U.S. COMMISSION ON CIVIL RIGHTS

TELEPHONIC MEETING

WEDNESDAY, DECEMBER 16, 2009

The Commission convened via teleconference at 11:30 a.m., GERALD A. REYNOLDS, Chairperson, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman
TODD F. GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner (via telephone)
ARLAN D. MELENDEZ, Commissioner
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director
STAFF PRESENT:

DAVID BLACKWOOD, General Counsel, OGC
MARGARET BUTLER
CHRISTOPHER BYRNES, Parliamentarian
DEMETRIA DEAS
PAMELA A. DUNSTON, Chief, ASCD
ROBERT LERNER, Asst. Deputy Staff Director
JOHN RATCLIFF
LENORE OSTROWSKY
EILEEN RUDERT
KIMBERLY TOLHURST
AUDREY WRIGHT

COMMISSIONER ASSISTANTS PRESENT:

TIM FAY
DOMINIQUE LUDVIGSON
JOHN MARTIN
ALISON SCHMAUCH
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CHAIRMAN REYNOLDS: Good morning. This is Chairman Reynolds. It's 11:47 a.m., Eastern Standard Time, on December 16th, 2009. We have a telephonic meeting with commissioners participating from different locations. I will call the name of each commissioner in order to determine if there is a quorum to hold the meeting.

Vice Chair Thernstrom?

(No response.)

CHAIRMAN REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Here.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Here.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Here.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Here.

CHAIRMAN REYNOLDS: And I make five. Is the Staff Director present?

STAFF DIRECTOR DANNENFELSER: Present.

CHAIRMAN REYNOLDS: Is the court reporter
on the line?

THE REPORTER: Yes, present.

CHAIRMAN REYNOLDS: Thank you.

The meeting will come to order. To assist our court reporter, I would like to remind any commissioners wishing to make statements to identify themselves first.

Whenever it is necessary to take a vote, I will call out the name of each commissioner. The commissioner should then answer "Yes," "No," or "Abstain."

After the voting is concluded, I will read out how each of you is voted to ensure that the tally is correct.

I. APPROVAL OF AGENDA

CHAIRMAN REYNOLDS: Is there a motion to approve the agenda?

COMMISSIONER KIRSANOW: So moved. Kirsanow.

CHAIRMAN REYNOLDS: Is there a second?


II. STATE ADVISORY COMMITTEE ISSUES

- PENNSYLVANIA

CHAIRMAN REYNOLDS: Okay. Discussion time. I would like to move to table discussion of the
state advisory committee issues. There needs to be
some additional vetting done with respect to that SAC
package.

Is there a second?

COMMISSIONER KIRSANOW: Kirsanow. Second.

CHAIRMAN REYNOLDS: Commissioner Gaziano,
how do you vote?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes.

CHAIRMAN REYNOLDS: And I also vote in
favor of the motion. The motion passes. Any other
discussion regarding the agenda as amended?

COMMISSIONER HERIOT: That was just a
motion to table, wasn't it?

CHAIRMAN REYNOLDS: Yes, you're correct,
but any other discussion about the agenda? Any other
changes?

COMMISSIONER MELENDEZ: Commissioner
Melendez. Has the agenda been changed from what was
sent to me in the book?
CHAIRMEN REYNOLDS: Mr. Staff Director, can you confirm that we are working off the same document except for the fact that we have just tabled discussion of the state advisory committee issues.

STAFF DIRECTOR DANNENFELSER: Yes. It is the same agenda with that one item deleted.

COMMISSIONER MELENDEZ: Okay. Thank you.

CHAIRMAN REYNOLDS: Okay. I move that we adopt the agenda as amended. Is there a second?


CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: Okay. Commissioner Gaziano, how do you vote? Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes.

CHAIRMAN REYNOLDS: Okay. And I also vote for it. It's unanimous.

III. PROGRAM PLANNING

- UPDATE ON STATUS OF TITLE IX PROJECT
CHAIRMAN REYNOLDS: Next up, on December 9th, the Staff Director sent commissioners a list of the institutions of higher education that will be asked to produce documents and electronically stored information pursuant to the Commission's Project on Sex Discrimination and Undergraduate Admissions Policy.

Before we vote on this list, I ask that Dr. Lerner provide us with an update on the status of the project.

DR. LERNER: Thank you, Mr. Chairman.

This is Robert Lerner.

Basically we have been working with the Office of General Counsel to clear some of the preliminaries about the documents. They had some suggestions about some things we might incorporate. We have also been refining our request of what we are asking for and extending it a bit.

The other thing we have been, of course, students doing some of the preliminary work, the background work to the report itself, but the main item of business for us, of course, is the approval of the --

COMMISSIONER HERIOT: What background work is that, Dr. Lerner?
DR. LERNER: A couple of things. One, I am doing an analysis of all of the previous data I could find on admissions, for general reference in admissions, where we have information about that.

Secondly, we put together a database of institutional rates, male and female admissions rates. I think we're putting together a very extensive database. For most institutions of higher education that are relevant, I think it's fairly complete.

So we've got an idea of not just the sampling list, from which we selected the samples, but we also have an idea nationwide for undergraduate institutions. That gives you kind of a bit of an idea about which institutions may or may not be just based on race and gender.

Of course, those are only associative kinds of results. They don't prove anything. But they do give some clues. Essentially that is what we have been working on.

The other thing -- oh, one more thing. I'm sorry, Commissioner Heriot. One more thing is we are developing an interrogatory to submit. We haven't finished it yet.

