

A photograph showing a person cowering under the legs of two larger people, likely bullies, on a sidewalk. The person is holding a yellow book and has their hands raised in a gesture of fear or submission. The scene is set outdoors on a paved surface.

PEER-TO-PEER

VIOLENCE + BULLYING

EXAMINING THE FEDERAL RESPONSE

SEPTEMBER 2011

U.S. COMMISSION ON CIVIL RIGHTS

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

Members of the Commission:

Martin R. Castro, Chairman
Abigail Thernstrom, Vice Chair
Roberta Achtenberg
Todd Gaziano
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U. S. Commission on Civil Rights

Peer-to-Peer Violence and Bullying

Examining the Federal Response

September 2011

LETTER OF TRANSMITTAL

The President
The President of the Senate
The Speaker of the House

On behalf of the United States Commission on Civil Rights I am pleased to transmit this report, *Peer-to-Peer Violence and Bullying, Examining the Federal Response*, pursuant to Public Law 103-419. The purpose of the report is to examine the role played by the U.S. Departments of Education and Justice in addressing peer-to-peer discrimination on the basis of race, national origin, religion, disability, sex and/or LGBT status.

To that end, the Commission gathered enforcement data from the Departments of Education and Justice and convened a day-long briefing on the subject of peer-to-peer violence and bullying. Twenty presenters participated in the briefing. Among the panelists invited to the briefing were: current and former federal government officials, academics, and representatives from a diverse set of advocacy organizations. In addition, the Commission received numerous written submissions from the public, academics, and advocacy organizations.

Based on the evidence gathered by the Commission, we conclude that despite the harm that peer-to-peer bullying and harassment due to a student's membership in certain classes, such as race, religion, or sexual orientation, current federal laws (and the laws of many states) do not fully protect all students from peer-to-peer bullying and harassment resulting from animus toward their group status.

Specifically, the Commission's findings, by majority vote, are:

1. Bullying and harassment, including bullying and harassment based on sex, race, national origin, disability, sexual orientation, or religion, are harmful to American youth.
2. Current federal civil rights laws do not provide the U.S. Department of Education with jurisdiction to protect students from peer-to-peer harassment that is solely on the basis of religion.
3. The current federal civil rights laws do not protect students from peer-to-peer harassment that is solely on the basis of sexual orientation.

To better record the incidence of harassment based solely on sexual orientation or solely on religion, we recommend that the Departments adopt more detailed tracking methods

regarding the complaints they receive. To better assist state and local officials to comply with their responsibilities under federal law, we recommend that the Department of Education strive to use consistent language and provide concrete examples in the guidance documents that it produces.

On August 12, 2011, the Commission approved this report. The vote was as follows: Commissioners Achtenberg, Castro, Thernstrom and Yaki supported the approval of the report; Commissioners Gaziano, Heriot and Kirsanow opposed the approval of the report; Commissioner Kladney abstained from voting on the report due to the fact that August 12th was his first Commission meeting.

For the Commissioners,

Martin R. Castro
Chairman

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Chapter 1. EXECUTIVE SUMMARY

This report focuses on the government's efforts to enforce federal civil rights laws with respect to peer-to-peer violence based on race, national origin, sex, disability, religion, and sexual orientation or gender identity.

The Commission examined the nature and incidence of peer-to-peer violence in public K-12 schools and studied the types of peer-to-peer violence faced by students, as well as the effects of such violence. The Commission further reviewed the policies and procedures employed by the United States Departments of Education and Justice in enforcing prohibitions against peer-to-peer violence.

The Commission, by majority vote, concluded that bullying and harassment, including bullying and harassment based on sex, race, national origin, disability, sexual orientation, or religion, are harmful to American youth, and developed findings and recommendations to address the problem, including the following recommendations:

- The U.S. Departments of Education and Justice should track their complaints/inquiries regarding sexual harassment or gender-based harassment by creating a category that explicitly encompasses LGBT youth.
- The U.S. Departments of Education and Justice should track complaints that they receive regarding harassment based solely on sexual orientation that are closed for lack of jurisdiction.
- The U.S. Department of Education should track complaints that it receives regarding harassment based solely on religion that are closed for lack of jurisdiction.
- The U.S. Department of Education should consider issuing a new Dear Colleague Letter regarding the First Amendment implications of anti-bullying policies. The new Letter should provide concrete examples to clarify the guidance that the Department of Education previously provided in its Dear Colleague Letter on the First Amendment dated July 28, 2003.

Chapter 2. INTRODUCTION AND BACKGROUND

Peer-to-Peer Violence in K-12 Public Schools

On March 11, 2011, the U.S. Commission on Civil Rights, by majority vote, selected peer-to-peer violence and bullying as the topic for its annual, statutorily mandated enforcement investigation.¹ The Commission elected to explore the federal enforcement of civil rights laws with respect to peer-to-peer violence based on race, national origin, sex, disability, religion, and sexual orientation or gender identity.²

On May 13, 2011, the Commission held a day-long briefing on peer-to-peer violence and bullying. Twenty panelists, including government officials, academics, attorneys, and advocates participated. Key elements of the briefing are included in this report.

This report examines the work of the United States Departments of Education (ED) and Justice (DOJ) in enforcing prohibitions against discrimination and harassment as they relate to bullying and other peer-to-peer violence in public K-12 schools. This chapter provides information on the incidence of peer-to-peer violence as well as the unique problems associated with peer-to-peer violence as it relates to various demographic groups. It also provides background information on relevant legal protections, highlighting statutes enforced by ED and DOJ. Chapters Three and Four set forth the processes employed by ED and DOJ, respectively, in monitoring and enforcing prohibitions against peer-to-peer violence and provide data regarding ED and DOJ's enforcement activities. Chapter Five is an overview of ED's October 2010 Dear Colleague Letter addressing the legal obligations of schools related to bullying and harassment. Chapter Six discusses jurisdictional issues related to ED and DOJ's use of existing laws to combat peer-to-peer violence where the victims are in part targeted based on their sexual orientation or gender identity, or based on their religion. Chapter Seven explores other concerns related to the current federal response to peer-to-peer violence, including critiques based on the enforcement standards used by ED, the

¹ See Meeting of the U.S. Comm'n on Civil Rights, Wash., D.C., Mar. 11, 2011, transcript, *available at* http://www.usccr.gov/calendar/trnscrpt/transcript_03-11-11ccr.pdf (last visited June 24, 2011).

² *Id.*

appropriateness of a large-scale federal response versus the need for state and local control, and the First Amendment.

What is Bullying?

Although the Commission declines to endorse a single and authoritative definition of “bullying,” several entities have put forth definitions that are informative as to the nature and variance of the issue. For example, the National Center for Education Statistics and the Bureau of Justice Statistics have described bullying to include “being made fun of; being the subject of rumors; being threatened with harm; being pushed, shoved, tripped, or spit on; being pressured into doing things [one] did not want to do; excluded [sic] from activities on purpose; and having property destroyed on purpose.”³ Similarly, the American Psychological Association describes bullying as follows:

Commonly labeled as peer victimization or peer harassment, school bullying is defined as repeated physical, verbal or psychological abuse of victims by perpetrators who intend to cause them harm. The critical features that distinguish bullying from simple conflict between peers are: intentions to cause harm, repeated incidences of harm, and an imbalance of power between perpetrator and victim. Hitting, kicking, shoving, name-calling, spreading of rumors, exclusion and intimidating gestures (e.g., eye rolling) by powerful peers are all examples of behaviors that constitute abuse that is physical, verbal or psychological in nature.⁴

In addition, the National Education Association has defined bullying as:

[I]ntentional and repeated acts of a threatening or demeaning nature that occur through direct verbal (e.g., threatening, name calling), direct physical (e.g., hitting, kicking), and indirect (e.g., spreading rumors, influencing relationships, cyberbullying) means that typically occur in situations in which there is a power or status difference.⁵

³ SIMONE ROBERS ET AL., NAT’L CTR. FOR EDUC. STATISTICS, INST. FOR EDUC. SCIENCES, U.S. DEP’T OF EDUC. & BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2010, at 42 n.29, available at <http://nces.ed.gov/pubs2011/2011002.pdf> (last visited July 20, 2011) [hereinafter NCES INDICATORS STUDY].

