Then I'll recognize myself and  
6 then Commissioner Kirsanow, and then Commissioner  
7 Yaki.

8 COMMISSIONER TITUS: Thank you, Mr.  
9 Chairman.

10 I'd like to address my question to Ms.  
11 Goldberg, and it's kind of a continuation of  
12 Commissioner Achtenberg's question earlier.

13 As you mentioned, statistics show that  
14 students with disabilities are more likely to be  
15 harassed and bullied than students under any other  
16 protected class, and yet we probably hear less about  
17 that in the press and from policymakers.

18 You went on to say that, kind of because  
19 of that, you support federal legislation to address a  
20 problem with things like teacher training, data  
21 collection, school sensitivity programs.

22 Now, I know from experience in Nevada  
23 that you work with non-profits at a state level, and  
24 also with state legislatures, and yet you see the  
25 need for and value of federal legislation.

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1 I wonder, do you agree with Mr. Singh  
2 that not only is it better policy to have a federal  
3 standard instead of a patchwork of different  
4 definitions and also results in better enforcement,  
5 but it is a moral imperative?

6 MS. GOLDBERG: I believe it's a moral  
7 imperative. I think it's so pervasive, we hear about  
8 children with disabilities, but we hear about  
9 children with any issue, we had 800,000 people,  
10 students, visit our website last year. We had a  
11 young girl who said she was thinking of committing  
12 suicide. She went on our website for teenagers and  
13 changed her mind.

14 So it's kids with disabilities, it's all  
15 kids, it is so pervasive that indeed it is a moral  
16 imperative.

17 The harm that's happening to these kids,  
18 you talk about mental health issues, these kids end  
19 up with mental health issues, 160,000 kids drop out  
20 of school every day because they've been bullied.  
21 Children end up with so many issues their entire  
22 life. The story I told about the family, their life  
23 has been changed forever. So, yes, I agree that we  
24 need federal legislation, we need it across -- I  
25 think we have 45 states that have their own laws, but

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1 it is not working.

2 We wouldn't be here today, you wouldn't  
3 have this hearing today, if it was working. It's not  
4 working. Therefore, we need something consistent.

5 With kids with disabilities, we passed  
6 the Individuals With Disabilities Education Act 30-  
7 some years ago. States had their own, but we needed  
8 a federal law to protect children, to educate  
9 children, to have positive outcomes. That's why we  
10 need a federal law across the country. Thank you.

11 CHAIRMAN CASTRO: Thank you. The Chair  
12 recognizes Commissioner Heriot.

13 COMMISSIONER HERIOT: Thank you. I  
14 would like to ask the rest of the panel to comment on  
15 something that Mr. Shelton mentioned. Some civil  
16 rights organizations, and I believe the NAACP is  
17 among them, have taken the position, not with regard  
18 to bullying generally, but rather that there's a  
19 problem with excessive school discipline across the  
20 board.

21 Too many expulsions, too many  
22 suspensions in schools. And I'd have to say I agree  
23 with Mr. Shelton when he sees concern about zero  
24 tolerance rules. I think they're a big problem and I  
25 believe very much that federal intervention here

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1 creates an incentive to zero tolerance rules.

2 I guess I don't agree — if we're talking  
3 about outside the area of zero tolerance rules —  
4 that there's a problem with excessive school  
5 discipline. I guess my question here has to be, you  
6 know, it seems to me that part of the solution has to  
7 lie with more disciplining, yet what I'm hearing,  
8 from most of the witnesses, is not a call for more  
9 discipline but a call for more sensitivity training.

10 I think there was some mention of more  
11 multi-cultural curriculum decisions. Is it possible  
12 to control this problem without tougher discipline,  
13 and is it possible to use proper discipline under the  
14 jurisdiction of the federal government.

15 Doesn't the federal intervention make it  
16 more difficult for teachers and principals to use the  
17 kind of discretion that's necessary to control real  
18 bullying.

19 CHAIRMAN CASTRO: Whoever feels  
20 comfortable, I don't expect everyone to answer this.

21 MS. GYM: I can only speak to what  
22 happened in our case at South Philadelphia High  
23 School. So this school district in Philadelphia does  
24 have a zero tolerance policy.

25 It certainly has the highest number of

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1 persistently dangerous --

2 COMMISSIONER HERIOT: Zero tolerance of  
3 what?

4 MS. GYM: Zero tolerance policy on  
5 violence in schools.

6 COMMISSIONER HERIOT: Violence is an  
7 exception, yes. I'm against violence.

8 MS. GYM: That's exactly right. And,  
9 you know, what we felt like with that, incidences of  
10 violence and harassment, that it was an easy crutch.

11 We, after the South Philadelphia, after  
12 the December 3rd beatings they automatically  
13 suspended 10 students. We didn't actually know who  
14 they were, why they were.

15 It ended up including two of the  
16 immigrant student victims who had actually been  
17 beaten in the melee. So it was a simple crutch for  
18 them, and then they wiped their hands and walked  
19 away.

20 So essentially they got, they changed  
21 over the security staff, they put in \$700,000.00  
22 security cameras and they suspended 10 students. And  
23 that satisfied them.

24 COMMISSIONER HERIOT: Should those  
25 students have been expelled, in your opinion?

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1 MS. GYM: The question was whether that  
2 incident was investigated. I would not argue that  
3 students should not be punished for, especially in  
4 the situation that we were seeing at the school, that  
5 it was the --

6 COMMISSIONER HERIOT: Would you argue  
7 that they should have been expelled? There should  
8 have been more punishment. CHAIRMAN CASTRO:  
9 Commissioner, we're going to --

10 COMMISSIONER HERIOT: There should have  
11 been more punishment?

12 MS. GYM: I'm saying that there should,  
13 it certainly exists, discipline and punishment for  
14 students who are doing that. But, the larger issue  
15 of tackling, really what we felt was rampant anti-  
16 Asian, anti-immigrant bias at this school, was not  
17 addressed and instead the simple crutch of relying  
18 upon a handful of expulsions, give you a couple  
19 thousand dollars in security cameras, and then we're  
20 done, we can walk away.

21 That is not effective either. And it's  
22 all too simple, I think, and something that people  
23 lean on. So we got a lot of reactions from a lot of  
24 people saying you should just, you know, just can the  
25 whole school, find them out. But it's a lot more

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1 complicated than that.

2 COMMISSIONER HERIOT: I think a lot of  
3 people are taking an opposite position.

4 CHAIRMAN CASTRO: Thank you,  
5 Commissioner Heriot. I will take the mic at this  
6 point. Thank you for your question, we'll come back  
7 at the end, again.

8 Mr. Singh had mentioned that the  
9 Chancellor's policy was great on paper, but not  
10 enforced or implemented properly. You mentioned  
11 that, Ms. Gym, that there were procedures and  
12 training and policies that were put in place and then  
13 there was also requirements for language access.

14 My question is, in terms of the language  
15 access aspect of this, while there may be something  
16 good on paper, what is the actual practical effect of  
17 making these policies, procedures, and trainings  
18 accessible to individuals who are English proficient  
19 limited?

20 And the flip side to that is to the  
21 extent any of your organizations have anti-bullying  
22 materials web sites, to what extent do you make those  
23 accessible for folks who are limited English  
24 proficient?

25 MS. GYM: Ultimately that change, the

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1 changes that we've seen at the school, that story  
2 isn't going to ever be told through the courts or  
3 through settlements or policies or things like that.

4 The most dramatic change that we've seen  
5 is that there's been an incredible group of students  
6 who were once victims became very organized around  
7 these issues.

8 They now go out and work with other  
9 students at other schools and talk to them and have  
10 done workshops around the country. So, you know, for  
11 us, the language access, the thing that was very  
12 crystal and helpful was that the Department of  
13 Justice was crystal clear about what the District's  
14 and that school's obligations were for language.

15 So that they must use language line if  
16 an Interpreter is not available. The school district  
17 actually agreed to train half of its bi-lingual  
18 counseling force, which is not, it's a kind of a  
19 flexible position, shall we say.

20 But they agreed to train them into  
21 formal interpretation, how to become a formal  
22 interpreter. So that they, it wasn't just a matter  
23 of someone at the school who spoke the language, but  
24 someone who had been formally trained, who actually  
25 knew how to interpret, particularly in a disciplinary

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1 situation or if there were consequences or if a  
2 student is reporting violence against them.

3 The school, by having and working with a  
4 consultant, actually not just leading up to this  
5 school district, the Department of Justice allows  
6 some flexibility for the schools to determine how  
7 best to share the information with a broader school.

8 But the harassment training is for the  
9 students and the staff. It feels like there's a lot  
10 more responsiveness and responsibility that the  
11 school is conscious of.

12 We also have a brand new Principal,  
13 which has made a big difference as a result of the  
14 work. He's been much more conscientious about  
15 language access and being concerned that translation  
16 is done effectively.

17 CHAIRMAN CASTRO: The Chair recognizes  
18 Commissioner Kirsanow, and thereafter, Commissioner  
19 Yaki, Vice-Chair Thernstrom and Ms. Tolhurst.

20 COMMISSIONER KIRSANOW: Thank you, Mr.  
21 Chairman. Commissioner Heriot actually asked most of  
22 what I wanted to address. What strikes me is we have  
23 the issue with respect to definition.

24 I've heard a considerable amount of  
25 testimony and there's been, no fault of your own, I

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1 think this is a definitional issue that's pervaded  
2 all panels on the entire issue.

3 We have a spectrum. We have bullying,  
4 or maybe teasing, bullying, harassment, violence and  
5 some of those things kind of overlap. Ms. Gym, your  
6 testimony especially struck me, insofar as there were  
7 10 suspensions of students for actions that, based on  
8 what you describe, would normally land people in jail  
9 for a considerable period of time.

10 These were criminal acts. I'm struck by  
11 the fact that the only punishments were suspensions.  
12 Did anyone actually end up serving jail time for  
13 assaulting, battering, it seems to me almost, you  
14 know, a battery with intent to commit grievous bodily  
15 harm, if not death? Any jail time at all?

16 MS. GYM: No.

17 COMMISSIONER KIRSANOW: It also strikes  
18 me, that I didn't hear in your testimony, any kind of  
19 repercussions, other than possibly the firing of a  
20 Principal — I'm not sure she was fired — toward  
21 the staff that would normally happen in any kind of  
22 functional environment.

23 This was clearly dysfunctional. It  
24 seems to me some of these staff members should have  
25 not just been fired, but should have private causes

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1 of action against them in tort for permitting this  
2 negligent conduct. Was any of that, did any of that  
3 occur?

4 MS. GYM: No.

5 CHAIRMAN CASTRO: The Chair recognizes  
6 Commissioner Yaki.

7 COMMISSIONER YAKI: I have a question  
8 for Messrs. Marcus and Shelton and Singh. I think I  
9 know what the answer would be for Ms. Gym, from the  
10 testimony already and should just go over and  
11 testify as well, Mr. Buck, I don't think this is in  
12 your wheelhouse.

13 But, in testimony this morning, there  
14 was much ado by some who criticized the notion of  
15 expanding the protections of, against bullying to  
16 members of the LGBT community because, quote/unquote,  
17 it's really local discretion.

18 And it could be better handled at a  
19 local level, we don't need the federal government  
20 coming in to deal with this. I'd like your opinion,  
21 as people who've dealt with this issue for quite some  
22 time, about whether you believe that bullying is an  
23 issue that should just be handled locally with their  
24 own thing or why you believe, instead, in a federal  
25 policy that deals with the issue.

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1 [Unofficial discussion re speaking into  
2 the microphone . . .]

3 MR. MARCUS: Commissioner Yaki, I would  
4 distinguish between those forms of bullying which  
5 also constitute harassment, and those that do not.  
6 To the extent that bullying constitutes harassment on  
7 the basis of a group characteristic, which we  
8 collectively consider to be invidious, I would say  
9 that it is entirely appropriate for the federal  
10 government to continue to act as it has acted for  
11 several decades, and could step in, and to insist  
12 that if federal dollars are being used to fund an  
13 educational program, that those federal dollars  
14 should not be used in ways that support activities  
15 that harass people based on minority status.

16 But, I would also say that the topic of  
17 bullying can be much broader and can include activity  
18 that does not address a minority, or which is not  
19 raised to the very high legal threshold for  
20 constituting harassment.

21 And in those cases I would say that I  
22 share a skepticism about federal displacement of the  
23 responsibility of local officials.

24 MS. SHELTON: I would just say that I  
25 think the federal government has a tremendous role

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1 in helping to set standards and a clear  
2 understanding. I do agree with some of what  
3 Commissioner, I hope I'm saying your last name right,  
4 Kirsanow, said about --

5 COMMISSIONER KIRSANOW: It's a Klingon  
6 name.

7 (Laughter.)

8 MS. SHELTON: -- the differential in  
9 terms of definitions and interpretation. And I think  
10 there are many, many different definitions of  
11 interpretation. Whether it's just a childish  
12 behavior and when it's actually criminal behavior, in  
13 many of these cases.

14 We didn't make much of a distinction,  
15 quite frankly, in the conversation between forms of  
16 bullying that there are physical and violent, from  
17 the forms of bullying that are harassing and  
18 otherwise demeaning.

19 And I think we have to have those kind  
20 of national or federal standards to help understand  
21 at the local level. And I do, however, think that  
22 every community has its differences and that very  
23 well communities should be left to determine what is  
24 in the best interest, certainly, within the guise of  
25 those particular standards.

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1 CHAIRMAN CASTRO: Mr. Singh.

2 MR. SINGH: I don't disagree with much  
3 of what has been said, as a general matter, speaking  
4 in general terms, you know. To the extent that a  
5 student finds him or herself in an environment that  
6 might lead him or her to commit suicide, for example,  
7 on the basis of actual or perceived sexual  
8 orientation, your question had to do with, you know,  
9 extension of rights to people because of LGBT sort  
10 of characteristics.

11 That's unacceptable and that seems  
12 uncontroversial to us. And so as we vigorously  
13 pursue extension of protection to students in respect  
14 of religion, it would be sort of intellectually,  
15 morally inconsistent for us to withhold those sorts  
16 of protections to LGBT students, you know, subject to  
17 some of the issues that have been raised earlier  
18 about definitions and this sort of thing.