We're developing an interrogatory to submit to the Office of Civil Rights, the Department
of Education, to understand how they -- to their complaints and for how they deal with ones that are dismissed or not.

There are some that clearly are not relevant. And we are going to do an analysis of that the way we ordinarily do this kind of work. That is basically it.

CHAIRMAN REYNOLDS: Okay. Any other questions for Dr. Lerner?

(No response.)

- MOTION TO APPROVE INSTITUTIONS TO BE INCLUDED IN PROJECT

CHAIRMAN REYNOLDS: Okay. I move that the Commission authorize the issuance of subpoenas for the production of documents and electronically stored information for this project under the signature of the Chairman as authorized by section 3 of the Civil Rights Commission's Amendments Act of 1994 to the following institutions: Lincoln University of Pennsylvania; University of Maryland-Eastern Shore; Virginia Union University; Howard University; Catholic University of America; Loyola College in Maryland; Messiah College; Georgetown University; the Johns Hopkins University; Gettysburg College; University of Richmond; York College, Pennsylvania; Goucher College;
Goldey-Beacom College; Washington College; Shepherd University; Shippensburg University of Pennsylvania; the University of Delaware; and, finally, the University of Maryland at Baltimore County.

The date, place of delivery, and substance of the request will be determined by the Chairman after consultation with the Staff Director. Is there a second?

COMMISSIONER HERIOT: I'll second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: Commissioner Gaziano, how do you vote? Commissioner Gaziano?

COMMISSIONER GAZIANO: I'm sorry. I muted. Yes.

CHAIRMAN REYNOLDS: All right.

Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Abstain.

CHAIRMAN REYNOLDS: And I vote for it. So Commissioner Melendez abstained. The remaining commissioners voted in favor of the motion. The
motion passes.

COMMISSIONER GAZIANO: May I raise one other issue?

CHAIRMAN REYNOLDS: Sure.

COMMISSIONER GAZIANO: This is Commissioner Gaziano. Given some recent press accounts about William and Mary, I understand they depending on how we interpret our subpoena authority may be beyond subpoena authority. Is there a problem with just sending them a request and seeing if they will comply?

CHAIRMAN REYNOLDS: When you say, "request," you are not suggesting that we send a subpoena, are you?

COMMISSIONER GAZIANO: No. The same type of request but not under a subpoena. Does anyone else see a problem with that? Again, I think that our subpoena authority for production of documents might be broader than the range for compelling testimony of persons.

But, without getting into that, I just wondered if we could send a request without a subpoena to William and Mary.

CHAIRMAN REYNOLDS: I don't have any concerns with that. Does anyone else?
(No response.)

CHAIRMAN REYNOLDS: Okay. Is this something we need to vote on or can we just with the understanding that --

COMMISSIONER HERIOT: Well, I would think we want to get out what we have just approved. And maybe next month or the next meeting, which is less than a month away, if we need to vote on this, we can vote on it.

COMMISSIONER GAZIANO: Sure. That sounds fine.

- UPDATE ON STATUS OF 2010 ENFORCEMENT REPORT

CHAIRMAN REYNOLDS: Okay. All right. The next item on the agenda is an update on the status of the 2010 enforcement report. Mr. General Counsel, please provide us with an update.

MR. BLACKWOOD: Thank you. David Blackwood.

Since the last meeting, as most of you are aware, we did issue a subpoena to the Department of Justice. Since that time, I have sent subsequent correspondence or e-mails to the Department requesting an early time to meet. I believe the time has only been, I believe today is day eight.

With regard to individual subpoenas, which
I am not going to mention any individuals specifically, I can tell you that we have been in contact with additional individuals in the Philadelphia area and are going to proceed to schedule their depositions.

What I propose to do is send everybody a schedule of the proposed depositions in the next day or two so you all can line up. Some of the commissioners want to participate in them.

I am trying to nail down, though, with some of these witnesses a specific time and place for their appearance. As soon as I feel that we are confident about that, I would send a list to you all with the time and place.

COMMISSIONER GAZIANO: Mr. Blackwood, maybe I missed something. You said you are trying to contact the Justice Department representative just to meet and talk about this. And have you gotten a response to your meeting request yet?

MR. BLACKWOOD: No, I have not. As you know, the letter that accompanied the subpoena requested an early meeting to discuss those matters that there might be any controversy about or issues of confidentiality.

I also expressed that same interest when I
talked to Mr. Hunt before I sent over the subpoena. And I sent an e-mail just the other day to Mr. Hunt again, saying early meeting. And I haven't gotten a response yet.

COMMISSIONER GAZIANO: Yes. I think that is just absolutely outrageous. It is absolutely outrageous, of course, that the Justice Department has been stonewalling the Commission's requests for almost six months. Maybe it is today, I think, actually marks the six month anniversary.

And, yet, I read in the newspaper that they want further information from us, which seems -- which we have provided but seems like another outrageous excuse to stall.

But they are not even returning your telephone calls or e-mails to talk about this?

MR. BLACKWOOD: Just to be specific, the phone call that I had, actually, we did talk. That was not a voice mail. Subsequent to that time the only communication was an e-mail. And I have not yet received a response back.

COMMISSIONER GAZIANO: And, as I recall your letter, of course, it also wanted to resolve those matters, to identify those matters about which there could be no conceivable objection based on an
OPR review or anything else. And that is for the files on previous investigations.

And you have gotten no indication one way or the other about when they will even talk about that?