⁴ Sandra Graham, *Bullying: A Module for Teachers*, Am. Psychological Ass’n, <http://www.apa.org/education/k12/bullying.aspx> (last visited June 24, 2011) (internal citations omitted).

⁵ RACHEL DINKES ET AL., NAT’L EDUC. ASS’N, FINDINGS FROM THE NATIONAL EDUCATION ASSOCIATION’S NATIONWIDE STUDY OF BULLYING: TEACHERS’ AND EDUCATION SUPPORT PROFESSIONALS’ PERSPECTIVES 39

What Harassment is Subject to Federal Jurisdiction?

Bullying triggers federal civil rights laws where it meets the heightened legal standard for “harassment.” That is, it targets students based on a protected classification, it creates a hostile environment, and schools have notice of the conduct but fail to address it. As described by ED’s Assistant Secretary for Civil Rights Russlynn Ali:

[S]chool districts violate the federal civil rights laws that OCR enforces when harassment based on race, color, national origin, sex, or disability is sufficiently serious to create a hostile environment, and school employees encourage, tolerate, do not adequately address, or ignore the harassment.⁶

We do not have jurisdiction and would not take action against single incidents of playground taunting absent something like physical conduct that made a single incident sufficiently severe or pervasive to create a hostile environment.

Jocelyn Samuels, Dept. of Justice
(Briefing Transcript, p. 48)

Likewise, according to Jocelyn Samuels, Senior Counselor to DOJ’s Assistant Attorney General for Civil Rights, “[DOJ]’s authority goes to harassment which is physical or verbal or other conduct that is sufficiently severe or pervasive to create a hostile environment that interferes with a student’s ability to learn.”⁷

Because federal case law establishes a high bar for school liability for incidents of student-on-student harassment,⁸ not all forms of bullying are subject to

federal jurisdiction, and ED and DOJ do not get involved in typical schoolyard bullying and teasing. As Ms. Samuels explains, “We do not have jurisdiction and would not take action

(2011), available at

http://www.nea.org/assets/img/content/Findings_from_NEAs_Nationwide_Study_of_Bullying.pdf (last visited May 5, 2011) [hereinafter NEA STUDY OF BULLYING].

⁶ Statement of Russlynn H. Ali, Asst. Sec’y, Office for Civil Rights, U.S. Dep’t of Educ., at 3, May 13, 2011, available at

<http://www.eusccr.com/1.%20Russlynn%20Ali.%20U.S.%20Department%20of%20Justice.%20Office%20for%20Civil%20Rights.pdf> (last visited June 23, 2011) [hereinafter Ali Statement].

⁷ Briefing Before the U.S. Comm’n on Civil Rights, Wash., D.C., May 13, 2011, transcript at 41:21-25, available at <http://www.eusccr.com/Peer-Bullying%20May%2013%202011%20Transcript.pdf> (last visited June 22, 2011) [hereinafter Briefing Transcript] (Samuels Testimony).

⁸ See *infra* pp.23-27.

against single incidents of playground taunting absent something like physical conduct that made a single incident sufficiently severe or pervasive to create a hostile environment.”⁹

It is important to keep these distinctions in mind while reviewing this report. Federal civil rights laws—and the federal government’s enforcement of those laws—are limited to heightened incidents of harassment that do not include typical schoolyard bullying unless that bullying creates a hostile environment. As such, incidents of bullying reported in surveys and statistical studies in this report do not necessarily meet the threshold for federal jurisdiction.

Peer-to-Peer Violence Generally¹⁰

Acts of bullying, violence, and harassment are widespread in K-12 schools. The School Survey on Crime and Safety (SSCS), sponsored by ED’s National Center for Education Statistics (NCES), found that 25 percent of schools reported that bullying took place amongst their students on a daily or weekly basis.¹¹ Likewise, the School Crime Supplement to the National Crime Victimization Survey (SCS-NCVS), sponsored by DOJ’s Bureau of Justice Statistics, found that about 32 percent of students aged 12 to 18 reported having been bullied in their schools during the 2007 school year.¹² Twenty-one percent of the bullied students said that they experienced bullying once or twice per month, 10 percent said they were bullied once or twice per week, and 7 percent responded that they were bullied on a nearly

⁹ Briefing Transcript, *supra* note 7, at 48:24-49:4 (Samuels Testimony).

¹⁰ The data presented in this chapter is designed only to provide general insight into the nature and prevalence of bullying in K-12 schools, primarily as presented by organizations and agencies that collect such information for their own use. The Commission did not independently verify the data presented here. Further, although much data on peer-to-peer violence exists from studies and surveys conducted by federal and state agencies, academics, and interest groups, including data gathered from self-reports, school staff observations, school disciplinary records, and crime reports, such as the data presented here, some critique the usefulness and accuracy of this data. *See, e.g.*, Briefing Transcript, *supra* note 7, at 63:9-14 (Clegg Testimony) (“[T]he Commission needs to take with a grain of salt the numbers that you’re given by interest groups and by federal bureaucracies who want to expand their jurisdiction, especially when the two of them are working together.”); *but see id.* at 106:5-107:11 (Meyer Testimony) (discussing the reliability of research regarding outcomes of anti-LGBT bullying).

¹¹ NCES INDICATORS STUDY, *supra* note 3, at 30-31.

¹² *Id.* at 42-43. Of those students who reported being bullied in school: 21.0 percent reported being made fun of, called names, or insulted; 18.1 percent reported being subjected to rumors; 5.8 percent reported being threatened with harm; 11.0 percent reported being pushed, shoved, tripped, or spit on; 5.2 percent reported being excluded from activities on purpose; 4.2 percent reported their property being destroyed on purpose; and 4.1 percent reported that peers tried to make them do things they did not want to do. *Id.* at 122.

daily basis.¹³ Only 36.1 percent of the bullied students responded that they had notified an adult at school about the incident or incidents.¹⁴ Similarly, the Youth Risk Behavior Survey (YRBS), sponsored by the Centers for Disease Control and Prevention (CDC), found that 19.9 percent of high school students reported being bullied on school property during the prior 12 months.¹⁵

Studies conducted by the private sector have found an even higher prevalence of bullying. A recent study of 43,000 students by the Josephson Institute of Ethics found that 47.1 percent of American high school students reported having been bullied, teased, or taunted in the previous year in a way that seriously upset them.¹⁶ The study also found that 49.8 percent of high school students admitted to having bullied, teased, or taunted someone within the past year,¹⁷ and that 33.4 percent of high school students believed that physical violence, such as fighting, bullying, and intimidation, was a big problem at their school.¹⁸

A 2011 study by the National Education Association found that 87 percent of school staff reported witnessing bullying. Specifically, 25 percent of school staff reported witnessing bullying once per month, 21 percent reported witnessing bullying 2 to 3 times per month, 16 percent reported witnessing bullying once per week; 15 percent reported witnessing bullying several times per week; and 9 percent reported witnessing bullying on a daily basis.¹⁹ Of the staff surveyed, 43 percent perceived bullying to be a moderate or major problem.²⁰

¹³ *Id.* at 42, 44.