19 But, in general terms, that's where we  
20 stand on that particular issue.

21 CHAIRMAN CASTRO: The Chair recognizes  
22 Vice-Chair Thernstrom.

23 VICE-CHAIR THERNSTROM: I have a  
24 question for Goldberg and, but I do have a  
25 preliminary statement first. I have been, I've seen

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1 a lot of schools. I've seen some great schools.

2 And they are orderly, there's no  
3 bullying, there's no running in the halls, there's no  
4 fighting. There's no fighting in the playgrounds,  
5 there's no ugly language to other kids.

6 There's no sassy language to teachers.  
7 There is a general culture of civility in the school.  
8 But it all starts at the top, with the Principal, and  
9 that Principal insists that every teacher in every  
10 classroom, all day long, reinforces that culture.

11 And it seems to me that the description,  
12 descriptions, I should say, Goldberg provided and the  
13 whole Philadelphia incident, which I've been very  
14 interested in, are, you're talking about stories of  
15 failures of school authorities.

16 Of principals, of teachers of, you know,  
17 in the case of Philadelphia it went beyond that one  
18 school. And there is no solution to that, except  
19 allowing [inaudible]. And schools have been totally  
20 delinquent in the way that they train teachers.

21 I mean there's very little emphasis on  
22 the importance of civility to learning and managing  
23 classrooms. But, we've got to have schools in which  
24 principals are, in which principals have the freedom  
25 to look at the kids in their particular school, and

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1 those kids may be a different group than the, you  
2 know, a school a mile away.

3 And say, in this school, these are the  
4 messages we need to deliver. These are the kids that  
5 we need to work with and we need to work closely with  
6 them.

7 And, my preference is that the schools —  
8 and most of the grade schools I've seen are Charter  
9 schools — my preference is that these principals and  
10 these teachers be able to save your child. It's your  
11 choice if they want to be in the school or not.

12 You can't go along with this, you can't  
13 go along with our culture of civility. But I know  
14 this isn't a school you want to be at. So choose.  
15 And in regular public schools, that is not possible.

16 And moreover, when Commissioner Kirsanow  
17 said, well, was anybody let go in the Philadelphia  
18 schools, in that Philadelphia school, no. Letting go  
19 of a teacher is, you know, the teacher has to engage,  
20 they're not going to break the child or something.

21 I mean it is really, if a teacher has  
22 tenure, it's really difficult to get rid of them.  
23 Anyway, it's my little speech in my, you can  
24 disagree.

25 MS. GOLDBERG: I think that every

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1 student and every school has to be safe. You have to  
2 have a safe school in a climate that has respect for  
3 everyone. So I agree with you and I think leadership  
4 is important at the level of the Administrator.

5 And I think we have a way to go to  
6 change that. So I do agree with you in many ways. I  
7 think there are excellent public schools out there.  
8 And one of the things I recommended was positive  
9 behavior intervention supports.

10 There's a noted researcher, a professor,  
11 George Sugai, and he has done amazing work in  
12 building that respect. And he talks about a  
13 triangle. And there are a few children at the top.

14 And you build that respect, and he  
15 doesn't say label bully, the kids who are bullied,  
16 because they also have issues. So you build that  
17 respect all the way through the school, and you  
18 provide some more intensive help for those kids who  
19 are having problems, who are the bullies, or who have  
20 been bullied.

21 So there are ways that have been noted  
22 by a number of years of research that we can do to  
23 improve our schools. So, thank you for bringing that  
24 up.

25 MS. GYM: I have two quick responses.

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1 The first thing is, is that when people talk about  
2 South Philadelphia High School, they talk about it as  
3 a failing public school.

4 And, in which case, the focus  
5 overwhelmingly is on test scores, academic  
6 excellence, become better at what you are. And in  
7 that context, issues like how are we getting along?  
8 is there cultural conflict? Do we have space to even  
9 dialogue about what the problems are in the school?  
10 are completely off the table. When we met with  
11 teachers in March about fostering this dialogue and  
12 how students were creating the dialogue, they said,  
13 we're in testing season, we don't have time, this is  
14 too much time for us. We're stressed out, we're  
15 trying to do too much, now you're asking us to do  
16 something else.

17 So in a situation where the school has  
18 become so overly focused, or has somehow separated  
19 the notion that test scores are separated from  
20 character or that academic excellence has nothing to  
21 do with your values or things like that, then I think  
22 it's gotten a little wrong.

23 The second thing I want to point out is  
24 that both nationally and specifically in  
25 Philadelphia, what we're seeing is an increasing

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1 concentration of immigrant students within  
2 neighborhood high schools.

3 You know, the Urban Institute in 2005,  
4 showed that 70 percent of English language learners  
5 are housed in just 10 percent of elementary schools.  
6 In Philadelphia itself, three-quarters of immigrant  
7 students are housed in just nine high schools.

8 That's largely to do, you know, in some  
9 ways, because Philadelphia is an extremely choice-  
10 oriented system. And in a choice-oriented system,  
11 there are some who can choose and some who can't.

12 And the ones who can't are typically  
13 going to be, well among those who can't, are the  
14 immigrant students. They aren't served by charter  
15 high schools, there are only four out of 61 charter  
16 high schools in a 2007 study, one of which was ours,  
17 that served 10 percent or more immigrant students  
18 within them. There's no money that goes to Charters.  
19 The Charter school that we built, which serves  
20 immigrant students, we have a mission to do so.

21 We have five teachers, a home school  
22 liaison, a handful or tutors. We get no more money  
23 than a Charter school, that serves zero immigrant  
24 students.

25 There's no possibility for these

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1 students. So we're seeing them come back to our  
2 schools. So if we know that the immigrant students  
3 are there and, in fact, that the numbers are  
4 increasing, so at a nearby school the numbers have  
5 tripled in percentage of Asian students, and  
6 immigrant students have tripled in the last three  
7 years, then why would we not train, approach it like,  
8 it shouldn't be shocking or surprising or  
9 disappointing or frightening that people have bias.  
10 You know, I think it's like, people carry bias.  
11 People have uncertain interpretations when they meet  
12 somebody different and new.

13 Conflict shouldn't be scary. But what's  
14 wrong is when people don't help children negotiate  
15 conflict, help them learn how to handle and identify  
16 what is harassment? when have you crossed the line?  
17 when is it okay to say, gee, I don't like you and  
18 then I will pick up a baseball bat and beat you with  
19 it. I mean like, you, where, at what point do we say  
20 you should just know better? And I don't think we've  
21 taught them that.

22 CHAIRMAN CASTRO: The Chair recognizes  
23 the Acting Staff Director, Ms. Tolhurst, followed by  
24 Commissioner Achtenberg.

25 MS. TOLHURST: Thank you. My question

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1 is for Mr. Marcus. Regarding religion, what do you  
2 say to the suggestion that your 2004 guidance and the  
3 current Department of Education guidance on Title  
4 IX, simply bootstrap a currently unprotected group,  
5 into Title VI protection.

6 And to be clear in your answer, can you  
7 please give us some examples of types of religious-  
8 based harassment and bullying which, today, would not  
9 be covered under Title VI, unless and until it's  
10 explicitly expanded to include religion.

11 MR. MARCUS: Thank you, I will start  
12 with the second part of your question. And what I  
13 would say is that, under current law, I believe that  
14 discrimination against a religious group that lacks  
15 ethnic characteristics is not covered.

16 Now, I'm not sure that I would want to  
17 go through, on a case-by-case basis about all of the  
18 different religious groups, but there are some  
19 religions that do not claim any sort of ethnic or  
20 ancestral particularity, but rather more of a  
21 universal characteristic and I think that is a large  
22 percentage of the students in the United States, who  
23 do not belong to such.

24 So I would say that most forms of  
25 religious harassment would not be covered. In

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1 addition, I would say that, to the extent that  
2 there's a loophole, where religious discrimination is  
3 not covered if it's just based on the tenets of  
4 religious belief.

5 And I would say even discrimination  
6 against Jews or Sikhs or others are not covered, if  
7 it's just based on what they believe, right. So  
8 under OCR's guidance, even if it's a group that has  
9 ethnic characteristics, like Jews or Sikhs, if you  
10 can't prove that it's based on their ethnicity, then  
11 it's not covered.

12 So when you have this sort of loophole,  
13 it makes enforcement very difficult. It's very  
14 difficult, in many cases, to figure out, well, why  
15 exactly did this one child beat up or harass another  
16 child?

17 Was it religion? Was it ethnicity?  
18 It's a group that had different sorts of  
19 characteristics. So, as a practical matter it's very  
20 important to eliminate that loophole.

21 Now, if I understood the first part of  
22 your question, I think you're asking me whether the  
23 2004 and 2010 OCR policies create a right that  
24 doesn't exist under the statute.

25 In other words, whether the Civil Rights

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1 Act of 1964 does not cover groups like Jews and  
2 Sikhs, and whether my policy and Russlynn Ali's  
3 policy inappropriately extends that.

4 Now I've written extensively on that.  
5 I've got, I've written an entire book on that topic,  
6 called Jewish Identity and Civil Rights in America,  
7 to address that.

8 And I've also published academic  
9 articles to address it. Let me try very quickly.  
10 The U.S. Supreme Court in the case of *Shaare Tefila*  
11 *v. Cobb*, asked the question whether Jews are covered  
12 as a member of a racial group, under the Civil Rights  
13 Act of 1866.

14 I answered yes because Congress intended  
15 to protect racial groups in a very broad sense, and  
16 that in 1866, the term race was understood to include  
17 Jews and Arabs and other groups.

18 Now, one might say, well, that might  
19 have been true in 1866, but not in 1964. In 1964,  
20 Jews were not considered to be members of a distinct  
21 racial group.

22 My answer to that is that the Civil  
23 Rights Act of 1964 was not intended to create new  
24 rights against racial discrimination, but rather was  
25 intended to create an administrative enforcement

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1 apparatus to protect the rights that were already  
2 established in the Equal Protection Clause and in  
3 other parts of the Constitution.

4 And that to that extent, the appropriate  
5 way of understanding the scope of anti-racism  
6 protection in Title VI is to look back to the Equal  
7 Protection Clause, the 1866 Act, so on and so forth,  
8 and the Supreme Court has already done that work in  
9 *Shaare Tefila v. Cobb*.

10 CHAIRMAN CASTRO: The Chair recognizes  
11 Commissioner Achtenberg, thereafter Commissioner  
12 Gaziano.

13 COMMISSIONER ACHTENBERG: Mr. Marcus, if  
14 religion were a protected class, let's say the, some  
15 of the legislation that's currently in front of the  
16 Congress were to be, that would specifically include  
17 religion, were to be adopted, what would be your  
18 reaction to a student coming to school wearing a t-  
19 shirt that said, Jews killed Christ.

20 And the reason that I'm postulating this  
21 hypothetical is we heard this morning that the issue  
22 of student harassment and intra-student violence has  
23 to be bounded, to some significant extent, by respect  
24 for the First Amendment, and with which I completely  
25 concur.

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1           And it was further postulated that we  
2           can't, we can't inhibit students from expressing  
3           unpopular beliefs, or beliefs that might be motivated  
4           by their own religious affiliation or what have you,  
5           and I concur with that, as well.

6           I'm wondering what significance, if any,  
7           you would ascribe to such t-shirt wearing and where  
8           you draw the line in terms of protection of First  
9           Amendment speech and where you, where things bleed  
10          over into activity, shall we say, that would be  
11          subject to civil rights law protection.

12          MR. MARCUS:   That's certainly a very  
13          difficult and important question, Commissioner.  Let  
14          me start with the beginning of your question that  
15          referred to legislation that is now pending before  
16          Congress.

17          And I would say that there is  
18          legislation pending before Congress that does the  
19          important work of including religion within  
20          provisions requiring school districts or universities  
21          to prohibit certain forms of bullying.

22          But none of those bills that I've seen  
23          are enough, because none of those bills would require  
24          the use of an enforcement system, like what's used  
25          for Title VI.

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1           So I would say none of those forms of  
2 legislation, as written, would actually be terribly  
3 helpful. I think it's vitally important that, if the  
4 solution comes through one of the existing bills,  
5 that those bills be modified with language similar to  
6 what was in Title IX, that requires the Department of  
7 Education to create an enforcement system comparable  
8 to what's used in Title VI.

9           Having said that, in your example I  
10 would say that, in my view, the t-shirt that you  
11 described that says that Jews killed Christ is  
12 protected under the speech clause of the First  
13 Amendment.

14           However, it is my view that the correct  
15 response of educators to protected but offensive  
16 speech is never to do nothing, in that educators need  
17 to know that, even if they are legally prohibited  
18 from regulating speech or punishing it, that's not  
19 the end of the inquiry.

20           Educators need to know that there are  
21 lots of forms of hostile behavior that require  
22 response from the educators. Often it should be an  
23 opportunity to teach students about civility,  
24 tolerance, so on and so forth.

25           Where exactly one draws the line is very

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1 difficult. I would say that I think that the  
2 standard established by the Supreme Court in *Davis v.*  
3 *Monroe County* goes quite some distance, although  
4 perhaps not far enough, to prevent the enforcement  
5 of harassment law in ways that would chill protected  
6 speech, and that less stringent standards create a  
7 risk that protected speech would nevertheless be  
8 chilled. So I think that the first step is to make  
9 sure that the appropriate legal standard is being  
10 used.

11 And I also think that educators, before  
12 they regulate speech, should try any other less  
13 intrusive alternative way of ensuring that their  
14 goals are met. But I would also say that there are  
15 others with greater expertise than I, including, if  
16 I'm not mistaken, Professor Volokh is in the room and  
17 may be able to address the First Amendment questions  
18 in greater detail.

19 CHAIRMAN CASTRO: We have four minutes  
20 left before this panel runs out, so I'm afraid all  
21 the Commissioners who had asked for questions of this  
22 panel aren't going to be able to. I'm giving the  
23 last question to Commissioner Gaziano.

24 COMMISSIONER GAZIANO: Thank you, Mr.  
25 Chairman. I'm going to ask Mr. Buck a hypothetical

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1 which I hope will help explain to others that my  
2 concern with OCR's new guidance is not so much the  
3 new classes, suspect classes, but the extent of the  
4 children's behavior that they seem to be reaching.

5 In the situation where we have real  
6 physical violence, actual knowledge, you know, I want  
7 the Justice Department to swoop in and have a zero  
8 tolerance policy on violence and do what it takes to  
9 stop it.