MR. BLACKWOOD: No response as of this date.

COMMISSIONER GAZIANO: Okay.

CHAIRMAN REYNOLDS: Any other comments or questions?

COMMISSIONER YAKI: Yes. Commissioner Yaki. How are you?

CHAIRMAN REYNOLDS: Welcome. Commissioner Yaki, the General Counsel just provided us with an update on our 2010 enforcement report. I don't know if you support any of it, but if you have any questions, please ask.

(No response.)

CHAIRMAN REYNOLDS: If we don't have any additional comments or questions, we will move on.

Next up is the Multi-Ethnic Placement Act briefing report. At the December 4th --

COMMISSIONER YAKI: Hang on. Was someone reading? I just got cut off the line for about a minute. I was on, but I was cut off.
I was trying to raise the issue of whether there had been a vote on Title IX subpoenas.

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: I would like the privilege of simply reopening that vote.

CHAIRMAN REYNOLDS: Okay. I second the motion. Discussion?

COMMISSIONER HERIOT: Not reopen in the sense of take another vote, I assume?

CHAIRMAN REYNOLDS: Well, I believe that's what Commissioner Yaki has requested.

COMMISSIONER MELENDEZ: I assume it is just to reopen to record his vote. No, we don't have to reopen it for discussion.

CHAIRMAN REYNOLDS: Commissioner Yaki, is that your intent?

COMMISSIONER YAKI: That's fine.

CHAIRMAN REYNOLDS: I'm sorry. Commissioner Yaki, what did you say?

COMMISSIONER YAKI: I said that's fine since he wouldn't listen to me anyway.

CHAIRMAN REYNOLDS: Okay. So please let the record reflect that, in connection with the Title IX, the subpoenas in connection with the Title IX project, that Commissioner Yaki voted against the
- MULTI-ETHNIC PLACEMENT ACT BRIEFING REPORT

CHAIRMAN REYNOLDS: Okay. At the December 4, 2009 meeting, commissioners approved part A of the Multi-Ethnic Placement Act briefing report. Commissioners voted individually on each finding and recommendation.

- CONSIDERATION OF FINDINGS & RECOMMENDATIONS

CHAIRMAN REYNOLDS: At that meeting, we agreed to table finding 9 and recommendations 3 and 8 until the next Commission meeting. Commissioners asked that staff provide better supporting documentation and cite the appropriate authorities for those three items.

The rewritten finding and two recommendations along with supporting documentation, were sent to commissioners by the Staff Director on December 8th.

- MOTION TO APPROVE MEPA FINDING #9

CHAIRMAN REYNOLDS: I move the Commission approve the rewritten finding number 9, which reads as follows, "Since the enactment of the 1996 amendments to MEPA, the removal of barriers to the Inter-Ethnic Adoption Act, HHS has conducted compliance reviews,"
which found that a number of agencies and personnel have circumvented MEPA's provisions against consideration of race in placement. MEPA makes it clear that the use of race in making placement decisions is subject to strict scrutiny and must represent a compelling interest."

Is there a second?

COMMISSIONER GAZIANO: Second for purposes of discussion. Commissioner Gaziano.

CHAIRMAN REYNOLDS: Okay. Discussion?

COMMISSIONER GAZIANO: Looking at the statute, it is far from clear that the statute makes anything subject to strict scrutiny. I think a more natural reading of the statute absolutely prohibits any consideration of race.

So I would propose the following hopefully friendly amendment to the last sentence, but I stand ready to be -- I understand that there are some regulations that HHS may have sent out saying strict scrutiny applies.

How about this for an amendment? For the last sentence, "MEPA prohibits any consideration of race in making placement decisions." And it seems contradictory with outreach or may be contradictory with outreach, but there is a way to square that.
Have others looked at the statutory language or have it before them or should I try to --

COMMISSIONER HERIOT: I do not have it before me.

COMMISSIONER GAZIANO: -- quote the language?

CHAIRMAN REYNOLDS: Please quote the language, Todd.

COMMISSIONER GAZIANO: Section 1996(b), which is the statutory cite, not the -- I mean, the code, would be the code section, "Prohibited conduct. A person or government that is involved in adoption or foster care placement may not: a) deny to any individual the opportunity to become an adoptive or a foster parent" -- and I think this is the key language -- "on the basis of race, color, or national origin of the individual or of the child involved; or b) delay or deny the placement of a child for adoption or in foster care on the basis of race, color, or national origin of the adoptive foster parent or of the child involved."

Maybe that incorporates strict scrutiny, but, at a minimum, it is not clear that it allows any consideration of race.

COMMISSIONER HERIOT: I agree with Todd
that this is basically the key to this whole statute. I wouldn't have drafted it this way, but it doesn't say what HHS says it says.

COMMISSIONER GAZIANO: And, if we're unsure, the alternative to my friendly amendment is just to strike that last sentence and leave the previous sentence says, "Some personnel have circumvented MEPA's provisions against consideration of race in placement."

CHAIRMAN REYNOLDS: Folks, what's the preference? To strike the sentence or to adopt the friendly amendment?

COMMISSIONER HERIOT: My preference is to look more closely at the legislative history than we have so far.

COMMISSIONER YAKI: This is Commissioner Yaki. I would also add this briefing with intent interest to Commissioner Taylor. And I would be hesitant to read too much into language without the appropriate letters of intent and without the input of Commissioner Taylor at this time.