¹⁴ *Id.* at 42, 126.

¹⁵ DANICE J. EATON, ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NO. SS-5, YOUTH RISK BEHAVIOR SURVEILLANCE—UNITED STATES, 2009, at 8, 53-54 (2010), available at <http://www.cdc.gov/mmwr/pdf/ss/ss5905.pdf> (last visited May 5, 2011).

¹⁶ JOSEPHSON INSTITUTE, 2010 REPORT CARD ON THE ETHICS OF AMERICAN YOUTH 175 (2010), available at http://charactercounts.org/pdf/reportcard/2010/ReportCard2010_data-tables.pdf (last visited May 4, 2011) [hereinafter JOSEPHSON STUDY]; see also Press Release, Josephson Institute of Ethics, Largest Study Ever Shows Half of All High School Students Were Bullies and Nearly Half Were the Victims of Bullying During the Past Year (Oct. 25, 2010) available at http://charactercounts.org/pdf/reportcard/2010/press-release_bullying-violence.pdf (last visited May 4, 2011). The American Academy of Child & Adolescent Psychiatry (AACAP) estimates that “as many as half of all children are bullied at some time during their school years, and at least 10 percent are bullied on a regular basis.” See American Academy of Child & Adolescent Psychiatry, Facts for Families: Bullying, http://www.aacap.org/cs/root/facts_for_families/bullying (Mar. 2011) (last visited May 19, 2011).

¹⁷ JOSEPHSON STUDY, *supra* note 16, at 145.

¹⁸ *Id.* at 46.

¹⁹ See NEA STUDY OF BULLYING, *supra* note 5, at 39.

²⁰ See *id.*

Furthermore, in recent years, the advent and widespread use of new technologies such as the Internet²¹ and cellular phones²² has led to new methods of bullying, often called “cyberbullying.” Cyberbullying has been defined to include incidents in which classmates post hurtful information about a student on the Internet or make unwanted contact through instant messaging or text messaging that threatens or insults the student.²³ The recent growth of popularity of social networking sites (such as Facebook and MySpace) and video-sharing websites (such as YouTube) has led to increased reports of cyberbullying.²⁴ Though estimates do vary, one study found that about 20 percent of students that are 11 to 18 years of age indicate they have been a victim of cyberbullying at some point in their life.²⁵

Cyberbullying can have several negative effects on victims; many students have reported feeling sad, depressed, angry, and frustrated because of cyberbullying, while many expressed they were afraid or embarrassed to attend school.²⁶ Indeed, there are three factors that can make cyberbullying even more devastating than traditional bullying: (1) because cyberbullies can be anonymous or use false names, victims do not always know who is targeting them or why,²⁷ (2) the viral nature of cyberbullying enables the bully to reach a large audience in a short amount of time or involve a large group of bullies in the behavior,²⁸ and (3)

²¹ An estimated two thirds (63 percent) of teenagers use the Internet every day. See AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, SOCIAL MEDIA AND YOUNG ADULTS 13 (2010), available at <http://missourikidsfirst.org/mosaferonline/wp-content/uploads/2010/06/Social-Media-and-Young-Adults.pdf> (last visited May 18, 2011).

²² By one account, approximately 79 percent of American teenagers have a mobile device. See CTIA—The Wireless Association®, Teenagers: A Generation Unplugged, <http://www.ctia.org/advocacy/research/index.cfm/AID/11483> (last visited May 18, 2011) (describing the findings of a 2009 national survey by CTIA and Harris Interactive).

²³ See NCES INDICATORS STUDY, *supra* note 3, at 42 n.30.

²⁴ Sameer Hinduja & Justin W. Patchin, Overview of Cyberbullying, Mar. 10, 2011, http://www.stopbullying.gov/references/white_house_conference/white_house_conference_materials.pdf#overview_of_cyberbullying (last visited June 24, 2011).

²⁵ *Id.* The NCS-NCVS found that 3.7 percent of 12-18 year-olds reported having been cyberbullied, either in school or outside of school, in the 2007 school year. See NCES INDICATORS STUDY, *supra* note 3, at 42-43, 123. In addition, 1.6 percent of students reported that classmates posted hurtful information about them on the Internet, and 2.1 percent reported being subjected to unwanted contact, including threats or insults via instant messaging. See *id.* at 42, 123. Of those students that reported cyberbullying, 20.7 percent responded that it occurred once or twice per month and 5.1 percent responded that it occurred once or twice per week. *Id.* at 42, 127.

²⁶ See Hinduja & Patchin, Overview, *supra* note 24.

²⁷ See Hinduja & Patchin, Overview, *supra* note 24; Sameer Hinduja & Justin W. Patchin, *Cyberbullying: An Exploratory Analysis of Factors Relating to Offending and Victimization*, 29 DEVIANT BEHAVIOR 129 (2008).

²⁸ See Hinduja & Patchin, Overview, *supra* note 24.

cyberbullying can be substantively more cruel because it typically takes place from a distant location where the bully does not see the immediate impact of his or her actions.²⁹

While all bullying is harmful to America's youth, some experts believe that bullying based on students' identities—such as their sex, race, ethnicity or national origin, disability, sexual orientation or gender identity, or religion—can be particularly damaging.³⁰ Unfortunately, these forms of bullying are all too common in American schools. The SCS-NCVS found that 9.7 percent of students ages 12 to 18 reported being targeted by “hate-related words” in the 2007 school year.³¹ Two percent of all students reported being targeted based on gender, 4.6 percent based on race, 2.9 percent based on ethnicity, 1.0 percent based on disability, 1.0 percent based on sexual orientation, and 1.6 percent based on religion.³²

²⁹ See Hinduja & Patchin, Overview, *supra* note 2427; NANCY E. WILLARD, CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS (2007).

³⁰ See Briefing Transcript, *supra* note 7, at 129:11-15 (Herek Testimony) (“[B]eing targeted as a member of a particular group, a racial group for example, is more—is associated with greater harm than being targeted for, again, what we might call routine sort of violence.”); *id.* at 130:9-12 (Meyer Testimony) (“[Greater harm] has been shown with regard to other types of groups [in addition to LGBT], and the reason behind it ... is because of the symbolic value that is involved in something that is such a hate crime.”); Statement of Ilan H. Meyer, Columbia Univ., at 10, May 13, 2011, available at <http://www.eusccr.com/10.%20Ilan%20Meyer.%20Columbia%20Universirt.pdf> (last visited June 23, 2011) [hereinafter Meyer Statement] (“[P]eople in disadvantaged social statuses are exposed to unique added stressors—I have referred to this as *minority* (also *social*) stress. Minority stress stems from social disadvantages related to structural stigma, prejudice, and discrimination.”) (emphasis in original); *cf.* *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 671 (7th Cir. 2008) (Posner, J.) (“People are easily upset by comments about their race, sex, etc., including their sexual orientation, because for most people these are major components of their personal identity—none more so than a sexual orientation that deviates from the norm. Such comments can strike a person at the core of his being.”); *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (“[T]he ... statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. ... The State’s desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders’ beliefs and biases. As Blackstone said long ago, ‘it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of public safety and happiness.’”) (Rehnquist, C.J.) (citations omitted).