10 But in the situation where we've got the  
11 "acting white," and by the way I believe your analogy  
12 works mostly, but not completely. I think you have  
13 the stronger case for racial discrimination.

14 I think the kids, at least, are  
15 discriminating. But in the *Davis* standard, where it  
16 must be severe, pervasive and objectively offensive,  
17 that clearly met in the South Philly situation.

18 The OCR standard is severe, pervasive or  
19 persistent. So here's my hypothetical. Every week a  
20 particular child is called whitey, a black child is  
21 called whitey or "acting white" by some member or  
22 whatever.

23 And the school could be set to, it  
24 should have had knowledge because they observe or  
25 could observe that he's never allowed to play in any

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1 of the reindeer games with any of the other kids in  
2 his cohort.

3           Would it be, you think, effective, given  
4 the cultural norms that you've been studying, for the  
5 DOJ or OCR Swat Team to swoop in and declare zero  
6 tolerance for any more "acting white," that there  
7 would be immediate suspensions and expulsions.

8           Is that likely to improve the situation  
9 for the top high achieving black students, or is it  
10 likely to possibly cut the other way?

11           MR. BUCK: Well, it's hard to predict  
12 what would happen in that situation. I mean, you  
13 could imagine that it might help stamp out the  
14 activity, or you could imagine that some people might  
15 view it as calling in, you know, a largely white  
16 authority group from outside to come in and enforce  
17 more, kind of white norms of behavior.

18           And so it might cut the other way, as  
19 you suggested. So, yeah, personally I guess I am  
20 rather skeptical of turning every incident of kids  
21 being mean to each other into a federal crime.

22           And certainly there are many cases where  
23 it does rise to that level of abusiveness, but I'm  
24 not sure that, you know, it's going to be productive  
25 to spend the resources and time of the federal

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1 government in every situation you can imagine.

2 CHAIRMAN CASTRO: Thank you all, I  
3 appreciate.

4 COMMISSIONER HERIOT: We have four  
5 minutes left, right?

6 CHAIRMAN CASTRO: We have 2:42, is the  
7 time we're stopping and that's what I have on my  
8 watch here. But I will start with you at the next  
9 panel.

10 So, thank you on behalf of the  
11 Commission for being here and want to commend you on  
12 all your work and look forward to continuing to see  
13 your work.

14 We would ask the members of the next  
15 panel to please begin to come to the front, while our  
16 staff changes the nameplates. Thank you all.

17 **IV. FEDERAL/LOCAL ROLE IN BULLYING**

18 CHAIRMAN CASTRO: We are now turning to  
19 our final panel of the day. This last panel shall  
20 examine the issues of the role that the different  
21 levels of government, both state and federal, should  
22 have regarding the issue of bullying.

23 On this panel we have Tammy Aaberg, a  
24 Parent Advocate; Francisco Negrón, General Counsel  
25 for the National School Boards Association; Ken

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1 Trump, President of the National School Safety and  
2 Security Services; Professor Eugene Volokh, of the  
3 UCLA School of Law; and Deborah Lauter, Civil Rights  
4 Director at the Anti-Defamation League.

5 As with the past panels, each panelist  
6 will have seven minutes to make your presentation.  
7 We have received your written statements and we've  
8 reviewed them. They are part of the record, so don't  
9 feel the need to finish through all your statements,  
10 as you saw the prior panels.

11 There will be an opportunity for  
12 interchange. We will have thereafter a discussion  
13 period that will run until 4:25 p.m. We hope that  
14 will be 55 minutes, but it may be a minute or so off,  
15 depending on how long we can get through our  
16 questions.

17 So, with that, I'd like to ask Ms.  
18 Aaberg to please begin.

19 MS. AABERG: Good afternoon,  
20 Commissioners. My name is Tammy Aaberg, and my  
21 story, my son, Justin, died by suicide. I found  
22 Justin hanging from his futon frame in his bedroom.

23 This was the most tragic day of our  
24 lives and a traumatic vision that will never leave  
25 our minds. Justin was 15 years old when he died and

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1 also happened to be born gay.

2 Justin was a wonderful very smiley kid,  
3 who loved to play his cello and compose his own  
4 songs. He loved his pet chinchillas and loved making  
5 sand castles at the beach and laying out in the sun.

6 Soon after Justin took his life, his  
7 friends began to describe what life at school was  
8 like for Justin. One friend of his told me that in  
9 eighth grade she saw him crying down the hallway and  
10 the Counselor came out and they found out that, well,  
11 at the time Justin didn't say anything, but then the  
12 friend, he told a friend the next day what had  
13 happened.

14 And when the Counselor called the friend  
15 down, to ask what had happened to Justin, she said  
16 things like this happen to gay kids all the time.  
17 But this time it wasn't just mental, it was physical.

18 And the Counselor just said, you know,  
19 thank you for telling me what happened, as Justin is  
20 at the top of my worry list, and then just sent her  
21 back to class.

22 And I never received a call that he was  
23 upset the one day, and I never got a call to say  
24 something had physically happened to my son.

25 I was very angry with the Counselor when

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1 I first found this out. But then students, staff  
2 members, and parents began to describe how bad the  
3 school climate was in the district for LGBT students,  
4 as there's a policy in place which people refer to as  
5 a neutrality policy, due to the neutral position  
6 staff need to take regarding sexual orientation in  
7 curriculum. Unfortunately this policy, which is call  
8 the Sexual Orientation Curriculum Policy, confuses  
9 teachers and staff and they feel like their hands are  
10 tied, as they don't know what should or shouldn't be  
11 considered neutral.

12 I believe this is what happened with the  
13 Counselor. Once she heard the word gay, she didn't  
14 ask Justin's friend any further questions and I never  
15 received a phone call.

16 Also, the incident that had happened in  
17 the hallway was actually also sexual harassment, so  
18 if she would have, if the Counselor would have asked  
19 the friend more details, she'd have found out that  
20 these two boys had grabbed him in his genitals and,  
21 actually the police, I believe, should have been  
22 called.

23 In the months after Justin's death, I  
24 learned more about the effects of the school  
25 district's Sexual Orientation Curriculum Policy from

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1 many students, and also a few supportive staff who  
2 noticed and felt the harmful school climate against  
3 LGBT students.

4 I found out that this so-called  
5 curriculum neutrality policy regarding sexual  
6 orientation affected a lot more than just the  
7 curriculum and is anything but neutral. I heard  
8 tragic story after story of things that happen to  
9 students that had nothing to do with curriculum.

10 Unfortunately, I found out too late that  
11 we lived in a very homophobic area throughout most of  
12 Justin's life. It's so sad that the misguided  
13 intentions of some in the community have led to  
14 policies that are harmful to the young people in the  
15 school district who happened to be lesbian, gay, bi-  
16 sexual or trans-gender.

17 Even now, eight months of me and others  
18 in the community pleading with the school board in  
19 the district Justin died in, to please get rid of the  
20 harmful neutrality policy and to please get proper  
21 training for teachers and staff regarding addressing  
22 LGBT bullying and harassment, they still keep saying  
23 that this is not a problem in their schools. Many  
24 kids and staff members in the district know that this  
25 is not true.

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1           Many reports were made regarding an  
2 eighth-grade student who completed suicide by her  
3 friends and some of the staff members who did grief  
4 counseling for students after Justin died, know that  
5 they submitted reports.

6           I'm here today not only to tell you of  
7 my son's story, but also to make a plea to the  
8 Commission to please consider helping to pass a  
9 federal law that includes bullying and harassment for  
10 all K-12 public schools across the entire country.

11           The law would definitely need to be an  
12 enumerated law to include race, gender, sexual  
13 orientation, gender identity, religion, socio-  
14 economic status, and disability.

15           It is not right that kids in one part of  
16 the country have laws that protect them more than  
17 others. And some kids really have any protections at  
18 all.

19           And if they do have a policy in place,  
20 it is not enforced. I believe the federal government  
21 should enforce that each school turn in a yearly  
22 report of the incidences of bullying and harassment  
23 being reported, to make the schools accountable.

24           I met other mothers across the country  
25 that have lost children to suicide. In these cases

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1 many attempts were made by the parents to have the  
2 schools do something about the harassment that their  
3 child was going through, to only fall on deaf ears.

4 A few of these children include Asher  
5 Brown, age 13 from Texas; Seth Walsh, age 13 from  
6 California; Carl Hoover-Walker, age 11 from  
7 Massachusetts. These children are dead, my son is  
8 dead. Justin is gone from this earth and I will  
9 never be able to give him a hug, see his smile, hear  
10 his beautiful cello playing or tell him I love him,  
11 because some people believed he deserved fewer  
12 protections than others. All of these children and  
13 too many others across the country all died too young  
14 as a result of bullying and harassment.

15 They'll be forever missed by their  
16 friends and family. Life for us will never be the  
17 same again without them. The current level of  
18 federal involvement in our schools is not sufficient.

19 I also want to mention that last night,  
20 as I was getting ready for bed here in D.C., I got a  
21 call from a teacher in the district that we lost  
22 another student last night to suicide, an eighth  
23 grader. Thank you.

24 CHAIRMAN CASTRO: Thank you. We can't  
25 imagine what you're going through and we appreciate

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1 your being here and sharing this with us. Mr.  
2 Negrón.

3 MR. NEGRÓN: Thank you, Chairman Castro,  
4 Vice-Chairman Thernstrom and distinguished  
5 Commissioners, good afternoon.

6 My name is Francisco Negrón, I'm the  
7 General Counsel of the National School Boards  
8 Association. The National School Boards Association  
9 is the national organization of state associations of  
10 school boards. I'm representing more than 90,000  
11 local school board members throughout the United  
12 States.

13 Collectively, we govern approximately  
14 15,000 local school districts serving the nation's  
15 46.5 million public school students.

16 Thank you for the opportunity to be a  
17 part of the conversation on inter-student violence,  
18 and to share with you a little bit about the  
19 perspective of public school boards and school  
20 districts.

21 Summed up into one sentence, that  
22 perspective is that federal mandates are not the  
23 solution, local leadership is.

24 Federalizing the response to bullying by  
25 viewing it solely through the lens of federal civil

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1 rights legislation is, in fact, not the best  
2 approach. Forty-five states have already addressed  
3 the bullying question, passing state statutes,  
4 requiring school districts to enact policies,  
5 implement prevention measures and report incidents.

6 As a result, NSBA has expressed, as a  
7 part of our conversation, our concern that the  
8 Department of Education's Office for Civil Rights'  
9 approach in their Dear Colleague Letter of October,  
10 2010, is too broad. It confuses the legal standard  
11 and may, in fact, invite litigation against school  
12 districts.

13 OCR's position confuses the standards  
14 between liability and enforcement, making it more  
15 difficult for school officials to understand the  
16 requirements of the law.

17 You know that, in 1999, the Supreme  
18 Court ruled in *Davis v. Monroe* that schools could be  
19 held liable, under Title IX, for student harassment  
20 when the school has actual knowledge, but is  
21 deliberately indifferent.

22 OCR now advises school officials could  
23 be responsible if they reasonably should have known  
24 about an incident of harassment. Additionally, OCR  
25 says harassment creates a hostile environment which

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1 is a violation of the law, if it is severe, pervasive  
2 or persistent, rather than the *Davis* standard  
3 requiring that the harassment be severe, pervasive  
4 and objectively offensive.

5 Even though OCR says that this is an  
6 enforcement, an agency enforcement standard that's  
7 been in play for several years, the confusion around  
8 differing standards is spreading and it doesn't lie  
9 solely with non-lawyer school officials.

10 Courts are starting to use the OCR  
11 standard, granting the Department administrative  
12 deference for guidance that has not the same weight  
13 as officially promulgated rules under the  
14 Administrative Procedures Act.

15 Just last month, in *T.K. v. New York*  
16 *City Department of Education*, a federal district  
17 court in New York relied on OCR's Dear Colleague  
18 Letter, saying that the letter's illustrations, and  
19 this is a quote, "of when a school is required to act  
20 and what type of response is required," under the law  
21 is "useful in applying the appropriate legal  
22 standard."

23 The court then melds the *Davis* standard  
24 on peer harassment with the OCR's standard to find  
25 that the district was not entitled to summary

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1 judgment, upon its failure to provide the free and  
2 appropriate public education.

3 Now this is not a money damages  
4 situation under Title IX, but it suggests that some  
5 courts are willing to apply the OCR standard more  
6 broadly. It's too early to tell if a trend is  
7 developing.

8 Our fear is that Plaintiffs' lawyers may  
9 be emboldened by such an approach to pursue  
10 litigation against schools. So let me be clear, it  
11 is indeed crucial that school officials respond to  
12 incidents of bullying and harassment swiftly and  
13 appropriately. But nuanced legal distinctions can  
14 create confusion that detracts from an understanding  
15 of the requirements of the law and could have the  
16 unwelcome effect of chilling educators' actions, for  
17 fear of their own personal legal liability.

18 From a practical perspective, it could  
19 mean that educators may be reluctant to resolve what  
20 may be a routine issue of student discipline with the  
21 least intensive, least intrusive, although perhaps  
22 more effective approach, rather than risk a federal  
23 lawsuit.

24 Lastly, one very real concern for  
25 schools is the tension, as has already been

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1 identified, between student freedom of expression and  
2 the regulation of a hostile environment.

3 Students do not leave their  
4 constitutional free speech rights at the school house  
5 gates, simply because their views are unpopular and  
6 anti-majority.

7 In fact, even Justice Alito, when he was  
8 on the Third Circuit, has said that harassing speech,  
9 even in a school setting, is not categorically denied  
10 First Amendment protection.

11 The challenge for schools, which OCR  
12 does not address in its Dear Colleague Letter, is how  
13 to regulate speech that may contribute to a hostile  
14 environment without overstepping those constitutional  
15 bounds.

16 Forcing schools to pick their poison  
17 between threats of litigation for competing federal  
18 rights is not the answer. At best, it's a quandary  
19 for educators who are not jurists.

20 That bullying and harassment are  
21 unacceptable in schools is clear. What is less clear  
22 is that federal mandates are the solution. We  
23 continue to support the call for research and data to  
24 eradicate bullying and nurture positive learning  
25 environments. Thank you.