CHAIRMAN REYNOLDS: Okay. So between Commissioners Heriot and Yaki, I believe that we have a request to table this particular issue.

COMMISSIONER YAKI: Yes. This is
1 Commissioner Yaki. That would be correct.

   COMMISSIONER GAZIANO: That's fine with me, too. I would feel more comfortable if we had Commissioner Taylor's input and further study. I sort of noticed these questions late last night and this morning.

   CHAIRMAN REYNOLDS: Okay. I suspect that we won't have violent opposition to this suggestion. So we will table a discussion of that particular item.

   - MOTION TO APPROVE MEPA RECOMMENDATION #3

   CHAIRMAN REYNOLDS: Next up, I move the Commission to approve rewritten recommendation number 3, which reads as follows, "HHS should continue to conduct compliance reviews and impose sanctions as necessary to ensure that state agencies and personnel are in compliance with MEPA section 1501(c), strict limitations on the use of race in placement decisions."

   Should we table all of this and just consider these three items together or are people comfortable dealing with the other two issues?

   - MOTION TO APPROVE MEPA RECOMMENDATION #8

   COMMISSIONER GAZIANO: If we're going to table one, why don't we? I would suggest all three.

   CHAIRMAN REYNOLDS: Anyone object?
COMMISSIONER HERIOT: I agree with that.

COMMISSIONER YAKI: I would second that.

CHAIRMAN REYNOLDS: Okay. That's what we will do.

- CONSIDERATION OF DEADLINES FOR CONCURRING OR DISSENTING STATEMENTS & REBUTTALS

CHAIRMAN REYNOLDS: The next item on the agenda is consideration of deadlines for concurring and dissenting statements and rebuttals for the MEPA report.

Mr. Staff Director, please share your recommendations with us regarding these time lines.

STAFF DIRECTOR DANNENFELSER: Yes. Thank you, Mr. Chairman.

I was going to recommend time lines of January 20th with statements to be submitted, which would be 35 days from today, building in 5 extra days for the holidays and then with the assumption that the statements would then be circulated to all commissioners on January 21st and then have a date of February 21st for rebuttals.

I guess, in light of the tabling of the three items here, it is a question of whether commissioners want to move forward with those time lines or do they want to wait until these three items
are resolved until we start the clock on the
statements being submitted?

COMMISSIONER HERIOT: Well, it is hard to
write a statement if you don't know what the
recommendations are.

CHAIRMAN REYNOLDS: Okay. I would propose
that, in order to prevent the loss of time and
momentum on this issue, that we consider a
teleconference where we would deal with these
remaining issues. Are folks comfortable with that
approach?

COMMISSIONER YAKI: Hello. This is
Commissioner Yaki.

Why at a teleconference? Why not at a
regular meeting?

CHAIRMAN REYNOLDS: When is our next
meeting scheduled?

STAFF DIRECTOR DANNENFELSER: January 15th.

CHAIRMAN REYNOLDS: Well, that would cause
us to lose quite a bit of time.

COMMISSIONER YAKI: We have a
teleconference scheduled before then?

CHAIRMAN REYNOLDS: Before the 15th?

COMMISSIONER YAKI: Yes.
CHAIRMAN REYNOLDS: Marty, help me out.

STAFF DIRECTOR DANNENFELSER: No, we don't. That is our next scheduled meeting, the 15th of January.

CHAIRMAN REYNOLDS: So next in-person meeting on the 15th. And if we were inclined to go with the teleconference, we would have to schedule it. And the soonest that we would be able to do it would be ten days. Is that right?

STAFF DIRECTOR DANNENFELSER: Well, we have the weekend. If we did it today, it would be about 10 or 11 days from now. Of course, that takes us right -- that would take us, I believe, until maybe the Tuesday after Christmas or so.

PARTICIPANT: Twelve days would be the 29th.

STAFF DIRECTOR DANNENFELSER: If we sent it today, it would publish on Tuesday. And then the Wednesday would be actually the 30th. The 30th would be the first day.

CHAIRMAN REYNOLDS: Okay. Folks, I'm trying to get --

STAFF DIRECTOR DANNENFELSER: I'm sorry. I'm sorry. No. Wait a minute. Friday would be. We get in on Friday, conceivably get in on Friday. And
then --

COMMISSIONER YAKI: We have had some trouble with the publishing dates.

STAFF DIRECTOR DANNENFELSER: It would be like the 26th or so. December 26th would be. So that's a weekend.

COMMISSIONER HERIOT: Saturday.

STAFF DIRECTOR DANNENFELSER: So the 28th, December 28th, would be the first date.

CHAIRMAN REYNOLDS: Okay. I'm trying to get a sense of whether there is a strong preference one way or the other. Folks, do you want to weigh in? Would you mind just waiting until the next in-person meeting knowing that we're going to lose a little time or do you want to schedule a teleconference?

COMMISSIONER HERIOT: I'm available any of those days for a telephone conference.

COMMISSIONER YAKI: I'm not.

COMMISSIONER MELENDEZ: Commissioner Melendez. I would prefer to wait. I am on vacation starting this Friday, and I won't be back until January 6th or something. And who knows where I will be.

CHAIRMAN REYNOLDS: Todd?

COMMISSIONER GAZIANO: I could make myself
available before the first of the year, but I'd probably have a slight preference not to. If we need to take this up separately, maybe we could do it when Commissioner Melendez returns from his vacation but not take up the next in-person meeting.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: But I could go either way, whatever you all want.