³¹ NCES INDICATORS STUDY, *supra* note 3, at 41, 120; see also Statement of Anti-Defamation League at 5, May 13, 2011, available at <http://www.eusccr.com/20.%20Anti-Defamation%20League.pdf> (last visited June 23, 2011) [hereinafter Anti-Defamation League Statement].

³² NCES INDICATORS STUDY, *supra* note 3, at 40-41, 120. Because the survey gave students the option of choosing more than one characteristic, the total percentage of students that reported being targeted by “hate-related words” is less than the sum of each category. See *id.* at 41.

A 2007-2009 survey of California students, called the California Healthy Kids Survey (CHKS) and funded by the California Department of Education, found higher rates of identity-based bullying. The study found that 27 percent of all students in grades 7, 9, and 11 reported being subjected to identity-related bullying or harassment.³³ Eleven percent reported harassment based on gender (male or female), 18 percent based on race, ethnicity, or national origin, 9 percent based on physical or mental disability, 12 percent based on actual or perceived sexual orientation, and 11 percent based on religion.³⁴ This report addresses each category of bullying in turn.

Sex

Bullying based on sex takes many forms. It includes sexual harassment, which is unwanted conduct of a sexual nature. Some examples can include sexual propositions, pressuring for sexual favors, touching of a sexual nature, sexual gestures, telling sexual or dirty jokes, or spreading sexual rumors.³⁵ Sex-based harassment likewise includes sexual violence such as rape, sexual assault, sexual battery, and sexual coercion.³⁶ And finally, sex-based bullying includes bullying, harassment, and violence that is not sexual in nature, but is instead due to the individual's sex and/or non-conformity to sex stereotypes.³⁷ Examples can include

³³ See WESTED HEALTH & HUMAN DEVELOPMENT PROGRAM FOR THE CAL. DEP'T OF EDUC., CALIFORNIA HEALTHY KIDS SURVEY: STUDENT WELL-BEING IN CALIFORNIA, 2007-2009, GRADES 7, 9, 11: MAIN REPORT 41, available at http://chks.wested.org/resources/Secondary_State_0709_Main.pdf (last visited May 19, 2011) [hereinafter CHKS MAIN REPORT]; see also MOLLY O'SHAUGHNESSY ET AL., CALIFORNIA SAFE SCHOOLS COALITION & 4-H CENTER FOR YOUTH DEVELOPMENT, U.C. DAVIS, SAFE PLACE TO LEARN: CONSEQUENCES OF HARASSMENT BASED ON ACTUAL OR PERCEIVED SEXUAL ORIENTATION AND GENDER NON-CONFORMITY AND STEPS FOR MAKING SCHOOLS SAFER 7 (2004), available at <http://www.casafeschools.org/SafePlacetoLearnLow.pdf> (last visited May 10, 2011) [hereinafter CAL. SAFE PLACE] (discussing results of the same survey from 2001-2002); see also Anti-Defamation League Statement, *supra* note 31, at 5.

³⁴ See CHKS MAIN REPORT, *supra* note 33, at 41; see also CAL. SAFE PLACE, *supra* note 33, at 7.

³⁵ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 3-4 (Sept. 2008), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf> (last visited May 11, 2011) [hereinafter SEXUAL HARASSMENT: IT'S NOT ACADEMIC].

³⁶ Russlynn Ali, Asst. Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence, at 1-2, Apr. 4, 2011, available at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.html> (last visited June 10, 2011) [hereinafter Sexual Violence DCL].

³⁷ See Statement of Fatima Goss Graves, Vice President for Educ. and Employment, Nat'l Women's Law Ctr., at 2, May 13, 2011, available at <http://www.eusccr.com/8.%20Fatima%20Goss%20Graves.%20National%20Women%27s%20Law%20Center.pdf> (last visited June 22, 2011) [hereinafter Goss Graves Statement].

harassment of a girl for participating in a sport that is considered unfeminine;³⁸ bullying a girl for being pregnant;³⁹ or harassing a boy for his effeminate mannerisms.⁴⁰ Sex-based bullying, harassment, and violence can involve boys targeting girls, girls targeting boys, and members of the same sex targeting each other.⁴¹

While statistics on sex-based bullying in K-12 schools are somewhat limited, a 2001 study by the American Association of University Women (AAUW) found that 81 percent of students in grades 8 to 11 reported experiencing sexual harassment, including 83 percent of girls and 79 percent of boys.⁴² Twenty-seven percent of the students surveyed, including 30 percent of girls and 24 percent of boys, said that they were sexually harassed often.⁴³ Seventy-six percent of students reported that they experienced nonphysical harassment often, occasionally, or rarely,⁴⁴ while 58 percent reported experiencing physical harassment often, occasionally, or rarely.⁴⁵ And 44 percent of girls and 20 percent of boys reported that they were afraid of being sexually harassed at school.⁴⁶

[T]he harassment began ... when the classmate, G.F., attempted to touch LaShonda's breasts and genital area and made vulgar statements such as "I want to get in bed with you" and "I want to feel your boobs." ... [Later,] G.F. purportedly placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward LaShonda in physical education class.

Davis v. Monroe County Bd. of Educ.

526 U.S. 629, 633-34 (1999)

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Russlynn Ali, Asst. Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Harassment and Bullying, at 1, Oct. 26, 2010, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> (last visited May 11, 2011) [hereinafter Harassment/Bullying DCL].

⁴¹ See Goss Graves Statement, *supra* note 37, at 2; see also *Oncale v. Sundowner Offshore Svcs.*, 523 U.S. 75 (1998).

⁴² AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 20-21 (2001) [hereinafter AAUW STUDY]. The study defined "sexual harassment" to mean: "[U]nwanted and unwelcome sexual behavior that interferes with your life. Sexual harassment is not behaviors that you like or want (for example wanted kissing, touching, or flirting)." *Id.* at 2.

⁴³ *Id.* at 20-21.

⁴⁴ *Id.* at 22.

⁴⁵ *Id.* at 25.

⁴⁶ *Id.* at 3.

In addition, in the School Survey on Crime and Safety (SSOCS), sponsored by the U.S. Department of Education's National Center for Education Statistics, schools reported 800 incidents of rape and 3800 incidents of sexual battery not involving rape in the 2007-2008 school year.⁴⁷ The AAUW study found that 12 percent of boys and 9 percent of girls in grades 8 to 11 reported that they had been forced to do something sexual other than kissing.⁴⁸

Such sexual harassment causes students' education to suffer. According to the AAUW study, 24 percent of students subjected to sexual harassment reported that the harassment made them less likely to talk in class; 20 percent reported that the harassment made it difficult for them to pay attention in class; 22 percent of the students reported that the harassment made them not want to go to school; and 16 percent reported that, as a result of the harassment, they actually stayed home from school or cut a class.⁴⁹ In addition, 11 percent of students subjected to sexual harassment reported that the harassment caused them to make a lower grade in a class than they thought they otherwise would have.⁵⁰

Sex-based bullying can harm both female and male students in other ways as well. According to the AAUW study, of the students—boys and girls—who reported being subjected to sexual harassment, 47 percent reported feeling very or somewhat upset about the incident.⁵¹ In addition, 32 percent reported that they felt self-conscious, 43 percent reported that they felt embarrassed, 23 percent reported that they felt afraid or scared, 24 percent reported feeling less sure of themselves and less confident, 17 percent reported feeling confused about who they are, and 19 percent reported doubting whether they can have a happy romantic relationship.⁵² These feelings were particularly salient amongst girls. Of the *girls* who reported being subjected to sexual harassment, 44 percent reported that they felt self-conscious, 53 percent reported that they felt embarrassed, 33 percent reported that they felt afraid or scared, 32 percent reported feeling less sure of themselves and less confident, 22 percent reported feeling confused about who they are, and 25 percent reported doubting

⁴⁷ NCES INDICATORS STUDY, *supra* note 3, at 104; *see also* Goss Graves Statement, *supra* note 37, at 3.