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1 CHAIRMAN CASTRO: Thank you. Mr. Trump.

2 MR. TRUMP: Good afternoon. I bring to  
3 you 25 years of experience in working with schools  
4 and in schools on school safety issues. I also am a  
5 father of two young children and member of a multi-  
6 cultural family and one who has had bullying hit  
7 home.

8 So I have personal experience as well as  
9 front line experience. I'd like to touch on several  
10 items that have come up during the course of the day.  
11 First, the issue of the data.

12 There are serious gaps in federal data  
13 on school violence, in general, and school bullying  
14 specifically. The federal violence data relies on  
15 half a dozen or so academic surveys that are very  
16 limited in scope.

17 Data on bullying is also relatively new  
18 and limited to academic research, organizationally  
19 commissioned surveys, and various other limited data  
20 sources, as far as the extent of bullying.

21 We have heard words such as bullying  
22 epidemic, bullying crisis. When we see the headlines  
23 in the media and cable and local news, the words  
24 crisis and epidemic arrive very quickly, and I had a  
25 Principal who shared with me earlier this week the

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1 concern that bullying has become such a broadly- used  
2 term and buzz word, that it's really diluting the  
3 real chronic bullying issues, to the point where he's  
4 had teachers come in and say, Principals are  
5 bullying.

6 Principals are saying teachers are  
7 bullying. Parents saying everybody is bullying their  
8 kid, and it's not perhaps, legitimate incidents are  
9 not perhaps receiving the attention that they  
10 deserve.

11 So we have to exercise caution while  
12 not devaluing anyone's individual experience, but not  
13 to also legislate by anecdote and have roller coaster  
14 public policy and awareness in a broader issue of  
15 school safety.

16 Related to that, bullying needs to be  
17 viewed on a continuum and we have violence, we have,  
18 a continuum that includes verbal disrespect, physical  
19 aggression, fighting.

20 We have potential for school shootings,  
21 preparedness for terrorist attacks on school, staff  
22 suicide, student suicides, weather and natural  
23 disasters, large-scale fights or riots, gang  
24 violence, accidental gun discharges, non-custodial  
25 parent issues, stranger danger in elementary schools,

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1 and the issues we face go on and on and on in that  
2 continuum. So a bullying-alone approach or a gangs-  
3 alone or school policing approach alone is not the  
4 best. It requires a comprehensive and balanced  
5 federal policy and funding in a comprehensive  
6 approach at the school-based level.

7 Definitions of bullying in schools.  
8 Most schools, the vast majority of schools, focus on  
9 those behaviors that would constitute bullying with  
10 threats, intimidation, assaults, harassment,  
11 extortion, disruption of the school environment in  
12 their school policies and the laws that have been  
13 proposed at the state and federal level largely are  
14 very vague and general and are very much open to  
15 frivolous lawsuits, increased confusion within the  
16 school community, and less focus on the behaviors of  
17 bullying and more on personal characteristics of the  
18 victims.

19 And we need to make sure that we're very  
20 clear, so that those cases do occur that we have  
21 language that is very specific focusing on bullying  
22 behaviors.

23 We also have concern about the skewed  
24 federal policy and funding, which has largely been  
25 shifted almost exclusively to bullying alone. The

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1 school climate is important but we also have to have  
2 a secure environment.

3 The child who is on his way to the  
4 office to talk to the school psychologist is not  
5 going to benefit if they have an unsafe and insecure  
6 environment where he's beaten in the back hallway on  
7 the way to the office.

8 So you have to have a secure environment  
9 and a positive school climate. The two go hand in  
10 hand and they're not separate and distinct.

11 We have eliminated, the Congress and the  
12 Administration have eliminated, the federal Safe and  
13 Drug Free Schools grant that helped the schools deal  
14 with drug and violence prevention, security and other  
15 issues. We've just eliminated the emergency planning  
16 grant, the only K-12 school emergency planning grant.

17 We're focusing in a very skewed manner  
18 on bullying. We need to make sure that we have  
19 addressed bullying, but also as a part of a  
20 comprehensive and balanced federal policy, as well as  
21 local policies within the schools.

22 At the local level, an overemphasis on  
23 bullying and an overreach by the Department of  
24 Education is a concern of Administrators. I had a  
25 school, a 36-year old veteran school Principal said

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1 earlier this week, quote, As an Administrator it  
2 makes you gun shy to actually deal with the problem,  
3 when you first have to think about whether your  
4 decision will put you on the front page of the paper  
5 or get you and your district in a law suit."

6 I also believe, as been said earlier,  
7 that when there is that emphasis and fear of the  
8 decision making at the local level with the  
9 Principals, the Superintendents, when they become one  
10 more on a political issue and the fear of lawsuits,  
11 it takes away from dealing with the actually  
12 incidents at hand, their ability to made good  
13 decisions and it could increase the over-reaction  
14 that we've heard under so-called zero tolerance  
15 decisions that have been in the news where we all  
16 shake our heads. So I think that the caution needs  
17 to be viewed in terms of making sure that there's not  
18 an overreach.

19 And we also need to look at mental  
20 health issues. One of the things I was pleased to  
21 hear this afternoon was the issue of mental health.  
22 Dave Cullen and Dr. Peter Langman, in a 10-year post-  
23 Columbine study, found mental health issues, not  
24 bullying, were the primary actions behind many school  
25 shooters.

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1           We also know that the American  
2 Foundation for Suicide Prevention cites that 90  
3 percent of all people who died by suicide, had  
4 diagnosable psychiatric mental health issues, and  
5 that we have not fairly given the great deal of  
6 attention to the mental health needs of children.

7           One father of a student who committed  
8 suicide in our area in Ohio said the bullying  
9 actually pushed his child over the hill, but mental  
10 health and family stress issues pushed him up the  
11 hill.

12           So we need, when we look at this, we  
13 need to look at the suicides, the mental health needs  
14 of children, as well. But I believe that we can take  
15 a comprehensive approach at the local school level,  
16 by dealing with bullying in five areas, supervision  
17 and security, and hot spots where it occurs,  
18 effective firm, fair and consistent discipline in  
19 classroom management, use of the criminal law.

20           I was amazed that the Philadelphia case  
21 did not involve any type of law enforcement  
22 interaction for assault, as well as civil law, which  
23 I can assure you does occur.

24           I get calls from attorneys for expert  
25 witness work every week. School climate strategies,

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1 mental health support for students and effective  
2 communication plans.

3 I encourage the Commission to focus it's  
4 recommendations on the tools available to local  
5 schools, supporting the roles of school  
6 administrators as the lead persons responsible for  
7 local discipline and climate issues, and to make  
8 recommendations, most of all, that are practical,  
9 day-to-day implications for schools in consideration  
10 of the broader social, political and special interest  
11 issues that we've heard about all day today. Thank  
12 you, Mr. Chairman.

13 CHAIRMAN CASTRO: Thank you. Mr.  
14 Volokh.

15 MR. VOLOKH: Thank you, thank you very  
16 much for having me here. I specialize in First  
17 Amendment law so that's what I'm going to talk about.

18 There are lots of other important issues  
19 here;, I just don't have much to say about them. I  
20 won't speak to the federalism questions, I won't  
21 speak to educational policy, nor will I speak to the  
22 questions of the proper way of dealing with violence  
23 and threats of violence, which are clearly  
24 unprotected by the First Amendment.

25 I've heard many people at both tables,

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1 earlier today, say that really this is not a First  
2 Amendment issue. Everybody agrees that the First  
3 Amendment should be respected, but these proposals  
4 don't really materially impact the First Amendment.

5 I wish that were true, but it seems to  
6 me that if you look at what the actual material —  
7 for example, the Dear Colleague Letter from the  
8 Department of Education — says, it really is in  
9 considerable measure about speech. That what is  
10 labeled bullying and harassment are capacious enough  
11 to include speech, including speech that is protected  
12 by the First Amendment, and my question is what to do  
13 about it.

14 For example, if you look at the Dear  
15 Colleague Letter, it specifically talks about how  
16 harassment was defined to include verbal acts.  
17 That's lawyer speak for speech or statements.

18 In fact, it specifically says graphic  
19 and visual statements. It expressly says that  
20 harassment needn't, that speech in order to be  
21 harassment need not be limited to speech at a  
22 specific target.

23 So it's not limited to personal insults  
24 that go to a particular person. It could include  
25 general statements, such as condemnation of

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1 homosexuality, of particular religions and the like.

2 The letter specifically refers to  
3 creating emails or web sites as a possible vehicle  
4 for what would be actionable harassment. Posting to  
5 social networking sites is another example.

6 We heard Assistant Secretary Ali  
7 specifically echo that in an answer to a question  
8 this morning. So what we're talking about is a broad  
9 vision of what is punishable harassment and so-called  
10 bullying.

11 The definitions are broad enough,  
12 capacious enough, not just to cover speech, but to  
13 cover speech 24-7. We're not talking about  
14 restrictions that are premised on some notion —  
15 which indeed the Court has rejected — that free  
16 speech stops at the school house gate.

17 There is no more school house gate.  
18 Perhaps in part because of technology, it's true that  
19 speech that is created outside school can certainly  
20 affect the environment in school and can even be seen  
21 in school on people's smart phones and computers in  
22 the lab and so on and so forth.

23 But, despite that, the reality is that  
24 the vision expressed is — as the Dear Colleague  
25 Letter suggests — that the students should be

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1 punishable for speech throughout the entirety of  
2 their school lives, including perhaps their early  
3 adulthood.

4 Many high school students are actually  
5 18 by the time they graduate. Now, what kind of  
6 speech is punished. As I said, it's not just speech  
7 that sets a specific target.

8 Nor is it limited to personal insults  
9 more broadly. It covers for example, gossip. So,  
10 the letter talks about rumors about sexual behavior  
11 — that's often cruel and crude, that's gossip,  
12 that's the kind of behavior that most adults engage  
13 in, (though I hope at a less vulgar level than some  
14 teenagers do.) But according to the letter, say  
15 somebody spreads sexual rumors, which is to say, and  
16 says, oh, I heard so and so is in a relationship with  
17 this and such. Post it, save it to their Facebook  
18 page or send an email about it, that could be  
19 actionable harassment. Or at least could become part  
20 of that actual harassment if it is decided that it's  
21 severe, persistent or pervasive.

22 Another example from Ms. Graves'  
23 testimony from earlier, the written testimony from  
24 earlier today, had to do with Facebook insults of a  
25 pregnant student. Now, I'm certainly not in favor of

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1 insulting mothers, pregnant or otherwise, but it is  
2 also the sort of thing that, if somebody decides that  
3 they want to express their views about a classmate —  
4 they think that the pregnancy is a sign of  
5 irresponsibility or sexual promiscuity or whatever  
6 else — I would think that that's constitutionally  
7 protected speech.

8 Now if this were just limited to in-  
9 school statements — you can't talk about it at  
10 school — I could understand that, although even that  
11 might be going too far. But we're talking here  
12 about, specifically, things that are posted online.

13 So, again, this is an attempt at 24-7  
14 control of student speech. And it may cover  
15 criticism of religion, homosexuality and so on and so  
16 forth because of the theory that that creates a  
17 severe, pervasive or persistent enough to create an  
18 offensive environment or an abusive environment for  
19 the student — again, whether the speech is on campus  
20 or off campus.

21 The NEA — there's available outside the  
22 room a report of the NEA, a nationwide study of  
23 bullying. Their definition of bullying, which yields  
24 some of the high percentages they find for bullying,  
25 includes 'sexist remarks' and 'social/relational

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1 bullying.'

2           Professor Meyer's presentation earlier  
3 today, I think, was very interesting. It was largely  
4 focused on violence, far outside my context, except  
5 that I think all of us condemn that kind of violence.  
6 But one of the things that he did note is that one of  
7 the dangers to the mental health of gay students is  
8 anti-gay stigma and prejudice. I think that's  
9 probably right, but the consequence of that is that  
10 if you take that logic seriously, then again speech,  
11 whether on campus or off campus, that expresses and  
12 contributes to the stigma of prejudice would be  
13 punishable.

14           The university cases — all of which have  
15 come out in favor of First Amendment protection, but  
16 after a lot of litigation — university cases  
17 likewise have made clear that harassment and hostile  
18 environment in the eyes of administrators is often  
19 defined broadly enough to cover this very kind of  
20 speech including political, religious and social  
21 commentary.

22           Now one thing that I think is quite  
23 correct from what the OCR said, is that the federal  
24 government only goes after the most egregious conduct  
25 and usually focused in violence.

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1           But it does, this in part because  
2 there's such limited staff, that it only goes for the  
3 worst thing, correctly so.

4           But the OCR also seeks school policies  
5 that are much broader than the particular cases that  
6 are the most egregious cases that they did prosecute.  
7 And, in fact, we heard Ms. Samuels note that we urge  
8 schools to nip these problems in the bud, before they  
9 become so egregious. So you put all this together  
10 and it seems to me there's a hard to deny potential  
11 First Amendment problem.

12           Now, I think schools have some latitude,  
13 both to punish threats, and also to punish certain  
14 kind of vulgarities under the *Frasier* decision, As  
15 well as certain kind of speech that shows an imminent  
16 likelihood of substantial material disruption, from  
17 fights and the like.

18           So there is some flexibility, but that  
19 flexibility is not unlimited, especially once you get  
20 to what a lot of people are talking about — cyber-  
21 bullying, for example, or control of off-campus  
22 speech, as well as on-campus speech controls. This  
23 goes far outside the schoolhouse gate and amounts to  
24 an attempt to control the expression, both the  
25 personal views and religious and political views of

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1 children throughout the entirety of their school  
2 lives, on campus and off.

3 CHAIRMAN CASTRO: Thank you, Professor  
4 Volokh.

5 Ms. Lauter.

6 MS. LAUTER: Thank you. Good afternoon.  
7 I'm Deborah Lauter. I'm the Civil Rights Director of  
8 the Anti-Defamation League.

9 Before giving my formal remarks, I just  
10 was so moved by Ms. Aaberg's presentation. I just  
11 want to offer my condolences and commend you for what  
12 you're doing to raise your voice so that others won't  
13 have to go through the same thing.

14 MS. AABERG: Thank you.

15 MS. LAUTER: The Commission needs to be  
16 commended as well for addressing this important  
17 subject of bullying, violence and harassment, and I  
18 greatly appreciate the opportunity to testify here  
19 today and with our written submission. It's been a  
20 very long day.