CHAIRMAN REYNOLDS: Okay. Well, I just — well, in light of the fact that we don't know whether Commissioner Taylor would be available for a teleconference, combined with the preferences expressed by Commissioners Gaziano, Yaki, and Melendez, let's just push it off until the next in-person meeting.

- DISCUSSION OF TIMETABLE FOR FUTURE BRIEFINGS

CHAIRMAN REYNOLDS: Okay. Mr. Staff Director, please share your thoughts regarding a timetable for future briefings.

STAFF DIRECTOR DANNENFELSER: Thank you, Mr. Chairman.

I would like to point out also just relating to briefing reports, that the illegal immigration report is currently with commissioners. And we have a time line for recommended edits to that
report, comments on that report and recommended edits
to the report, of January 3rd and that the staff would
then send out an amended report by January 8th so that
we could consider it at the January 15th meeting.

The other topic regarding timetables for
future briefings, we did have some e-mail discussion
about the possibility of having an in-person meeting
on January 29th. But it appears that that is not
going to work very well for some commissioners. So the next in-person meeting would be February 12th.

Of course, the first topic that commissioners chose was the age discrimination and employment issue. So that's just a matter of whether February 12th would be a good time to do that or is that potentially going to be a date on which another hearing or other action might be considered by the Commission?

CHAIRMAN REYNOLDS: Comments?

COMMISSIONER GAZIANO: That might be a time when we would be ready to have a hearing on the New Black Panther matter, but that is something that I suppose we can get a better feel for by the end of this week.

COMMISSIONER HERIOT: Well, I would be inclined to prioritize a hearing on a New Black
Panther matter if that's possible, and, if that turns out not to be possible, to put in the age discrimination briefing.

STAFF DIRECTOR DANNENFELSER: We would have to know pretty soon about picking a date for the age discrimination just for lining up panelists and getting them to commit their schedules for participation.

COMMISSIONER YAKI: This is Commissioner Yaki. I don't see why we wouldn't go ahead with the th age discrimination for February 12, given that anything regarding the NBPP is going to be in flux anyway.

If you're going to have a hearing, I suppose that we could discuss what might be a convenient time for everyone to adjust, and putting an extra hearing date in on just that particular matter anyway because, at a hearing, if I recall from previous engagements on this, a quorum is not necessary for a hearing to go forward.

So it's a much more flexible procedure than our regular schedules and dealing with the regularly scheduled meeting, we would take the 12th for the age discrimination hearing and just get that one down so we can move on to the next.
COMMISSIONER HERIOT: Well, I assume the same is true for a briefing. If we don't need a quorum for a hearing, I assume we also do not need a quorum for a briefing.

COMMISSIONER YAKI: Yes, except that we have certainty in terms of a topic right now with age discrimination. And we have been sort of lining people up for that now. Given the fact that we may be, and maybe it's speculative, we might have an idea on whether the NBPP could be done in February or not. I would say let that one play looser, given our rules on hearing.

It's not a briefing. It's a hearing.

COMMISSIONER HERIOT: Again, the same rules apply in this regard. I still would maintain that we should prioritize the hearing over --

COMMISSIONER YAKI: Why should we have a hearing when we don't know exactly what the date is --

COMMISSIONER GAZIANO: The reason to give it --

COMMISSIONER YAKI: If the Staff Director needs to move in order to get witnesses for age discrimination, why not let him do that? And then as things are up with the New Black Panther party --

COMMISSIONER HERIOT: Because there's a
deadline on the enforcement reports.

COMMISSIONER GAZIANO: Exactly.

CHAIRMAN REYNOLDS: But there is not a deadline on briefing reports.

COMMISSIONER GAZIANO: Exactly.

COMMISSIONER YAKI: Well, I know we have no deadline on briefing reports. The issue here is whether or not there is even one percent of a chance that we would have enough information to go forward on February 12th.

Otherwise we miss all opportunities on the 12th. I would rather get at least one thing in for sure that we know we can do. And then if we have to go on February 11th with the New Black Panther party, why not?

COMMISSIONER GAZIANO: Well, I think I've heard this informally, but this is for the Staff Director. Why couldn't we be ready January 15th for the age discrimination briefing?

STAFF DIRECTOR DANNENFELSER: Well, right now we are inside a month. Our main concern with January 15th for the age discrimination is that panelists getting statements in, as far as lining them up, getting them confirmed, and then having them write their statements over the holidays and getting those
statements to commissioners in time for them to have sufficient time to review, would be very difficult at this point in time.

COMMISSIONER YAKI: I think what the Staff Director is trying to say, I am trying to say, is that the quality of and possibly quantity of witnesses who would be willing to engage in a testimony-writing process during the holidays would probably inhibit the number of people who might want to volunteer. That's having a hearing where all of our A choices may not be available.

COMMISSIONER HERIOT: Again, given that we have a deadline on the enforcement report, it would strike me as prudent to prioritize that over this briefing.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER YAKI: We can prioritize it, but I don't understand why we prioritize it over a date when we have flexibility in dates for the New Black Panther party because, at a hearing, you don't need a quorum.

(Cross-talk.)

COMMISSIONER HERIOT: As I said --

COMMISSIONER YAKI: -- up there by himself pontificating, whatever.
COMMISSIONER HERIOT: That's also true of a briefing. We can hold a special date on which we don't need a quorum.

CHAIRMAN REYNOLDS: Okay. Folks, we've heard apparently all of the arguments.