⁴⁸ *See* AAUW STUDY, *supra* note 42, at 23; *see also* Goss Graves Statement, *supra* note 37, at 3.

⁴⁹ AAUW STUDY, *supra* note 42, at 37; *see also* Goss Graves Statement, *supra* note 37, at 3.

⁵⁰ AAUW STUDY, *supra* note 42, at 37.

⁵¹ *Id.* at 32.

⁵² *Id.* at 33.

whether they can have a happy romantic relationship.⁵³ Where the sexual harassment was physical, even more students reported these emotional responses. Of those students—boys and girls—subjected to *physical* harassment, 38 percent reported that they felt self-conscious, 48 percent reported that they felt embarrassed, 28 percent reported that they felt afraid or scared, 28 percent reported feeling less sure of themselves and less confident, 21 percent reported feeling confused about who they are, and 23 percent reported doubting whether they can have a happy romantic relationship.⁵⁴

Race/National Origin

The California Healthy Kids Survey conducted in 2007-2009 found that when youth in California were bullied or harassed on school property, the most common specific reason cited was because of their race or national origin, with about 18 percent of students in grades 7, 9, and 11 reporting at least one bullying incident in the past year for this reason.⁵⁵ The problem is not limited to one specific racial or ethnic group. When results from 9th and 11th grade students are broken down by race and ethnicity, African-American students reported being bullied or harassed due to their race or ethnicity at the highest rate—23 percent.⁵⁶ Twenty-two percent of Asian-American students, 22 percent of Native Hawaiian or Pacific Islander students, and 20 percent of Native American students reported being harassed due to their race, ethnicity, or national origin as well.⁵⁷

⁵³ *Id.* Of the boys who reported being subjected to sexual harassment, 19 percent reported that they felt self-conscious, 32 percent reported that they felt embarrassed, 12 percent reported that they felt afraid or scared, 16 percent reported feeling less sure of themselves and less confident, 12 percent reported feeling confused about who they are, and 12 percent reported doubting whether they can have a happy romantic relationship. *Id.*; see also Goss Graves Statement, *supra* note 37, at 3.

⁵⁴ AAUW STUDY, *supra* note 42, at 34.

⁵⁵ CHKS MAIN REPORT, *supra* note 33, at 41.

⁵⁶ See WESTED HEALTH & HUMAN DEVELOPMENT PROGRAM FOR THE CAL. DEP'T OF EDUC., CALIFORNIA HEALTHY KIDS SURVEY: STUDENT WELL-BEING IN CALIFORNIA, 2007-2009, VARIATIONS BY RACE/ETHNICITY IN GRADES 9 & 11 STATEWIDE RESULTS: CTAG REPORT 40, available at http://chks.wested.org/resources/CTAG_Statewide_9-11_0709.pdf (last visited May 19, 2011) [hereinafter CHKS CTAG REPORT].

⁵⁷ *Id.*

Examples of racial harassment include ethnic slurs and derogatory ethnic comments, ethnic jokes, and criticisms of behaviors or physical features typically attributed to a certain race or ethnicity. For instance, a form of intra-racial bullying occurs when an African-American

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

Helen Gym,
Asian Americans United
Briefing Transcript, p. 164

student is accused by another African-American student of “acting white,” because the student exhibits certain behaviors,⁵⁸ such as showing enthusiasm for schoolwork, studying too much, or maintaining certain cultural patterns of behavior including dress, speech, and music choice.⁵⁹ A recent study of 166 gifted African-American students in Ohio found that 66 percent reported knowing someone who was ridiculed for doing well in school.⁶⁰

Although statistical research on race- and national-origin-based harassment has been somewhat limited, DOJ activity provides anecdotal evidence of the kinds of race-based harassment that has occurred. For instance, in 2010, DOJ reached a settlement agreement with the Philadelphia, Pennsylvania School District, addressing harassment of Asian-American students at South Philadelphia High School that, in December 2009, led to a day-long attack by roving groups of students against the school’s Asian-American student population; by the end of the day, more than two dozen Asian-American students were attacked, and 13 of them were sent to the emergency room.⁶¹ And in April 2011, DOJ reached a settlement agreement with a school district in Owatonna, Minnesota, resolving an

⁵⁸ See Statement of Stuart Buck, Univ. of Ark., at 1, May 13, 2011, available at <http://www.eusccr.com/12.%20Stuart%20Buck,%20University%20of%20Arkansas.pdf> (last visited June 23, 2011) [hereinafter Buck Statement].

⁵⁹ See Briefing Transcript, *supra* note 7, at 172:14-19 (Buck Testimony).

⁶⁰ See Donna Y. Ford, Tarek C. Grantham & Gilman W. Whiting, *Another Look at the Achievement Gap*, 43 URBAN EDUCATION 213, 230 (2008); see also Buck Statement, *supra* note 58, at 1-2.

⁶¹ See Statement of Jocelyn Samuels, Senior Counselor to the Asst. Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, at 4, May 13, 2011, available at <http://www.eusccr.com/2.%20Jocelyn%20Samuels,%20U.S.%20Department%20of%20Justice,%20Civil%20Rights%20Division.pdf> (last visited June 23, 2011) [hereinafter Samuels Statement]; Statement of Helen Gym, Asian Americans United, at 1, May 13, 2011, available at <http://www.eusccr.com/14.%20Helen%20Gym,%20Asian%20Americans%20United.pdf> (last visited June 23, 2011).

investigation into the race- and national-origin harassment of Somali Americans that led to a fight among 11 white and Somali-American students.⁶²

Disability

Incidents of bullying, harassment, and teasing of students with disabilities are also widespread.⁶³

Because bullies tend to target peers who appear vulnerable, students with disabilities are especially susceptible to physical or verbal attacks.⁶⁴ Indeed, research has shown that children with disabilities are bullied more often than children without disabilities.

Though research regarding the connection between bullying and disability is fairly limited (a review of United States research in 2009 stated that only 10

studies had been conducted in the United States on the subject), such research seems to indicate that students with disabilities are two to three times more likely than students without disabilities to be victims of bullying.⁶⁵

A 15-year-old boy with learning disabilities ... was bullied every Friday. Why? Because a group of students called Friday "beat up the retard day."

Paula Goldberg, PACER Center
(Briefing Transcript p. 159)

In a 2009 study of parents of children with Asperger Syndrome, 94 percent reported that their children had been bullied.⁶⁶ Additionally, 65 percent reported that their children had been

⁶² See Samuels Statement, *supra* note 61, at 4.