21 And for those of us on this last panel,  
22 we very much appreciate, Chairman Castro, your  
23 attention to timing so that we can get out on time at  
24 the end of the day. And I harken back to when you  
25 said you hope that this provides a model for

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1 civility, and I think that's been very successful.  
2 At least we haven't gotten to the questions on our  
3 panel. But so far so good.

4 I hope that you're all familiar with  
5 the Anti-Defamation League. We're one of the oldest  
6 civil rights and human relations organizations in the  
7 country. We were founded in 1913. And our goal and  
8 our mission is to fight anti-Semitism and all forms  
9 of hatred, prejudice and bigotry. And we advance  
10 interfaith and intergroup relations.

11 Our strength is in our combination of  
12 talented education and legal professionals. We're  
13 headquartered in New York and we have 28 regional  
14 offices around the country. Over the past 30 years,  
15 we have emerged as one of the principal national  
16 resources addressing prejudice and violent bigotry.

17 I'm actually here with my colleague,  
18 Michael Lieberman, who is considered one of the  
19 foremost experts on hate violence in America today.

20 Through our award-winning anti-bias  
21 education programs known as a "A World of  
22 Difference," we estimate we've impacted close to 37  
23 million students and educators. And over the past  
24 decade we have built upon our training initiatives to  
25 craft innovative programs to address bullying and the

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1 pernicious new form of harassment affecting children  
2 and students known as cyberbullying.

3 Working to create safe, inclusive  
4 schools and communities is one of ADL's top  
5 priorities. We take a very broad, holistic approach  
6 to addressing the problem. We track the nature and  
7 magnitude of the problem. We develop education and  
8 training programs for students, for parents, for  
9 educators. And we advocate at the state and the  
10 federal level for policies and programs that we feel  
11 can make a difference.

12 We believe the federal government, in  
13 partnership with state and local public agencies,  
14 nonprofits, community organizations, colleges and  
15 universitie,s and media companies can all play a  
16 critical role in ensuring that our schools and our  
17 communities are safe places for all students. I know  
18 there's been a lot of discussion about what's the  
19 federal role. For us, the comprehensive approach is  
20 what's best. We all have a stake in addressing this  
21 problem.

22 Laws and appropriate inclusive school-  
23 based policies can be a focal point for addressing  
24 bullying. But education, training, and community  
25 involvement are necessary complements to any

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1 effective response.

2 It's critical that government officials  
3 and civic leaders ensure that schools help foster a  
4 culture in which bias and bullying are not tolerated  
5 and are safe places for our students. We're very  
6 pleased that the Obama Administration has  
7 demonstrated extraordinary commitment to addressing  
8 bullying and cyberbullying in a comprehensive and  
9 inclusive manner.

10 We believe the OCR's October 26th Dear  
11 Colleague guidelines represent a significant step  
12 forward in protecting students from bigotry and from  
13 harassment. For us the guidance accomplished three  
14 major things.

15 First, it provides an unprecedented,  
16 inclusive description of the breadth of existing  
17 federal anti-discrimination laws and their  
18 application to both K-12 schools and to colleges and  
19 universities.

20 They explicitly set out a school's duty  
21 to address incidents of discriminatory harassment and  
22 stress that it's not enough for the institution to  
23 punish the student who is responsible. Instead the  
24 school administration must address the environment  
25 and the effect of the incident and take steps to

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1 ensure the harassment does not recur.

2           Second, the OCR guidance makes clear  
3 that anti-Semitic harassment can be prohibited by  
4 Title 6, as Mr. Marcus testified. And in March I  
5 want you to know that the ADL, along with 12 other  
6 national Jewish organizations, wrote to Secretary of  
7 Education Duncan calling for this clarification and  
8 that the guidance states that Title 6 protects Jewish  
9 students from anti-Semitism "on the basis of actual  
10 or perceived shared ancestry or ethnic  
11 characteristics."

12           This clarification is particularly  
13 welcome in conjunction with ADL's continuing work to  
14 combat anti-Semitic bullying, harassment and bigotry  
15 in schools and college campuses, including in some  
16 instances anti-Semitic intimidation of pro-Israel  
17 activists.

18           Third, the guidance underscored that  
19 harassment based on sexual orientation and gender  
20 identity in schools and on campus is prohibited by  
21 federal civil rights law. According to the OCR  
22 guidance, Title IX does protect all students  
23 including lesbian, gay, bisexual and transgender  
24 students from sex discrimination. This is a very  
25 welcome development.

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1           The ADL responds to bias, bullying and  
2 cyberbullying through a combination of education and  
3 legislative advocacy. As I said, on the federal  
4 level, on the state level and in schools, we do not  
5 support the criminalization of bullying. Instead we  
6 have promoted laws that require schools to adopt  
7 policies that are inclusive and comprehensive —  
8 balancing a school's duty to maintain a safe learning  
9 environment with students' constitutional rights.

10           Two years ago, we developed a model  
11 bullying prevention law for states. I have a pretty  
12 copy here. I think we have a copy in your packets.  
13 And we've been organizing and leading coalitions  
14 advocating for its passage, with recent successes in  
15 Florida, Massachusetts, and New Jersey.

16           The question was raised earlier, "Why  
17 are we seeing this explosion?" And I think we  
18 haven't really focused on this and I hope the  
19 Commission will. I think we see the explosion of  
20 what's happening in schools today for a combination  
21 of reasons. Some are because of the whole nature of  
22 social networking sites and the way kids are  
23 communicating.

24           I think we can't discount what's  
25 happening with cable, the change from TV stations and

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1 in the good old days when we had three stations and  
2 they were pretty neutral. Today what kids are  
3 witnessing on cable stations, either through reality  
4 shows where civility is broken down, or shows like  
5 South Park -- that was mentioned earlier -- that has  
6 satirical humor that may not be appreciated by kids,  
7 and the ones who even do the "Kick a Jew Day" which  
8 is a problem and we have been dealing with it at ADL.

9 And also the news media. The news media  
10 yelling over each other. Kids learn what they live  
11 and I think these are areas.

12 For us, one of the key partnerships that  
13 we need to engage with are these media companies.  
14 We've been partnering with Cartoon Network, MTV,  
15 Nickelodeon, Microsoft and AT&T. And we salute these  
16 companies' dedication to this problem. They've  
17 acknowledged it and they're trying to work with  
18 groups such as ours to fix it.

19 We also led a recent effort to promote  
20 the adoption of a thoughtful and inclusive American  
21 Bar Association resolution and report on bullying.  
22 They approved it in February and it basically put the  
23 ABA on record for the first time in support of  
24 federal and state policies and laws designed to  
25 prevent bullying --

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1 CHAIRMAN CASTRO: Thank you, Ms. Lauter.

2 As I promised, our first question will  
3 go to Commissioner Heriot. I take it you have a  
4 question.

5 COMMISSIONER HERIOT: I do. Thank you.

6 CHAIRMAN CASTRO: Okay. And will be  
7 followed by Commissioner Yaki, Commissioner Kirsanow,  
8 and Commissioner Achtenberg.

9 COMMISSIONER HERIOT: First, I want to  
10 offer my condolences.

11 MS. AABERG: Thank you.

12 COMMISSIONER HERIOT: I want to thank  
13 all the panelists for their presentations. This is  
14 very helpful.

15 My question, however, is specifically  
16 for Mr. Negron. When the Department of Education  
17 explains its bullying policies, and when other  
18 advocates explain those policies, I've heard two  
19 different characterizations that I think are very  
20 much in contention. On the one hand, we've heard the  
21 Department of Education's actions are historic and  
22 important and they are addressing the crisis and one  
23 that has been allowed to get out of hand. And on the  
24 other hand, at times we've been told the Department  
25 of Education's actions really haven't changed

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1 anything. They are basically just reiterating what  
2 they said in the past. And the law is just the same.

3 I understand why folks might be looking  
4 at it both ways. And on the one hand, while the  
5 Department has authority to issue regulations under  
6 Title IX and under Title VI when they do that they  
7 have to get Presidential approval. And that's a real  
8 cumbersome procedure for them. So I can see why  
9 they're not big on doing it.

10 On the other hand, everybody likes to  
11 think that what they're doing is important. And  
12 bullying certainly is an important issue. My  
13 question for you, Mr. Negron, is to your members,  
14 that is, school boards all over the country, I  
15 assume. Is that right?

16 MR. NEGRON: That is correct. Yes.

17 COMMISSIONER HERIOT: Do they feel that  
18 they have a good handle on what the Department of  
19 Education is asking them to do?

20 MR. NEGRON: First, let me tell you  
21 that, in addition to the school board members, we  
22 also represent 3,000 school lawyers across the  
23 country through the Council of School Attorneys who  
24 joined in our response to the Dear Colleague Letter.  
25 I think the concerns that the school lawyers have and

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1 that the school board members have and that NSBA has  
2 really arise from the implementation side of what  
3 OCR's letter has done.

4 One of the things that I spoke about  
5 very briefly was the whole question of a chilling  
6 effect on educators to institute the least intrusive  
7 approach to solving a question. And one of the  
8 things that the OCR has done that is just slightly  
9 different is set out a variety of examples that are  
10 meant to be instructive to school districts about  
11 what they can and can't do.

12 Just to illustrate, one example is the  
13 whole approach they use around gender discrimination.  
14 And what the Department seems to be suggesting, even  
15 though they very clearly state that, for instance,  
16 sexual orientation discrimination is not covered  
17 under Title IX, we know that some courts have said  
18 that it is, depending on the circumstances. But  
19 their enforcement standard is very clear.

20 And what we think is a problem is that a  
21 school district may adopt, for instance, a more  
22 strict enforcement standard following the guidelines  
23 and then somehow adopt for itself some sort of legal  
24 liability. So, for instance, if a school district  
25 decides that it's going to use the enforcement

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1 standard and include sexual orientation as a  
2 protected classification -- and by the way, most  
3 school districts already have that as a protected  
4 classification - but if they go that one step further  
5 and then equate that with gender discrimination, are  
6 they somehow now waiving a potential dispense under  
7 Title IX lawsuit, for instance?

8 So these are the kinds of difficulties,  
9 from a legal perspective, that school districts have.

10 COMMISSIONER HERIOT: Thank you.

11 CHAIRMAN CASTRO: Commissioner Yaki.

12 COMMISSIONER YAKI: Thank you very much,  
13 Mr. Chair. This question, first of all, I want to  
14 say, Ms. Aaberg, thank you very much for coming here.  
15 Thank you for your courage, for sharing the pictures  
16 of your son with us, which paints a face to what  
17 we're talking about here today. My question is for  
18 Mr. Negrón, but if you have anything you want to add  
19 I want you to feel free to join in.

20 Mr. Negrón, I'm going to be as civil as  
21 I possibly can. But it just seemed to me very  
22 difficult for me to listen to your testimony talking  
23 about the fear of lawsuits and plaintiffs' lawyers,  
24 when you're talking about sitting next to someone who  
25 lost their son because of a loss of leadership at the

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1 local level. Here you have a situation where the  
2 local school board/school district failed. They  
3 failed in protecting. They failed in notifying.  
4 They utterly failed when it came to her.

5 And to talk about plaintiffs' lawyers  
6 and whatever is essentially saying, "Well, you know  
7 there's a price we have to pay and there's some cost  
8 benefit analysis that we have to do when it comes to  
9 how much a child's life is." At least that's the way  
10 it came to me. I know that's not what you meant, but  
11 certainly the way it came out.

12 So my question to you is, you talk about  
13 the fact that there should be no federal mandates  
14 because there should be local leadership. How do you  
15 explain to Ms. Aaberg? How do you explain to others?  
16 And how do you explain, five years from now when the  
17 school district has changed, when new leadership has  
18 come in and this just may be a memory to them? How  
19 do you explain to them what happened to Ms. Aaberg  
20 and why there shouldn't be any federal mandates?

21 MR. NEGRON: Sure. And thank you for  
22 the opportunity to clarify that. Certainly my  
23 remarks aren't meant in any fashion to disrespect the  
24 personal tragedy of Ms. Aaberg.

25 School districts are concerned about

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1 bullying. They're concerned about the tragic loss of  
2 students. And so my condolences to Ms. Aaberg.

3 But I would tell you that school  
4 districts do have a responsibility to educate all  
5 students. And I think it's important that this  
6 Commission understand that litigation defense dollars  
7 are important. It may seem callous in the light of  
8 the realities and tragedies that happen.

9 But every dollar, by and large, that is  
10 spent on litigation generally comes from general  
11 revenue dollars. And general revenue dollars are  
12 classroom dollars. So, depending on the size of the  
13 district, we're talking about dollars that could be  
14 spent in the classroom to educate all of our  
15 students.

16 One of the missions of school boards and  
17 school districts is to ensure that the environments  
18 in which students learn are safe. But those  
19 environments could not exist without funds.

20 So it's not meant disrespectfully,  
21 Commissioner. It's meant as a very real recognition  
22 of the realities that face our school.

23 COMMISSIONER YAKI: Answer my question  
24 about the loss of leadership in this instance.

25 MR. NEGRON: I don't represent that

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1 school district individually and I can't respond to  
2 the loss.

3 COMMISSIONER YAKI: But you are  
4 representing the school district. You're saying that  
5 you want local leadership. But they failed here.

6 MR. NEGRON: Right.

7 COMMISSIONER YAKI: So why do you want  
8 local leadership?

9 MR. NEGRON: I think that, by and large,  
10 I mean there's always an exception to every case.  
11 And, by and large, school districts care about what  
12 happens to their students. Just because there may  
13 have been a particular lack of leadership in one  
14 situation or a policy that didn't work, doesn't mean  
15 that we should therefore assume from that that all  
16 school boards are without leadership. That's the way  
17 that democracy functions, sir.

18 MS. AABERG: I want to add that locally  
19 speaking of which, I grew up in Minneapolis and there  
20 wasn't a whole lot of problems with diversity — I  
21 grew up, I was used to it and everything. And right  
22 now Minneapolis has the best bullying policy that I  
23 can even think of.

24 I also just moved over one school  
25 district over. I have an eight-year-old. And this

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1 school district, when I'm asking for -- I had been  
2 asking Anoka-Hennepin for eight months now to please  
3 offer training to their staff. And they said they  
4 did provide training to their staff.