STAFF DIRECTOR DANNENFELSER: We want to look at March 12th for the age discrimination and with the --

COMMISSIONER GAZIANO: Why don't just agree on the priority and we're going to have one of these on the 12th and leave that to the discretion of -- maybe we'll leave it to the discretion of the Chairman based on the report of the Discovery Subcommittee and other factors that the Staff Director will provide to him.

COMMISSIONER YAKI: I have a point of order here. Where is this Discovery Subcommittee? I have yet to hear a single report on it.

COMMISSIONER GAZIANO: You resigned twice, as I recall.

COMMISSIONER HERIOT: Yes.

COMMISSIONER YAKI: Commissioner Gaziano, what the heck does that have to do with any transparency process that would have the Discovery Committee report to the entire Commission? I have not
seen a single report from the Discovery Subcommittee
to the Commission on what it is you or whoever else is
on that is doing. I think I demand that --

COMMISSIONER GAZIANO: Yes, you have.
Yes, you have. We give oral reports at every meeting.
And usually you try to cut me off.

(Cross-talk.)

COMMISSIONER GAZIANO: Usually you try to
cut me off, as you are right now, as you are right
now.

COMMISSIONER YAKI: Are there written
reports, Commissioner Gaziano? I seem to recall you
speaking over me three times already today. So excuse
me. I am just trying to figure out, have there been
written Discovery Committee reports?

COMMISSIONER GAZIANO: No.

CHAIRMAN REYNOLDS: Commissioner Yaki, one
at a time. I am not sure that there was an
expectation that there would be written reports from
the Subcommittee.

In fact, I am not sure that, at least in
my memory, that has ever been done. In most
instances, the updates have been done verbally.

COMMISSIONER YAKI: Commissioner Braceras
used to produce written reports when we were working
on some of the fundamental changes early on when we were dealing with this four years ago.

COMMISSIONER GAZIANO: Okay. Don't expect them from the Discovery Committee.

COMMISSIONER YAKI: I just want that on the record that you have no intention of producing anything in writing other than whatever you choose to say in public. I think that is wrong. I think that minutes should be required. I think that there should be written reports.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: And I think that Commissioner Melendez and myself will have a hard time approving anything today with regard to this kind of prioritization without some commitment that we get Discovery Subcommittee minutes and written reports. I assumed this is the enforcement report, but apparently, I guess, it is not so critical that there be any written record or transparency as part of the process.

I would urge Commissioner Melendez to join me in not engaging in this process, prioritization process, that you seem to be engaging without some commitment that the Discovery Subcommittee opens itself up to the process.
CHAIRMAN REYNOLDS: Commissioner Yaki, in just about every meeting since we elected to do this, we have received updates. The General Counsel has provided us with updates on a regular basis.

Now, if you want to have a different procedure, if you want to have formal procedures where we have a write-up of what is going on in any subcommittee, as you know, you are welcome to draft some procedures and to see if you can garner a majority of votes to support your position.

COMMISSIONER YAKI: I want it on the agenda for January.

CHAIRMAN REYNOLDS: That's fine.

Anything else?

COMMISSIONER MELENDEZ: Yes. This is Commissioner Melendez. Would it be a problem to write something up?

CHAIRMAN REYNOLDS: That would be up to the folks who support Commissioner Yaki's suggestion.

COMMISSIONER MELENDEZ: Or, else, in the minutes, is there a section that says this is from the subcommittee to support what they say if it's orally to the Committee?

There's a section in the minutes that, if we are going to substitute an oral report, then it
should be designated in the minutes that this is it. And whatever you say is whatever it is.

CHAIRMAN REYNOLDS: We have a transcript. We have a transcript for each meeting. So the presentation that is made by the General Counsel regarding what is going on in the subcommittee, we have a written document already.

COMMISSIONER YAKI: Yes. But here is the problem. The problem is that we hear about this orally at the time. For example, at the last meeting, the last in-person meeting we had, there was a discussion about written interrogatories or questions going over to DOJ.

Now, for those of us who are interested in this project for reasons other than Commissioner Gaziano, the fact that there were written interrogatories going over and we were just being informed about it at the meeting and those interrogatories were headed over by the end of the day, it is hardly enough notice for us to participate in any meaningful way.

If the Discovery Subcommittee, as part of the agenda, was required to submit a report to what activities it was doing so that we knew what the heck was going on, we would have had, I would have had more
time.

As it was, I spent time during the meeting rapidly drafting up some questions to be handed in. I do not know if they were incorporated or not. I have not seen the final version of those, but I assume they were.

CHAIRMAN REYNOLDS: Commissioner Yaki, isn't this --

(Cross-talk.)

CHAIRMAN REYNOLDS: Commissioner Yaki, your inconvenience, isn't that a direct consequence of your decision to leave the subcommittee?

COMMISSIONER YAKI: Well, why should I -- it is a direct consequence of the fact that there has to be transparency in this, at this Commission and in this process.

The fact that I chose not to join the subcommittee or the kangaroo court is irrelevant to whether or nor the entire Commission should be afforded the opportunity to know what the Discovery Subcommittee is doing ahead of time so that we can prepare questions to be answered during our regularly scheduled briefing.

COMMISSIONER GAZIANO: Commissioner Yaki, to answer your question, the General Counsel could as
well. He held up the interrogatories to include yours. And they were so included.

Thank you for your bipartisan support.