⁶³ See, e.g., Norma V. Cantu, Asst. Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Prohibited Disability Harassment: Reminder of Responsibilities Under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, July 25, 2000, at 1, available at http://www2.ed.gov/Press_Releases/07-2000/PolicyDisabilityharassment.doc (last visited May 10, 2011) [hereinafter Disability DCL] (stating, based on a focus group, that harassment of students with disabilities "range[s] from abusive jokes, crude name-calling, threats, and bullying, to sexual and physical assault by teachers and other students.").

⁶⁴ See JOHN HOOVER & PAM STENHJEM, NAT'L CTR. ON SECONDARY EDUC. & TRANSITION, BULLYING AND TEASING OF YOUTH WITH DISABILITIES: CREATING POSITIVE SCHOOL ENVIRONMENTS FOR EFFECTIVE INCLUSION 1-2 (2003) http://www.ncset.org/publications/issue/NCSETIssueBrief_2.3.pdf (last visited May 10, 2011).

⁶⁵ See ABILITYPATH.ORG, WALK A MILE IN THEIR SHOES: BULLYING AND THE CHILD WITH SPECIAL NEEDS 12 (2011), available at <http://www.abilitypath.org/areas-of-development/learning--schools/bullying/articles/walk-a-mile-in-their-shoes.pdf> (last visited May 10, 2011) [hereinafter WALK A MILE].

⁶⁶ See Susan Carter, *Bullying of Students with Asperger Syndrome*, 32 ISSUES IN COMPREHENSIVE PEDIATRIC NURSING 145, 151 (2009); see also Statement of Paula Goldberg, Exec. Dir., PACER Ctr., at 3, May 13, 2011,

victimized by peers within the past year, while 50 percent reported that their children were scared by their peers.⁶⁷

Peer-to-peer bullying of students with disabilities tends to be persistent.⁶⁸ In one study, parents of children on the autism spectrum reported that nearly 39.6 percent of their children had been bullied for more than a year, with another 20.4 percent reporting that bullying took place over several months.⁶⁹

Disability harassment and bullying are of special concern because students with disabilities could have a difficult time responding to bullying behavior if they have difficulty understanding social cues and norms.⁷⁰ Further, because some students with disabilities have difficulty communicating, their victimization by bullies sometimes goes unreported.⁷¹

Lesbian, Gay, Bisexual, and Transgender (LGBT)⁷²

At least one study has found that, after physical appearance, many students report that actual or perceived sexual orientation is the most common reason for bullying, name-calling, or harassment in schools.⁷³ Many believe that anti-LGBT bullying results from general animus toward LGBT students and a stigmatization of homosexuality.⁷⁴

available at <http://www.eusccr.com/13.%20Paula%20Goldberg.%20PACER%20Center.pdf> (last visited June 23, 2011) [hereinafter Goldberg Statement].

⁶⁷ See Carter, *supra* note 66, at 149-50; see also WALK A MILE, *supra* note 65, at 12.

⁶⁸ See WALK A MILE, *supra* note 65, at 10.

⁶⁹ Massachusetts Advocates for Children, *Targeted, Taunted, Tormented: the Bullying of Children with Autism Spectrum Disorder* (2009), http://www.massadvocates.org/documents/Bullying-Report_000.pdf (last visited May 10, 2011).

⁷⁰ See Goldberg Statement, *supra* note 66, at 3; see also *id.* (“Therefore, students with disabilities may have an especially hard time responding to bullying behavior, making it even more devastating.”).

⁷¹ See JONATHAN YOUNG, ARI NE’EMAN & SARA GELSER, NATIONAL COUNCIL ON DISABILITY, BULLYING AND STUDENTS WITH DISABILITIES 3 (2011), <http://www.ncd.gov/publications/2011/March92011> (last visited June 24, 2011).

⁷² The term “LGBT” refers to individuals who identify as, or are perceived to be, Lesbian, Gay, Bisexual, and Transgender. While this term is commonly used in public discourse, as well as in the studies referenced in this discussion, the phrase “sexual orientation and gender identity” more closely parallels the terms used in many laws and by ED and DOJ.

⁷³ See HARRIS INTERACTIVE & GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA—A SURVEY OF STUDENTS AND TEACHERS 30 (2005), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/499-1.pdf (last visited May 9, 2011) (reporting that 17 percent of students stated that students were most often bullied, called names, or harassed

Surveys report that anti-LGBT bullying is rampant in American schools. According to a 2009 survey by the Gay, Lesbian and Straight Education Network (GLSEN 2009 Survey), 84.6 percent of LGBT youth were verbally harassed, 40.1 percent were physically harassed, 18.8 percent were physically assaulted at school in the previous year because of their sexual orientation,⁷⁵ and 52.9 percent of LGBT students suffered from cyberbullying.⁷⁶ The same survey found that 61.1 percent of LGBT students reported that they felt unsafe at school

because they are or are perceived to be gay, lesbian, or bisexual, and that 33 percent of students said that the most common reason was the way students looked or their body size); Statement of Eliza Byard, Exec. Dir., Gay, Lesbian & Straight Educ. Network, at 3, May 6, 2011, *available at* <http://www.eusccr.com/3.%20Eliza%20Byard.%20GLSEN.pdf> (last visited June 23, 2011) [hereinafter Byard Statement].

⁷⁴ See Statement of Gregory M. Herek, Univ. of Cal., Davis, at 13, May 13, 2011, *available at* <http://www.eusccr.com/9.%20Gregory%20M.%20Herek,%20University%20of%20California,%20Davis.pdf> (last visited June 23, 2011) [hereinafter Herek Statement] (“Homosexuality remains stigmatized today in the United States: Significant portions of the heterosexual public harbor negative feelings and hostile attitudes toward sexual minorities.”); *id.* at 19 (“Sexual minority adults and adolescents are more likely to experience harassment and victimization to the extent that their sexual orientation is known to a greater number of others. This may be especially the case in school settings because negative attitudes towards homosexuality and sexual minorities are common among heterosexual youth, especially in early adolescence.”); see also Meyer Statement, *supra* note 30, at 13-14 (“In the context of school climate such seemingly minor experiences, especially when chronic, can color the entire social environment sending a message of rejection and disdain to the victim. This message is exacerbated when teachers and school personnel ignore instances of harassment such as name calling, implicitly joining the perpetrator in rejecting the LGBT youth and sending a message that LGBT youth are to be scorned.”) (internal citations omitted); Public Comment of Southern Poverty Law Center, at 1, May 13, 2011, *available at* <http://www.splcenter.org/get-informed/news/splc-to-us-commission-on-civil-rights-combating-anti-lgbt-bullying-requires-focus-on-climate> (last Sept. 9, 2011) (“We have been particularly concerned about anti-LGBT bullying, which is one of the few remaining forms of bigotry that can go unchecked on campuses.”).

⁷⁵ See JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY 25-29 (2010), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-1.pdf (last visited May 9, 2011) (hereinafter GLSEN 2009 SCHOOL CLIMATE SURVEY); see also Samuels Statement, *supra* note 61, at 3; Byard Statement, *supra* note 73, at 4; Herek Statement, *supra* note 74, at 18; Meyer Statement, *supra* note 30, at 21 (“At school, LGBT youth more frequently than heterosexual peers experience bullying, including physical assault; being injured, threatened, and harassed; and having their property stolen or damaged.”); NAT’L MENTAL HEALTH ASS’N, “WHAT DOES GAY MEAN?” TEEN SURVEY (2002), *available at* <http://www.mentalhealthamerica.net/download.cfm?DownloadFile=FFE225CB-1372-4D20-C8474683E203E3C5> (last visited May 10, 2011) (finding that 78 percent of teens report that kids who are gay or thought to be gay are teased or bullied in their schools and communities, that 93 percent of teens reported hearing other kids use derogatory words about sexual orientation at least once in a while, and that 51 percent reported hearing them daily). Public Comments indicate that transgender and gender nonconforming students are subjected to even higher rates of bullying. See Public Comment of National Center for Transgender Equality, at 2-5, May 2011, *available at* <http://transequality.org/PDFs/US%20Civ%20Rts%20Comm%20NCTE%20statement%205%206%2011.pdf> (last visited Sept. 9, 2011).