5 I said, "Well, I would like to know what  
6 you did." And they mailed me a 12-page PowerPoint.

7 Whereas, just five miles away the school  
8 district I'm in now, so far this year they've already  
9 had, every other month they provide four hours of  
10 teacher training in different aspects of bullying. I  
11 went to one when they did the LGBT. And the lawyer  
12 even described to all the staff what the policy  
13 meant.

14 So for local involvement, a couple years  
15 ago Governor Pawlenty was going to sign a bill of  
16 Safe Schools for All. There were -- I guess there  
17 was a lot of suicides back then. Well, the suicides  
18 slowed down and even though other people that were  
19 trying to pass the bill changed so many things about  
20 it he ended up denying it or vetoing it. And now how  
21 many more kids have died. I wonder, if this Safe  
22 Schools for All in Minnesota bill would have passed  
23 for the whole state, would my son still be here  
24 today.

25 So in Minnesota, and I know down in

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1 Texas and over in California, there are so many — I  
2 mean, with all the kids around the country coming to  
3 me and telling me what's going on in their district,  
4 obviously local involvement is not working.

5 CHAIRMAN CASTRO: The Chair recognizes  
6 Commissioner Kirsanow.

7 COMMISSIONER KIRSANOW: Thank you, Mr.  
8 Chairman. And thank you to all the panelists. It's  
9 been very educational. And my condolences to Ms.  
10 Aaberg. My question is for, I think, Mr. Negron. I  
11 was going to -- Mr. Trump can jump in if he wants to.

12 An earlier panel and I don't know if you  
13 were in the room, Ms. Gym testified about the South  
14 Philly school district. It was an extraordinary  
15 situation that the Commission has been very  
16 interested in for a while. And many of the incidents  
17 there were incidents that I considered to be criminal  
18 conduct. Yet, at least according to Ms. Gym, there  
19 was no discipline of any staff members. Maybe she  
20 doesn't know all of the circumstances. But no  
21 counselor, no principal, no vice principal, no  
22 superintendent, no one was disciplined, not even a  
23 written warning maybe.

24 Then she testified also that a complaint  
25 was filed with OCR -- I'm sorry -- with the

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1 Department of Justice on January 19th. And then at  
2 the end of February the Department of Justice showed  
3 up.

4 And they have rules. And there should  
5 be certain rules. But it strikes me that those rules  
6 would be ineffective in that interim six-week period  
7 where kids were getting beat up, heads beaten, hair  
8 pulled and people being dragged down stairs. Yet no  
9 one was disciplined.

10 And I'm wondering. You know, here we  
11 are in Washington, and a right to write rules and get  
12 the lawyers involved, and those things are  
13 appropriate. But in terms of the immediate  
14 prevention of this kind of conduct, it strikes me  
15 that that's something that a principal, a teacher, a  
16 counselor, a security guard should be involved in.  
17 What are the things that constrain schools from  
18 taking immediate action, exercising some form of  
19 accountability at those principal actors right there,  
20 on the ground as they say, who can prevent the  
21 conduct in the first instance?

22 MR. NEGRON: Thank you for the question.  
23 I wasn't in the room when that conversation was had.  
24 So I'm just going to speak from a theoretical  
25 approach. But my guess is that part of the reason

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1 that you don't know if any employees or any staffers  
2 were disciplined is because there might be a  
3 collective bargaining agreement in place. There  
4 might be some sort of public service laws that keep  
5 employee discipline matters private or confidential  
6 at least until there's the end of that proceeding.  
7 And that may be what the district is undergoing now.

8 So I would be speculating that those  
9 collective bargaining agreements or that those rules  
10 that might exist might have prevented some sort of  
11 employee action. I would hope that that is not the  
12 case.

13 Part of what we are concerned at the  
14 National School Boards Association is that educators  
15 be able to act when they need to act. If a policy is  
16 not a good policy -- and I'm not familiar with the  
17 neutrality policy that was discussed earlier -- but  
18 that policy didn't seem to work, did it?

19 And so I think the first thing we need  
20 to do is make sure that our policies empower  
21 educators, that educators know that they have the  
22 ability to act, to correct whatever situation comes  
23 before them, whether it's bullying or harassment.  
24 But also we need to not chill their ability to do  
25 that. We need teachers not to believe that there

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1 will be an impending federal lawsuit if they do not  
2 treat a specific set of circumstances as a federal  
3 civil rights violation.

4 Courts have said -- a court out of the  
5 6th Circuit, for instance, to use the scenario that  
6 has been discussed about sexual orientation, that  
7 sometimes adolescents simply engage in harassing  
8 behavior that doesn't necessarily equate, for  
9 instance, to a protected category under federal civil  
10 rights legislation. And so therefore teachers need  
11 the ability -- educators, principals, as you  
12 mentioned, need the ability to make those decisions  
13 on the ground, resolve it as least intrusively as  
14 possible if that's what's called for.

15 CHAIRMAN CASTRO: The Chair recognizes  
16 Commissioner Achtenberg.

17 VICE CHAIR THERNSTROM: I think Mr.  
18 Trump wants to respond.

19 CHAIRMAN CASTRO: I'm sorry.

20 MR. TRUMP: I'll keep it brief.

21 CHAIRMAN CASTRO: I'm sorry.

22 MR. TRUMP: Thank you. I did hear Ms.  
23 Gym's response and I heard that a lot of the things  
24 that Justice ordered including training and various  
25 mediation and components for students and staff. I

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1 would be curious, and I don't know the answer to this  
2 in that case. Did they also address the issue of why  
3 the school district or whoever did not make a  
4 complaint for assault? We heard assault. And if  
5 not, I'm just curious as to how a federal  
6 intervention by the Justice Department could bypass  
7 what you raised earlier about the lack of engagement  
8 of law enforcement on the criminal end on the  
9 assault.

10 CHAIRMAN CASTRO: All right. Now we'll  
11 move on to Commissioner Achtenberg, who will be  
12 followed by Commissioners Titus, Gaziano, Chair  
13 Castro and Commissioner Heriot.

14 COMMISSIONER ACHTENBERG: [inaudible  
15 portion] Thank you, Mr. Chairman.

16 Ms. Aaberg, as a mother of a dearly  
17 beloved son myself, I can only thank you for offering  
18 your wisdom to this body as we discuss this very  
19 important national issue as it pertains to all  
20 children.

21 My question is directed at Ms. Lauter.  
22 I want to preface it by saying I have enormous  
23 respect for the ongoing and many-decades-long work of  
24 the Anti-Defamation League on combating bias in every  
25 form. And I understand you have a great deal of

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1 expertise in that regard, your organization, that  
2 you've been willing to share with many communities.  
3 And I want to thank you for that.

4 I have in front of me more than 75  
5 letters and declarations from parents and students  
6 about the misery that sometimes led to enormous  
7 physical violence, sometimes led to suicides in some  
8 cases, often led to deteriorating physical condition  
9 or mental health that emanated from pervasive  
10 harassment and bullying. In some cases as young  
11 people, people were spit on, taunted, punched, hair  
12 pulled, genitals grabbed. Vicious assaults and  
13 vicious taunting were leveled in many cases.

14 Does that description surprise you?  
15 Does it comport with some of the things that you and  
16 your organization are seeing as you undertake this  
17 effort to combat bullying and discrimination in  
18 various forms? Or does it seem sort of out of whack  
19 with what you're seeing on the ground?

20 MS. LAUTER: Yes, sadly I have to say it  
21 comports with what we're seeing. And it affects --  
22 It's not confined to any geographic region in the  
23 country. It's not confined to schools that are  
24 having diversity issues in itself. The bullying  
25 issue can happen almost in any school including

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1 private schools that you would think are free of  
2 bigotry or whatnot.

3 We get reports from — I got an email  
4 from a friend in Atlanta whose daughter attends a  
5 private Christian school, one of the best in the  
6 Atlanta area, sharing the cyberbully messages she was  
7 getting because she was Jewish. So it's everywhere,  
8 unfortunately.

9 If you don't mind, I want to comment and  
10 follow up on Ms. Aaberg's comments about the  
11 standards in a state. In our testimony we present  
12 this, and I hope you do take a look at it, we charted  
13 all the state anti-bullying statutes. We've been  
14 referring all day to the 45 states that have it. And  
15 we think this is a good thing.

16 But what we did is we charted exactly  
17 what is in each of those states. So as she was  
18 commenting, I looked up what Minnesota's state law is  
19 and these are elements that we would look for and we  
20 put into our model statute, what we'd like to see in  
21 a comprehensive state.

22 In Minnesota they do have a district  
23 policy. They do not have a model policy. They do  
24 not have a -- Oh, I take that back. They do have  
25 cyberbullying mentioned in their policy. They don't

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1 have enumerated categories. So there is no clear  
2 signal of what is covered.

3 They do not have any procedures for  
4 reporting. They do not have any notification  
5 processes for parents. So parents won't even know  
6 that there's a policy there. There is no requirement  
7 for training. So administrators, educators, don't  
8 have to do it. And there's no accountability or  
9 reporting, which is a key component for us. How do  
10 we know that what's happening is being reported? How  
11 can this body do a better job? We need data  
12 collection. We need an analysis of how widespread.

13 And so that's why for us this  
14 combination of having state laws as well as the  
15 federal government doing the big picture would be  
16 enormously helpful to advance this. Thank you.

17 CHAIRMAN CASTRO: The Chair recognizes  
18 Commissioner Titus.

19 COMMISSIONER TITUS: Thank you, Mr.  
20 Chairman. Since this is our last panel and our last  
21 chance to speak, I'm going to just sum up a couple of  
22 things.

23 I heard a lot of references to we don't  
24 need the federal government. We need to leave it at  
25 the local level. And yet that ignores the testimony

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1 we heard this morning from the Justice Department,  
2 where they said and showed evidence of how to solve  
3 this problem. They work with local school districts.  
4 It's not something imposed, but something that comes  
5 about collaboratively.

6 I've also heard we don't need the  
7 federal government. We should leave it to the local  
8 government to set their own policy. And yet there's  
9 been no mention of any mechanism of enforcement. You  
10 can set a policy. But then if you don't carry it out  
11 what good is it? If you don't have some hammer  
12 coming down, perhaps from the federal government,  
13 nobody said what else you're going to have as an  
14 alternative.

15 Third, I've heard a lot about the  
16 chilling effect of having a policy from the federal  
17 level. And I think you, Mr. Negron, said that school  
18 teachers or principals are reluctant to enforce it  
19 because I think your quote was "they don't want to  
20 see themselves on the front page of the paper."  
21 Well, better on the front page than on the obituary  
22 page.

23 Finally, a question I have for the  
24 professor. You talk a lot about the Dear Colleague  
25 Letter and how that's made this more of a First

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1 Amendment issue, 24/7, all kinds of speech. But you  
2 don't mention the *Morse v. Frederick* case and how  
3 that might have some implications for this because  
4 it's more restrictive of speech school than the  
5 *Tinker* case. Would you elaborate on that for us?

6 MR. VOLOKH: Sure. So *Morse v.*  
7 *Frederick* was a decision several years ago, five-four  
8 with a very important concurring opinion, that dealt  
9 with speech that the Court interpreted -- probably  
10 correctly -- as pro-drug speech at a school function.  
11 And what the Court said is, in addition to the  
12 exceptions that are recognized for speech -- an  
13 exception for vulgarities in *Frasier* and an exception  
14 for speech where there was a substantial likelihood  
15 of material disruption in the *Tinker* case -- there's  
16 another exception for advocacy of drugs at school.

17 It's not clear whether that's the right  
18 answer, but that is the majority ruling that was  
19 substantially -- that two Justices, Justices Alito  
20 and Kennedy, made clear was narrow and limited to  
21 speech that did not have a political dimension. They  
22 interpreted that particular statement as being  
23 entirely apolitical.

24 So *Morse v. Frederick* does -- I mean  
25 what we do know is, when it comes to speech that

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1 essentially advocates illegal conduct or is seen as  
2 advocating illegal conduct (which is to say drug use)  
3 at school, and that is not political, that forms  
4 another First Amendment exception.

5 I'm not sure that supports the Dear  
6 Colleague Letter much. If the Dear Colleague Letter  
7 had been limited, for example, to speech that  
8 advocates violence at school in a nonpolitical  
9 context, then perhaps the analogy would be quite  
10 close.

11 But it is not limited to either of those  
12 respects. The Dear Colleague Letter sets up a  
13 standard that is by no means limited to advocacy of  
14 violence or drugs and the like. It includes just  
15 insulting speech and such. It is not limited to  
16 speech that is at school. Nor does it have any  
17 exception for speech that might have a political or  
18 religious dimension. Just doesn't mention that at  
19 all.

20 So I think *Fraser* and *Tinker* are  
21 potentially relevant more broadly. But *Morse v.*  
22 *Frederick*, I think, has very narrow relevance in the  
23 material.

24 COMMISSIONER TITUS: But harassment is  
25 illegal and it does also mention restricting off-

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1 campus speech, I do recall. But that's all right. I  
2 would just conclude by saying I think you're very  
3 brave. And I think your son would be very proud of  
4 you.

5 MR. VOLOKH: Thank you. I'm sorry. If  
6 I could just respond. Harassment, you say harassment  
7 is illegal. Justice Alito -- then Judge Alito --  
8 made clear there's no harassment exception of the  
9 First Amendment. Speech cannot be made illegal, and  
10 therefore stripped from constitutional protection, by  
11 simply having a statute or having interpretative  
12 regulations. What was going on in *Morse v. Frederick*  
13 was advocacy of conduct -- not of speech that is  
14 illegal, but of conduct that is illegal. And the  
15 Court said that that is actually -- I don't think  
16 that that helps much to support or challenge a  
17 restriction of harassment.

18 COMMISSIONER TITUS: Thank you.

19 CHAIRMAN CASTRO: The Chair recognizes  
20 Commissioner Gaziano.

21 COMMISSIONER GAZIANO: Thank you and I  
22 thank all the panel again. But I have to choose and  
23 I choose Professor Volokh on this instance. And I  
24 wanted to -- Earlier my earlier questions were  
25 related to why I thought that federal government's

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1 expansion into the type of student teasing and  
2 harassment might not work well for the intended  
3 result. But I said I have legal concerns.