COMMISSIONER YAKI: Well, you know, it's interesting that you talk about that, Commissioner Gaziano was ranting about stonewalling, because the fact is that I feel that there is a lot of stonewalling going on regarding exactly what the Discovery Subcommittee is doing in terms of its pursuit of this. We have to basically extract it as best we can from the oral presentations at our meetings. And I think that is simply unacceptable. Therefore --

CHAIRMAN REYNOLDS: Commissioner Yaki, would you like to rejoin the subcommittee? Would you like to serve on the subcommittee?

COMMISSIONER YAKI: Absolutely not. Why should I give any legitimacy to a process that I believe is a kangaroo court to begin with? And why should that matter in terms of the other members of the Commission, Commissioner Melendez, Commissioner Thernstrom, Commissioner Taylor, who may wish to know what is going on and be able to have access to that information to know that you prepare questions to the General Counsel and have it ready prior to the
meeting, rather than having to discover on the fly and after the fact?

Whether or not I am on the committee is irrelevant to the greater obligation to this Commission.

CHAIRMAN REYNOLDS: Okay. Well, we are going to put this issue on the agenda for the next business meeting. I assume that you will have some formal procedures that you would present to the commissioners and we'll have a discussion and vote on it.

COMMISSIONER YAKI: Well, until it happens, I am not going to vote on prioritizing NBPP. It will be the age discrimination provisions. I don't think that we should vote on it. I don't think that we should do that until this is done.

And at this point, I think I will probably be leaving the briefing.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: I don't know that we need a vote. Do we need a vote, Mr. Chair?

CHAIRMAN REYNOLDS: Not on this issue.

COMMISSIONER GAZIANO: Just to decide which matter to put on the February calendar?

COMMISSIONER HERIOT: I think the Chairman
has that inherent authority.

COMMISSIONER GAZIANO: I think so. So I think you can decide what to put on. Would you like a motion and a vote, Mr. Chairman?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER GAZIANO: Okay. I move to give the Chair discretion to decide that based on various appropriate inputs.

CHAIRMAN REYNOLDS: Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: Yes.


COMMISSIONER GAZIANO: Okay. Yes. I vote yes, too.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: I'll abstain. I'm not sure.

CHAIRMAN REYNOLDS: Okay. Commissioner Yaki?

(No response.)
CHAIRMAN REYNOLDS: And I vote for it. So let the record reflect that Commissioner Melendez abstained. Commissioners Gaziano, Kirsanow, Heriot, and Reynolds voted in favor of the motion. The motion passes.

IV. APPROVAL OF DECEMBER 4, 2009 MEETING MINUTES

CHAIRMAN REYNOLDS: Next up is the approval of the December 4, 2009 meeting. I move that these minutes be accepted. Is there a second?

COMMISSIONER GAZIANO: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER GAZIANO: Could I just ask that the two discussions on the letter to Congress be merged together so someone reading our minutes will sort of -- I think that it could or that first section could also be edited down on page.

And then I would ask one word change on page 5, in the discussion on the letter to Congress on the health care bill that the motion I made was that "The Commission adopt the following procedure to consider the letter," rather than "to adopt the letter," but that those two sections be merged together.

CHAIRMAN REYNOLDS: Okay. I'll treat those as friendly amendments unless someone has an
objection. Any other changes?

STAFF DIRECTOR DANNENFELSER: Mr. Chair, it is the Staff Director. I got a couple of e-mails from Commissioner Gaziano's assistant pointing out a few typos. And we will make those corrections.

And also the Vice Chair's assistant has pointed out that, regarding findings 1, 2, 3, and 5 from MEPA, I would also like to point out that the findings were approved as amended. So I think those are technical corrections that we could make to the minutes.

CHAIRMAN REYNOLDS: Okay. All right. With Todd's amendment and making the grammatical and technical changes described by the Staff Director, Commissioner Gaziano, how do you vote?

COMMISSIONER GAZIANO: Yes.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes.

CHAIRMAN REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes.

CHAIRMAN REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: Just for the record, I'll abstain based on the fact that the minutes weren't in the booklet that was sent to me.

CHAIRMAN REYNOLDS: Okay. I vote for it.
Commissioner Yaki?

COMMISSIONER YAKI: Abstain.

CHAIRMAN REYNOLDS: Okay. We have two abstentions: one from Commissioner Melendez.

COMMISSIONER YAKI: Excuse me. I didn't hear you record my vote on the other motion.

COMMISSIONER HERIOT: I didn't hear your vote.

COMMISSIONER YAKI: There is something weird where I'm cutting in and out on the -- I'm in my mobile, and I am cutting in and out on the briefing right now.

CHAIRMAN REYNOLDS: Okay. Kind sir, how did you vote?

COMMISSIONER YAKI: No.

CHAIRMAN REYNOLDS: Okay. Please let the record reflect that Commissioner Yaki voted no to Todd's motion to provide the Chair with the authority to prioritize the agenda.

COMMISSIONER HERIOT: The agenda, yes.

CHAIRMAN REYNOLDS: Yes. Bear with me.

V. STAFF DIRECTOR'S REPORT

CHAIRMAN REYNOLDS: Next up, Mr. Staff Director, please provide us with your report.

STAFF DIRECTOR DANNENFELSER: Thank you,
Mr. Chairman. I just have a couple of points to make today.

I may turn to Commissioner Melendez in a moment. Commissioner Melendez has selected a new special assistant. And that individual will be beginning next Monday. I believe he will be based in Washington, D.C. And I would just ask if Commissioner Melendez would like to just tell us a little bit more about this person at this point in time.