⁷⁶ See GLSEN 2009 SCHOOL CLIMATE SURVEY, *supra* note 75, at 28. The survey defined “cyberbullying” as being harassed or threatened by peers through electronic media such as text messaging, emails, instant messaging, or postings on the Internet. See also Byard Statement, *supra* note 73, at 4.

because of their sexual orientation;⁷⁷ similarly, a 2005 survey by GLSEN and Harris Interactive found that LGBT students were three times as likely as non-LGBT students to feel unsafe at school.⁷⁸

[They] grabbed Nabozny and pushed him to the floor. [They] held Nabozny down and performed a mock rape on Nabozny, exclaiming that Nabozny should like it. The boys carried out the mock rape as twenty other students looked on and laughed.

Nabozny v. Podlesny
92 F.3d 446, 451 (7th Cir. 1996)

Surveys of students in California have found similarly high results. In a 2003 student survey by the California Safe Schools Coalition and the Gay-Straight Alliance Network, called the Preventing School Harassment (PSH) survey, 65 percent of LGBT students reported being harassed or bullied based on their actual or perceived sexual orientation.⁷⁹ The same report found that 91 percent of students surveyed reported having heard others make negative remarks based on sexual orientation.⁸⁰ The 2007-2009 California Healthy Kids Survey found that 12 percent of all 7th, 9th

and 11th grade students in California's total student population reported being harassed or bullied because they were gay or lesbian, or because someone thought they were gay or lesbian.⁸¹ In the PSH study, 46 percent of students, asked whether their schools were safe for LGBT students, reported that this statement was "not at all true" or "a little true."⁸²

Similarly, Professor Mark Friedman, of the University of Pittsburgh Graduate School of Public Health, found that "sexual minority youth were 170 [percent] more likely [than heterosexual students] to be assaulted at school," and that 40 percent of lesbians, 44 percent

⁷⁷ See GLSEN 2009 SCHOOL CLIMATE SURVEY, *supra* note 75, at 22; see also Byard Statement, *supra* note 73, at 3.

⁷⁸ See HARRIS INTERACTIVE & GAY, LESBIAN & STRAIGHT EDUC. NETWORK, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA—A SURVEY OF STUDENTS AND TEACHERS 59 (2005), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/499-1.pdf (last visited May 9, 2011); see also Byard Statement, *supra* note 73, at 3.

⁷⁹ See CAL. SAFE PLACE, *supra* note 33, at 14.

⁸⁰ See *id.* Seventy-nine percent of students surveyed reported that they heard such negative comments "sometimes" or "often." See *id.*

⁸¹ CHKS MAIN REPORT, *supra* note 33, at 41; see also CAL. SAFE PLACE, *supra* note 33, at 6 (discussing results of the 2001-2002 survey); Herek Statement, *supra* note 74, at 17.

⁸² See CAL. SAFE PLACE, *supra* note 33, at 13.

of bisexual females, 43 percent of gay males and 50 percent of bisexual males had been assaulted at school.⁸³ This finding was based on a meta-analysis, comparing aggregate data from a number of independent studies.⁸⁴

Several studies have shown that LGBT students' academics suffer as a result of bullying based on sexual orientation. The GLSEN 2009 Survey found that LGBT students subjected to high levels of anti-LGBT bullying were about three times as likely to have been absent from school in the previous month.⁸⁵ It also found that LGBT students achieved lower grades when they were subjected to more frequent victimization,⁸⁶ and that a correlation exists between victimization and LGBT students' plans not to pursue post-secondary education.⁸⁷ A report by the California Safe Schools Coalition and the 4-H Center for Youth Development at the University of California, Davis likewise found that students in California who were harassed based on actual or perceived sexual orientation were more than three times as likely to have skipped at least one day of school in the previous month because they felt unsafe, and that 24 percent of students who were harassed based on actual or perceived sexual orientation reported usual grades of Cs or lower (compared to 17 percent of students who were not harassed).⁸⁸ Similarly, Professor Friedman's meta-analysis concluded that "sexual minority youth were ... 240 [percent] more likely [than heterosexual youth] to miss school due to fear that they would be unsafe at school or on [their] way to or from school," and that 16 percent of lesbian females, 23 percent of bisexual females, 14 percent of gay males, and 23 percent of bisexual males missed school for this reason.⁸⁹

⁸³ Public Comment of Mark S. Friedman, Assoc. Professor, Univ. of Pittsburgh, at 2, May 26, 2011, available at http://www.eusccr.com/Friedman_Letter%20USCCR%205-26-11.pdf (Sept. 16, 2011) [hereinafter Friedman Comment]. See also INST. OF MEDICINE OF THE NAT'L ACADS., BD. ON THE HEALTH OF SELECT POPULATIONS, COMM. ON LESBIAN, GAY, BISEXUAL, & TRANSGENDER HEALTH ISSUES & RESEARCH GAPS & OPPORTUNITIES, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 157-58 (2011), available at http://books.nap.edu/openbook.php?record_id=13128 (last visited Aug. 1, 2011) [hereinafter IOM STUDY] ("Compared with heterosexual youth, LGBT youth report experiencing higher levels of harassment, victimization, and violence, including verbal, physical and sexual abuse.").

⁸⁴ See Friedman Comment, *supra* note 83, at 1.

⁸⁵ See GLSEN 2009 SCHOOL CLIMATE SURVEY, *supra* note 75, at 47; Byard Statement, *supra* note 73, at 5.

⁸⁶ See GLSEN 2009 SCHOOL CLIMATE SURVEY, *supra* note 75, at 46-47; Byard Statement, *supra* note 73, at 5.

⁸⁷ See GLSEN 2009 SCHOOL CLIMATE SURVEY, *supra* note 75, at 46-47; Byard Statement, *supra* note 73, at 5.

⁸⁸ See CAL. SAFE PLACE, *supra* note 33, at 8; see also Public Comment of Transgender Law Center, at 3, Apr. 27, 2011, available at <http://transequality.org/PDFs/US%20Civ%20Rts%20Commn%20NCTE%20statement%205%206%2011.pdf> (last visited Sept. 9, 2011).

⁸⁹ Friedman Comment, *supra* note 83, at 2.