4 So now I'm going to raise the legal  
5 concern. And you mention one in your written  
6 testimony and that is the conversion of the standard.  
7 Let me tell you about -- you probably know. The  
8 *Morgan v. Swanson* case pending in the 5th Circuit en  
9 banc right now involves a group of situations of the  
10 schools where one situation parents attending the  
11 winter party were not allowed to pass out their  
12 child's goody bag to the other parents because it  
13 contained religious material. Was instructed that  
14 religious materials were prohibited on the school.  
15 Their defense in the 5th Circuit en banc -- and they  
16 lost all the way up and down and it's now just on  
17 damages -- is that students have no First Amendment  
18 rights whatsoever. It's breathtaking to me.

19 Clearly these schools need to be  
20 educated on true tolerance and respecting First  
21 Amendment rights. I think there's a serious problem.  
22 So does the OCR help in this regard or hurt? The  
23 legal standard by the Supreme Court is severe,  
24 pervasive and objectively offensive. So it must be  
25 both severe and that's conjunctive.

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1           The OCR in education of these  
2 miseducated schools is severe, pervasive or  
3 persistent. So if a child very politely but  
4 persistently insists that "Jesus saves" once a week.  
5 In one such case the child was overheard praying over  
6 her lunch and was prohibited from doing that. What  
7 are we to take of whether the OCR's guidance about  
8 what the First Amendment requires? Is that helpful  
9 or is that hurtful?

10           MR. VOLOKH: I think on the merits the  
11 OCR's guidance is mistaken in adopting severe,  
12 pervasive or persistent standard as opposed to the  
13 Supreme Court's standard in *Davis* severe, pervasive  
14 and objectively offensive. But I think there's a  
15 broader point that's maybe what you're trying to get  
16 at.

17           It's that the -- one thing that troubles  
18 me about a lot of this discussion including the Dear  
19 Colleague Letter is the sense that there's sort of  
20 denial going on. That there really isn't any speech  
21 issue in play. Sometimes the claim is 'this is  
22 conduct, not speech,' even though the conduct  
23 consists of verbal acts which is another way of  
24 saying speech. Sometimes the claim is 'it's  
25 harassment and not speech,' even though if you label

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1 speech sedition or harassment or intentional  
2 infliction of emotional distress, that doesn't strip  
3 it of constitutional protection.

4 Now, to be sure, the Dear Colleague  
5 Letter has a footnote that says, "There's a First  
6 Amendment issue and we don't mean to trench on the  
7 First Amendment." But that's not terribly helpful to  
8 school districts, where they need to know what  
9 exactly it is that they should be protecting under  
10 the First Amendment. They're generally not lawyers.  
11 Here they have this long letter with all of these  
12 examples of mostly conduct, physical violence, that  
13 needs to be restricted but also with statements,  
14 well, yes, analogous kinds of speech should be  
15 restricted, too, and occasional general references to  
16 things posted on websites and so on and so forth.  
17 Really no meaningful examples of "Here are things  
18 that you shouldn't be restricting" or "Here are  
19 things that whether or not you should be restricting  
20 we don't mean to cover." "Here are the kinds of  
21 political or religious or social or personal  
22 commentary on campus or off campus that should be  
23 protected." It just is not offering any real  
24 guidance to the school districts.

25 I don't want to overstate the concern

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1 about chilling effects. The fact is we have laws to  
2 deter people from doing bad things and sometimes we  
3 want people to be chilled from failing to properly  
4 protect those in their charge and so on and so forth.

5 But what you have to understand that  
6 when there's a very big hammer out there, the threat  
7 of federal investigation, then that has a  
8 disproportionate impact -- as opposed to perhaps a  
9 threat of a civil lawsuit for vindication of First  
10 Amendment rights. So my worry is that with letters  
11 like this, approaches like this, that do not really  
12 acknowledge the First Amendment issue and don't chart  
13 out examples and specific exclusions of what kind of  
14 speech should be protected, the inevitable effect is  
15 that there will be substantial deterrence of  
16 constitutionally protected speech.

17 MS. AABERG: May I respond to that?

18 CHAIRMAN CASTRO: Yes, go ahead.

19 MS. AABERG: There's been so much talk  
20 today about freedom of speech. And I honestly don't  
21 think -- Maybe I don't know. Maybe I should make --  
22 about or ask for an amendment to the First Amendment  
23 saying that it can't apply so much to students. I  
24 mean their brains aren't even developed. I mean they  
25 shouldn't have free speech to be able to harm other

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1 people. Yes, they should be able to pray at school  
2 or just things that aren't harmful or their beliefs.

3 My son told me two months before he died  
4 that a kid told him he was going to go hell because  
5 he was gay. So according to the First Amendment,  
6 that kid has the right to tell my kid that, when all  
7 these churches actually had the kids, the church  
8 kids, go to the school, wear shirts and tell, my son  
9 was like the only out kid in his grade. So I'm sure  
10 he got a lot of it that day.

11 I just don't see where the First  
12 Amendment -- I mean for students especially it should  
13 be if it's harmful I mean that should be it. I mean  
14 it shouldn't be allowed. I mean your opinion whether  
15 I don't agree with your religion or I don't agree  
16 with -- You know, my religion doesn't accept gay  
17 people. Stuff like that, it's fine. That's your  
18 belief. But to go up and tell someone they're going  
19 to go to hell or call them all kinds of names, I  
20 don't think that should be freedom of speech.

21 CHAIRMAN CASTRO: I'm going to ask a  
22 question and then we'll go to Commissioner Heriot and  
23 Commissioner Yaki. We hear about the neutrality  
24 policy, and on its face the word neutrality seems so  
25 benign. Yet we've heard from you, Ms. Aaberg, how

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1 malignant it has been. And you've mentioned that for  
2 the last eight months you've been interfacing with  
3 the school district trying to get them to undo that  
4 and they haven't. And as you indicated last night,  
5 although I don't know that we know all the  
6 circumstances, another child committed suicide.

7           What are the stated reasons that the  
8 school district is giving you for not addressing the  
9 neutrality issue? And conversely what do we see in  
10 the various states as it relates to the neutrality  
11 policy's impact, if Ms. Lauter could answer that  
12 part?

13           MS. AABERG: What we're finding out is  
14 that there is a group, a local group, called the  
15 Parent Action League. They're called PAL. And it  
16 seems like whatever they request they seem to get.  
17 We found out that the board seems -- they have a  
18 relation with the Minnesota Family Council as well  
19 and who knows if they're going as far as Focus on  
20 Family. I don't know.

21           So it seems so much more involved that  
22 outside groups on that aspect are coming in. They  
23 say they don't want their kid to be mentioned about  
24 gay people. But I don't understand why kids can't  
25 know that they exist anyway. And we're not even

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1 asking right now for curriculum or anything. We're  
2 asking just that these kids have rights and that they  
3 should be protected.

4 So with this neutrality thing, that's  
5 what's mostly happening is they keep saying that  
6 these parents have rights to not have their child  
7 hear about gay people. But I don't -- I asked the  
8 board, "Well, what are my rights about my son being  
9 able to learn that gay people exist?" And they  
10 couldn't answer that question for me.

11 That's basically all the evidence that  
12 we've found and articles locally have a lot to do  
13 with the local Christian groups which -- I don't  
14 know. I'm a Christian. But they told my son when he  
15 told me is God loves everybody. So for them to even  
16 use it's like they're using hate in their religion to  
17 harm other people. That's kind of how it's winning  
18 out with the neutrality policy in Anoka-Hennepin.

19 MS. LAUTER: I mean, the neutrality  
20 policies unfortunately result in avoidance of an  
21 issue. I was very struck by Commissioner Thernstrom  
22 earlier talking about what makes a good school. You  
23 know, it takes leadership and it takes some top-down  
24 leadership from the principal and teachers who are  
25 the leaders in their classrooms to be able to address

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1 issues in a way that doesn't promote, advance any  
2 kind of religious beliefs but at the same time is  
3 able to talk about respect for others.

4 The word tolerance was used earlier. In  
5 ADL's curriculum, we talk about respect for  
6 differences. But you don't have to exactly address  
7 it and that's why it's so important to enact these  
8 laws. When we do training, we talk about all the  
9 different kind of classes. So it's not any kind of  
10 promulgation of one ideology over another. It's a  
11 respect for human beings and for individual  
12 differences.

13 CHAIRMAN CASTRO: Commissioner Heriot.

14 COMMISSIONER HERIOT: Thank you. Mr.  
15 Negron, by my count at least, you've had somewhat  
16 more than -- a somewhat disproportionate share of the  
17 questions at least towards the beginning of the  
18 panel. But I want to throw one more your way. I  
19 want to ask you a question that is a follow-up to  
20 Commissioner Yaki's question a few minutes ago. I  
21 think it's a quick one and we can go on to other  
22 questions here.

23 I suspect, and you can correct me if I'm  
24 wrong, that one of the things that your members have  
25 to look out for is the possibility of the next

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1 suicide case. The next case coming down the pike  
2 could be a suicide by a student who was wrongly or  
3 maybe even rightly accused of bullying and not the  
4 bullying victim. Am I right that your members have  
5 to balance a lot of considerations when they set  
6 discipline policy and it's not always easy to know  
7 what the right thing to do is and that sometimes  
8 tragic mistakes are made?

9 MR. NEGRON: I think you certainly are  
10 correct that educators sometimes make the wrong  
11 decisions for the best intentioned reasons. Most  
12 educators act in good faith. Most school boards act  
13 in good faith. And sometimes mistakes are made.

14 I think that what's important about your  
15 question is to understand that school boards need to  
16 have policies in place, but balance the interests of  
17 students. And I'm actually really gratified that the  
18 conversation has involved such a large First  
19 Amendment component because, although we are talking  
20 almost exclusively about the tragedies that surround  
21 students in terms of violence and death, and that is  
22 very pointed, we also need to understand that school  
23 districts and educators have to make those balanced  
24 choices between First Amendment choices, the rights  
25 of students and the rights to a safe learning

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1 environment.

2 COMMISSIONER HERIOT: And I assume  
3 suicide on both sides of the equation can occur.

4 MR. NEGRON: I imagine that that  
5 happens. I think it's -- I don't know that that's  
6 necessarily present in anybody's mind. But it does  
7 bring to mind that these are very tough choices for  
8 educators to make on the ground.

9 COMMISSIONER HERIOT: Thank you.

10 CHAIRMAN CASTRO: The Chair recognizes  
11 Commissioner Yaki.

12 COMMISSIONER YAKI: Thank you very much  
13 Mr. Chair.

14 My mind is kind of boggled by some of  
15 what was last said because I'm not too sure how you  
16 balance rights when it comes to protected classes of  
17 individuals who deserve and need treatment and  
18 deserve protection under the Constitution.

19 But my question is for Mr. Volokh. And  
20 I'm going to ask you to be helpful.

21 MR. VOLOKH: I try.

22 COMMISSIONER YAKI: And I think you can  
23 do that. You -- and I think as I said to one of the  
24 previous speakers, I'm very much a big First  
25 Amendment close to absolutist in many ways, the way I

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1 taught and brought up. But I also understand that  
2 there are limitations, that when you're in a crowded  
3 theater someone yelling "Fire" or falsely claiming  
4 fire in a crowded theater that can cause imminent  
5 chaos, death, is something that is not protected.

6 So I'm going to ask you this because, to  
7 me, certainly there are analogs in criminal law.  
8 There are certainly some analogs in other parts of  
9 First Amendment jurisprudence where the Supreme Court  
10 has held that, for example, the Free Exercise clause  
11 may not protect parents from certain acts involving  
12 their children, *Prince v. Massachusetts*, *Jacobsen v.*  
13 *Mass.* You're familiar with those.

14 So the question is, having heard  
15 testimony earlier today from -- and believe me, as  
16 Commissioner Achtenberg said, we have stacks of  
17 testimony about how in the situation of, say, an LGBT  
18 child or unit, the kind of possibility, the  
19 vulnerability, the disparity in terms of how they  
20 perceive themselves, how they believe others perceive  
21 them and how it leads to certain actions by them in  
22 terms of suicides, depression, those kinds of things,  
23 is there some line, is there some threshold, where  
24 someone essentially, I would say, lights the match  
25 but is engaged in kind of nonphysical but

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1 psychological wordplay, verbal harassment ongoing  
2 that to you for a child, for a young person, someone  
3 whose brain is not as fully developed, doesn't have  
4 the mental shields that all of us have so we can  
5 engage in these kinds of colloquys without feeling  
6 like we're being picked on or what have you. Maybe  
7 we do. But for a young person for whom the Supreme  
8 Court has said there are some different  
9 constitutional observations in terms of their ability  
10 to deal with certain things, help me. And if there's  
11 a way that we can, that Department of Ed or Justice,  
12 could come up with some kind of a standard that says  
13 "You don't have to punch them in the face, but if you  
14 deliver the equivalent of a punch in the face to  
15 someone that verbally through other kinds of actions  
16 that sends that person into a potentially dangerous  
17 area where we have to worry about another situation  
18 with another young person hanging themselves, doing  
19 harm to themselves or what have you" help me. Where  
20 can we draw that line if you can?

21 MR. VOLOKH: So it's a very interesting  
22 and difficult question. I should note the Free  
23 Exercise cases are quite different. The Supreme  
24 Court has seen the Free Exercise Clause as  
25 essentially being a nondiscrimination rule and not a

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1 substantive right. Even during the 30 years when it  
2 saw it as a substantive right, it was a right that  
3 was much more weakly protected than free speech  
4 rights.

5 COMMISSIONER YAKI: That's right.  
6 You're a professor.

7 MR. VOLOKH: But the other thing I  
8 should say is that it's not the equivalent of a  
9 punch. Speech can be bad. It can be extremely  
10 distressing, but it's not the equivalent of a punch.  
11 And I think it's important to distinguish the two.

12 The other thing I should say --

13 COMMISSIONER YAKI: Just let me -- Why  
14 isn't it the equivalent of a punch? Let's take for  
15 example. I saw in your bio that you also do  
16 criminal.

17 MR. VOLOKH: Yes.

18 COMMISSIONER YAKI: I mean let's take  
19 for example. So you would believe that, say for  
20 example, in a defense in criminal case of battered  
21 woman syndrome if the spouse was not physically  
22 touched but was subjected to intense emotional  
23 cruelty, those actions, that's a First Amendment  
24 protected action.