COMMISSIONER MELENDEZ: All right. Yes. Nick Colten will be coming on board. And I appreciate the fact that we have kind of expedited getting him on board because I need some help. He is a young guy that should be able to help me out. So hopefully you will all be able to meet him in the office because he will be based there.

So thank you.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER GAZIANO: Commissioner Melendez, may I just ask? I hope that the White House has provided its speedy approval, but could you just tell me if that process has happened yet?

COMMISSIONER MELENDEZ: They submitted the paperwork for the White House clearance, my understanding. So I don't think it has been approved
at this point, but he will be on board, as we have with other special assistants, if the clearance actually happens.

COMMISSIONER GAZIANO: Okay. I certainly have no objection to us using one of our emergency authorities, but let the record reflect that I think other commissioners had to wait a month or more before we employed that emergency authority.

I see no reason why we necessarily should do that in your case since the White House is so slow, but I think you are getting special treatment.

COMMISSIONER MELENDEZ: Well, whatever.

COMMISSIONER YAKI: Commissioner Gaziano says what?

CHAIRMAN REYNOLDS: I'm sorry, Commissioner Yaki, please repeat your question.

COMMISSIONER YAKI: Commissioner Gaziano is what?

COMMISSIONER GAZIANO: That Commissioner Melendez was getting special treatment.

COMMISSIONER YAKI: And do you have your allegation is to reinforce that comment or you just --

COMMISSIONER GAZIANO: You see --

COMMISSIONER YAKI: -- are talking off the top of your head?
COMMISSIONER GAZIANO: -- conspiracy theories everywhere, Commissioner Yaki.

COMMISSIONER YAKI: I don't see conspiracy theories, Commissioner Gaziano. You're the one who sees the --

CHAIRMAN REYNOLDS: Why don't you --

COMMISSIONER YAKI: Commissioner Gaziano, I think, needs a little calming down.

CHAIRMAN REYNOLDS: Commissioner Yaki, Commissioner --

COMMISSIONER GAZIANO: The pot calling the kettle what?

CHAIRMAN REYNOLDS: You can call each other and insult each other after we're done here. Okay, folks. That would be --

COMMISSIONER YAKI: I'm just asking him about his comment. That's all.

CHAIRMAN REYNOLDS: Mr. Staff Director, do you have anything else?

STAFF DIRECTOR DANNENFELSER: Just that I sent commissioners some follow-up information relating to the commissioners' special assistants, the grade level situation.

So that was sent by e-mail to commissioners yesterday. So anybody who has any
questions or would like to act on that paperwork that was sent to them, please feel free to do so. And if you have any questions, please direct them to TinaLouise Martin or myself.

CHAIRMAN REYNOLDS: All right. Well, folks, that's it.

COMMISSIONER YAKI: I have a question of the Staff Director.

CHAIRMAN REYNOLDS: Commissioner Yaki, what's your question?

COMMISSIONER YAKI: What was our funding level in the omnibus appropriations bill that passed the House this week?

STAFF DIRECTOR DANNENFELSER: It was $9.4 million.

COMMISSIONER YAKI: Okay.

STAFF DIRECTOR DANNENFELSER: Thanks for pointing that out. The House did, Thursday of last week, pass the omnibus appropriations bill. And the Senate passed it on Sunday. So that did. And we expect the President, if he hasn't already signed it, will be signing it very soon. And that will provide a $9.4 million level for fiscal year 2010.

COMMISSIONER MELENDEZ: Commissioner Melendez. I have a question here. Is there any new
staff that has come on board that we should know about?

STAFF DIRECTOR DANNENFELSER: No, there has not been any new staff.

CHAIRMAN REYNOLDS: Well, other than the budget?

STAFF DIRECTOR DANNENFELSER: I'm sorry. Well, the Budget Chief came on board. I announced that at the last meeting. So he has been on board for a few weeks now.

COMMISSIONER MELENDEZ: Who is that?

STAFF DIRECTOR DANNENFELSER: John Ratcliff.

COMMISSIONER MELENDEZ: Okay. I thank you, Martin. And thank you for your help in the special assistant. I wasn't looking for any special treatment. I was just asking, how can we expedite getting me some help. So that was the extent that I inquired. So thank you.

STAFF DIRECTOR DANNENFELSER: You're welcome. Thanks.

COMMISSIONER YAKI: So apparently, Commissioner Gaziano, he had special treatment from the Staff Director. Perhaps you should address your comment there.
COMMISSIONER GAZIANO: Commissioner Yaki, for the record, please, since I have been insulted three times now --

CHAIRMAN REYNOLDS: Well, why don't you --

COMMISSIONER GAZIANO: No. For the record, for the record, for the record, I spoke up to approve the favorable treatment that Commissioner Melendez was getting. And I don't know how Commissioner Yaki decides that is not only wrong but invidious. He's obviously in a very bad mood, but I wanted the record to reflect --

(Cross-talk.)

COMMISSIONER YAKI: Commissioner Gaziano, it's a great time of the year.

CHAIRMAN REYNOLDS: Okay, folks.

COMMISSIONER YAKI: Being around you is like being around the Grinch.

CHAIRMAN REYNOLDS: Commissioner Yaki, just to tie a bow around this, I believe that Commissioner Melendez, because he conducts himself as a gentleman, is entitled to a little special treatment.

On that note, folks, we adjourn.

(Whereupon, the foregoing matter was concluded at 12:43 p.m.)
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