25 MR. VOLOKH: It's not a criminal law to

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1 the extent -- by battered woman syndrome, you mean a  
2 woman claiming self defense.

3 COMMISSIONER YAKI: Exactly.

4 MR. VOLOKH: It's black letter criminal  
5 law that you cannot claim self-defense rights because  
6 you're defending against insult. A threat is a  
7 different matter, when we're talking about threat of  
8 violence. That is punishable and it's treated as not  
9 quite the equivalence of violence but some would like  
10 that.

11 But the example you gave, no. If  
12 somebody said "Well, he was very cruel to me, so  
13 that's why I shot him" you may not even get to  
14 voluntary manslaughter, much less a self-defense  
15 defense.

16 COMMISSIONER YAKI: Okay.

17 MR. VOLOKH: So I think the law quite  
18 rightly does not treat insulting things as the  
19 equivalent of violence.

20 COMMISSIONER YAKI: But for children?

21 MR. VOLOKH: Pardon?

22 COMMISSIONER YAKI: How about for  
23 children?

24 CHAIRMAN CASTRO: Commissioner, try to  
25 keep that one question.

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1 MR. VOLOKH: If you're asking for  
2 analogies to other laws, no. It doesn't, I think,  
3 treat them as equivalent. And I think it's important  
4 to keep them different.

5 Now you might say, despite the fact that  
6 they're different, nonetheless certain kinds of  
7 insulting things can be restricted. I should say  
8 also inside school a good deal could be restricted,  
9 partly under the *Frasier* Doctrine, if it's actually  
10 vulgarities. It could be restricted. And face-to-  
11 face insults might be in the fighting words category.

12 But to take an example that's on  
13 everybody's mind, cyberbullying, if somebody says  
14 mean things about somebody on their Facebook page,  
15 Student A doesn't like Student B for whatever reason  
16 and says, "I think Student B is bad for whatever  
17 reason. His religion is idiotic. He is gay and  
18 that's bad. Or she's pregnant and that's bad" or  
19 whatever else, I don't think that the analogy would  
20 be sound even when we're talking about children. And  
21 usually it will be teenagers or close to it. Suicide  
22 certainly is a tragedy. But fortunately a relatively  
23 small fraction of all insults lead to them. But  
24 because of that we're going to be able to have  
25 restrictions on insulting things that people say on

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1 their web pages? I don't think I would say that.

2 I should also say suicide is immensely  
3 tragic. But there are many causes to suicide.  
4 Romantic problems occasionally cause suicide. We  
5 don't go out there and start pervasively regulating  
6 romance because of that danger including a danger to  
7 teenagers.

8 I think that we certainly want to try to  
9 stop the violence, needless to say. We may very well  
10 be able to do a lot of things within schools to help  
11 with suicide. But to start to come up with a  
12 pervasive kind of code of regulations of what can be  
13 said on Facebook pages because somebody who is  
14 insulted, even deliberately insulted, on Facebook  
15 might commit suicide, I think that would be  
16 unacceptable.

17 CHAIRMAN CASTRO: The Chair recognizes  
18 Commissioner Gaziano.

19 COMMISSIONER GAZIANO: Thank you. Mr.  
20 Trump, since you've been here I think almost all day,  
21 you know that whenever Commissioner Kirsanow asked  
22 for data on bullying, when it started, whether the  
23 same questions were asked, the progression, there's  
24 been crickets. No one knows. You were the first  
25 person I think to admit that there are serious gaps

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1 in the data.

2 So I'm going to ask you to elaborate in  
3 two respects. What data exists? Where does it  
4 exist that shows incidences of bullying that can be  
5 actually traced over time in some consistent manner?

6 And then more important to my interest,  
7 if you could also answer what data is there, if it  
8 exists anywhere, of school systems' indifference or  
9 animosity or encouragement of that kind of bullying  
10 because that seems to me, that second category of  
11 data, seems to be more relevant to when the federal  
12 government should get involved with this issue and  
13 swoop in in a real case of physical indifference or  
14 whether they should act in a much more systematic and  
15 universal way?

16 MR. TRUMP: To answer the first part of  
17 the question, there is no historical data on  
18 bullying, to my knowledge, especially at the federal  
19 level for an extended period of time. In fact, the  
20 Department of Education Safe and Drug Free Schools  
21 office now is trying to start collecting that for one  
22 of the first times through what they refer to as  
23 School Climate Surveys. And there are a number of  
24 issues associated with that.

25 We do not even have accurate federal

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1 data on a number of crimes and violence in school  
2 because there is no incident-based data on K-12  
3 schools, such as what is required under the Clery Act  
4 in colleges and universities. There is no such law  
5 for K-12 schools. So we don't know how many crimes,  
6 assaults and other incidents that are criminal are in  
7 school, much less the other offenses and lower-level  
8 aggressions, bullying.

9 The second part of the question is I  
10 have found -- and we heard the phrase "zero  
11 tolerance" used a lot today. And in my 25+ years in  
12 schools, most school administrators strive for firm,  
13 fair and consistent discipline applied with good  
14 common sense. Sadly and unfortunately, we do have  
15 those anecdotal cases -- more than one is one too  
16 many -- where that latter part, common sense, is not  
17 there.

18 But I found that by and large school  
19 administrators err on the side of giving children a  
20 break in situations to give them the benefit of the  
21 doubt. I don't think that there's a mass conspiracy  
22 called Zero Tolerance.

23 And to go back to Commissioner Titus'  
24 comment and to I believe Mr. Negron, I think he took  
25 an unintentional hit of getting credit for my comment

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1 about the principal who said being in the newspaper.  
2 I will own up to that on the record. But what I also  
3 said when I used that example, I followed at the end  
4 of that by saying that the concern was, his concern  
5 and mine, that fear of the newspaper would not be in  
6 a lawsuit. It would be from overreacting because  
7 they feel that there's a political pressure on them  
8 and feel that the threat of a federal investigation  
9 would actually force them to overreact, not to  
10 underreact.

11 CHAIRMAN CASTRO: I've been informed by  
12 my Acting Staff Director that we actually started ten  
13 minutes early. So we can go to 4:15 p.m. without  
14 being unfair to the other panels.

15 I've got Commissioner Achtenberg who has  
16 asked for a question. Nobody else on this side?

17 (No verbal response.)

18 Okay. So Commissioner Achtenberg and  
19 then I'll use Chair's discretion and ask the last  
20 question before we end for the day.

21 COMMISSIONER ACHTENBERG: Well, first  
22 with regard to the Dear Colleague Letter, let me say  
23 that it is standard practice among federal agencies  
24 to offer guidance within the realm of their  
25 expertise. I did it when I was Fair Housing

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1 Assistant Secretary without complaint. No one said  
2 that it was ultra vires for me do that. Far from it.

3 And the Courts do give great deference  
4 to the expressions of expertise of federal agencies.  
5 Mr. Marcus did it when he was the Acting Assistant  
6 Secretary of OCR in the Department of Education. The  
7 same thing that Ms. Russlyn Ali did in her letter.

8 So the letter per se, I understand you  
9 have other quarrels with the breadth of the letter.  
10 But let me just say to Mr. Negron's assertion that  
11 somehow courts giving deference to guidance being  
12 offered by federal departments clearly within their  
13 mandate and their area of expertise is not only  
14 nothing unusual, it's an agreed-upon construction of  
15 federal law that is almost universally respected by  
16 federal courts.

17 But back to the seriousness and  
18 pervasiveness of the issue at hand. And let me also  
19 say I respect, Professor Volokh, your efforts to  
20 answer in good faith Commissioner Yaki's question. I  
21 think these are difficult questions to deal with.  
22 The line does have to be drawn somewhere when we're  
23 talking about federal rights. And it's not always  
24 easy to tell where the line should be drawn.

25 However, given the conclusions of the

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1 National Crime Victim Survey that points out that one  
2 in four Latinos reports being severely harassed,  
3 given the fact that we are told that almost 100  
4 percent of young people with disabilities report  
5 being harassed or severely harassed, given that 80  
6 percent of students report that they experienced,  
7 have experienced, at least one of the many forms of  
8 sex discrimination in schools, given the fact that  
9 sexual minority youth, eight in ten say that at some  
10 point they have been harassed or severely harassed, I  
11 think this is an issue that is important, that we  
12 need to take cognisance of.

13 That doesn't mean necessarily that there  
14 has to be a federal remedy for this. But in this  
15 particular case there is well-recognized federal  
16 authority that is being invoked in this case, at  
17 least to my mind. And we heard a number of  
18 concurrences from those who work every day in the  
19 field.

20 I'd like to ask Ms. Lauter. The need  
21 for a federal response, would you articulate again  
22 why the grid of 45 state responses and the hundreds  
23 and hundreds of trainings that you yourself and your  
24 organization have done throughout the country isn't  
25 sufficient to address this pervasive issue?

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1 MS. LAUTER: Right. Because there are  
2 so many elements that need to be addressed. To have  
3 a federal response is important for a number of  
4 reasons: (1) that they can set out guidelines that  
5 would be what a district can have in order to be  
6 effective; but it also -- and since this is the wind-  
7 up of the session -- just critically important for  
8 the attention at the federal level for this subject.  
9 The very fact that this Commission is addressing this  
10 issue is fantastic because it's going to shine more  
11 light on what the problems are and what the  
12 challenges are.

13 This is an enormously difficult subject.  
14 And so you've all seen that in just this one day.  
15 And for those of us who struggle with it every day it  
16 needs from the highest level down. And again we  
17 commend the Obama Administration because they did the  
18 White House Summit. They've recognized the problem.  
19 They shine a light on it. And now it's up to the  
20 rest of us to work together to -- I don't think we'll  
21 ever fix it completely, but we can certainly make a  
22 difference.

23 CHAIRMAN CASTRO: I'll ask the last  
24 question. We've heard throughout the day today about  
25 how the system is so terribly broken. And part of

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1 what we want to do with this report is to put out  
2 some best practices and show some success stories of  
3 how this can be done right.

4 I know, Ms. Lauter, you've got that  
5 overview. I know, Mr. Negron, from the perch that  
6 you sit. Can you tell us some success stories of  
7 some districts that have done this right, so that we  
8 could propose and disseminate those best practices to  
9 prevent more of our children from taking their lives  
10 or being forced to take their lives.

11 MS. LAUTER: Yes. We would be happy to  
12 give you some. Maybe in writing might be a better  
13 way to do it. Unfortunately sometimes the best  
14 practices that I would be able to share with you are  
15 ones that come out of something that started bad,  
16 woke up the community, then they addressed it and  
17 went on, which we like to see.

18 But there are other systems that have  
19 come up with good policies that do all those things  
20 we'd like to see in terms of reporting, training and  
21 accountability. So I'd be happy to submit that  
22 later.

23 CHAIRMAN CASTRO: Please do.

24 Mr. Negron.

25 MR. NEGRON: Mr. Chair, I appreciate the

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1 invitation because state associations of school  
2 boards across the country do have a variety of  
3 training, some more intensive than others for school  
4 boards. And we'd be happy to share that with the  
5 Commission.

6 I should point out, and I think school  
7 board members would probably not like the fact that  
8 I'm pointing out, a specific piece of legislation.  
9 But an example of one that the jury is still out on  
10 is we don't know its effects because it just went  
11 into effect in January, signed in New Jersey, is a  
12 very comprehensive model of what state laws can do.  
13 They require all kinds of training with definitions  
14 about bullying, what to look for. They encompass a  
15 plethora of scenarios for school districts and have  
16 in similar fashion to the IDEA, the Special Ed law,  
17 have timelines in which school officials have to  
18 report what they see to the next level of authority  
19 all the way to the school board and then requiring  
20 some sort of action. They also in New Jersey require  
21 training by school board members on the different  
22 kinds of harassment.

23 So there are states that are -- that's I  
24 think the most comprehensive statute in the country.  
25 It's certainly just one model. And there are others.

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1 We'd be happy to share that with you.

2 CHAIRMAN CASTRO: Thank you. We  
3 appreciate it.

4 MS. AABERG: May I comment?

5 CHAIRMAN CASTRO: Ms. Aaberg.

6 MS. AABERG: I think what might be a  
7 good compromise I guess is if the federal government  
8 be more inclusive on Title IX for sexual orientation,  
9 gender identity and maybe even appearance, people  
10 being called fat and tall or whatever. And set  
11 things in place. Like make each state accountable.  
12 Set more guidelines. Like have the states follow up  
13 on it and have reports submitted to them.

14 And then let the states follow through  
15 and maybe then submit based on the problems that they  
16 get like reports to the DOE, DOJ if it's very  
17 worrisome. That would take a little off of the  
18 DOJ/DOE in a sense. And give them the best -- I  
19 mean, the incidences that really require attention.  
20 So that way the states kind of have control, but yet  
21 they do have guidelines.

22 CHAIRMAN CASTRO: Thank you.

23 On behalf of the Commission, we want to  
24 thank each and every one of you that are here with us  
25 this afternoon and all the panelists that were with

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1 us today.

2 I also want to make sure that I publicly  
3 thank the Commission staff for their Herculean  
4 efforts to prepare this hearing, this briefing, for  
5 today. Many of them were working day and night to do  
6 the work that is normally done in a year in half the  
7 time. So we very much appreciate that in working  
8 very hard to make sure we meet our statutory report  
9 deadline.

10 Particularly I would like to highlight  
11 Commission staff members, Dave Snyder, Lenore  
12 Ostrowsky. I know they're here in the room or around  
13 here. So wave your hand. Pam Dunston, Lillian  
14 Dunlap, Audrey Wright. And of course our Acting  
15 Staff Director and Acting General Counsel Kimberly  
16 Tolhurst.

17 Lastly, the record for this Enforcement  
18 Report is going to remain open for the next 15 days.  
19 If panelists or members of the public or anyone  
20 watching this on television would like to submit  
21 materials to us in writing they can mail them to the  
22 U.S. Commission on Civil Rights, Office of the  
23 General Counsel, 624 9th Street, N.W., Washington,  
24 D.C. 20425.

25 It is now 4:19. This meeting of the

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1 U.S. Commission on Civil Rights is hereby adjourned.

2 Thank you.

3 (Whereupon, at 4:19 p.m., the above-  
4 referenced matter was concluded.)

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