Bullying based on sexual orientation can be extremely traumatic for students—perhaps even more so than bullying that is not based on a student’s identity (*i.e.*, their sex, race, ethnicity, national origin, disability, sexual orientation, or religion).⁹⁰ Research shows that this is the case even though LGBT students do not have inherent vulnerabilities that would lead to such psychological stress.⁹¹ Numerous studies have found a mental-health impact resulting from anti-LGBT harassment.⁹² According to the California Safe Schools Coalition report, students in California that were harassed based on actual or perceived sexual orientation were more likely to report smoking, drinking alcohol, and drug use,⁹³ and were nearly four times more likely than non-harassed students to have carried a weapon to school in the previous year.⁹⁴ In addition, the GLSEN 2009 Survey found that LGBT students subjected to bullying were

⁹⁰ See Herek Statement, *supra* note 74, at 20-21 (“Although bullying and victimization have negative consequences for all students who experience them, being targeted for bullying because of one’s sexual orientation is associated with more problems and greater distress than is experiencing bullying or harassment that is not related to one’s identity.”); *id.* at 20 (“Several studies have found that experiences with harassment and victimization based on sexual orientation account for much or all of the disparities between heterosexual and nonheterosexual students in mental health, substance use, truancy and poor school performance, and risk behaviors.”); Meyer Statement, *supra* note 30, at 10 (“By definition, minority stress is unique, in that it affects and requires special adaptation by LGB people but not by heterosexuals. Therefore, minority stress confers a unique risk for diseases that are caused by stressed.”); CAL. SAFE PLACE, *supra* note 33, at 11 (“[O]utcomes associated with harassment based on actual or perceived sexual orientation are much more severe than outcomes associated with other harassment and bullying not based on race/ethnicity/national origin, religion, gender, sexual orientation, or disability.”); see also Herek Statement, *supra* note 74, at 14 (“Research indicates that experiencing stigma and discrimination is associated with heightened psychological distress—both among gay and lesbian adults and adolescents. Being the target of extreme enactments of stigma, such as antigay criminal assault, is accompanied by greater psychological distress than is experiencing a similar crime not based on one’s sexual orientation.”); Meyer Statement, *supra* note 30, at 12 (“Hate crimes—perpetrated by family or strangers—are a particularly painful type of prejudice event because they inflict not only the pain of the assault itself, but also the pain associated with the social disapproval of the victim’s stigmatized social group. ... Such victimization affects the victim’s mental health because it damages his or her sense of justice and order.”).

⁹¹ See IOM Study, *supra* note 83, at 146-47 (“It is important to note that LGBT youth are typically well adjusted and mentally healthy. Research based on probability samples with LGB youth consistently indicates that the majority do not report mental health problems. Regarding transgender youth, although no data from national probability samples are available, studies with sizable convenience samples indicate that many, if not most, of those youth do not report mental health problems.”) (citations omitted); Herek Statement, *supra* note 74, at 6-9 (describing homosexuality as a normal expression of human sexuality); Public Comment of Gay & Lesbian Alliance Against Defamation (GLAAD), at 4, May 3, 2011, available at <http://www.eusccr.com/GLAAD.pdf> (last visited on Sept. 15, 2011) [hereinafter GLAAD Comment] (“Research by leading psychologists has shown that individuals who identify as gay or lesbian do not have any inherent pre-existing conditions or factors that lead to depression and psychological stress, but rather the psychological stress is a direct result of, inter alia, negative societal messages.”).

⁹² See, e.g., IOM STUDY, *supra* note 83, at 158 (“The experiences [with harassment, victimization, and violence] are related to increased substance abuse, mental health problems, and sexual risk-taking behavior.”) (citation omitted).

⁹³ See CAL. SAFE PLACE, *supra* note 33, at 9 (analyzing data from the 2001-2002 California Healthy Kids Survey); see also Herek Statement, *supra* note 74, at 20.

⁹⁴ See CAL. SAFE PLACE, *supra* note 33, at 9.

more likely to suffer from depression, anxiety, and low self-esteem.⁹⁵ Tragically, numerous studies have also found that LGBT students are more likely to consider⁹⁶ or attempt⁹⁷ suicide⁹⁸—a statistic that is borne out by anecdotal evidence as well.⁹⁹ The psychological effects of anti-LGBT bullying have been found to last long after adolescence.¹⁰⁰

⁹⁵ See GLSEN 2009 SCHOOL CLIMATE SURVEY, *supra* note 75, at 48; Byard Statement, *supra* note 73, at 5-6; Meyer Statement, *supra* note 30, at 14 (“Considering the chronic exposure to prejudice, discrimination, and violence at schools, is [sic] not surprising... that such anxiety, and the vigilance required because of expectation for harm, is responsible for the poorer academic performance and truancy of LGBT youth”) (citations omitted).

⁹⁶ See CAL. SAFE PLACE, *supra* note 33, at 8-9 (finding that students harassed based on actual or perceived sexual orientation are three times as likely to “seriously consider” suicide and more than three times as likely to “make a plan for attempting suicide”); see also Herek Statement, *supra* note 74, at 20; Public Comment of Caitlin C. Ryan, Dir., Family Acceptance Project, S.F. State Univ., at 1-2, May 23, 2011, available at http://familyproject.sfsu.edu/files/Gender%20&%20School%20Victimization_rel.pdf (last visited Sept. 9, 2011) [hereinafter Ryan Comment].

⁹⁷ See Anthony R. D’Augelli et al., *Suicide Patterns and Sexual Orientation—Related Factors Among Lesbian, Gay and Bisexual Youths*, 31 SUICIDE & LIFE THREATENING BEHAVIOR 250, 261 (2001), available at <http://www.hhdev.psu.edu/hdfs/faculty/pubs/DAugelliSLTB01.pdf> (last visited Feb. 18, 2011) (concluding that 35 percent of gay, lesbian and bisexual youth have attempted suicide at least once); Mass. Comm’n on Gay, Lesbian, Bisexual & Transgender Youth, Massachusetts High School Students and Sexual Orientation: Results of the 2009 Youth Risk Behavior Survey, <http://www.mass.gov/cgly/YRBS09Factsheet.pdf> (last visited May 10, 2011) (finding that gay, lesbian, and bisexual high school students are 4.4 times more likely to attempt suicide than their heterosexual peers); see also Meyer Statement, *supra* note 30, at 22 (“Minority stress is also associated with a higher incidence of suicide attempts among LGB compared with heterosexual individuals. ... This increase in suicidality is mostly related to minority stress encountered by youth due to coming out conflicts with family and community.”) (citations omitted).

⁹⁸ See IOM STUDY, *supra* note 83, at 147:

Over the past decade, an increasing number of studies based on large probability samples have consistently found that LGB youth and youth who report same-sex romantic attraction are at increased risk of suicidal ideation and attempts, as well as depressive symptoms, in comparison with their heterosexual counterparts. These include both school-based, state-based and national studies. The results of these studies suggest increased rates of suicidal ideation and attempts among LGB youth in comparison with heterosexual youth even after controlling for potentially confounding factors such as substance abuse and depression. (citations omitted).

But see Kenneth M. Cohen & Ritch C. Savin-Williams, *The Positive Lives of Gay Teens*, Pa.

Psychological Ass’n, *Psychological News You Can Use* (Dec. 2010):

[F]actors other than same-sex attractions place youth at risk for mental health problems. Chief among them is transgressing gender boundaries in behavior and interests. Gender nonconformity is the impetus for verbal and physical harassment meted out by a small number of bullies who often attack peers, regardless of sexuality, who appear unduly feminine (boys) or masculine (girls).

⁹⁹ See Statement of Tammy Aaberg at 8, May 13, 2011, available at <http://www.eusccr.com/19-1%20Tammy%20Aaberg,%20Parent.pdf> (last visited June 23, 2011) [hereinafter Aaberg Statement] (“These children are dead. My son is dead. ... All of these children, and too many others across the country, all died too young as a result of bullying and harassment and will be forever missed by their friends and families.”); *id.* at 5 (“Students tell me that everything starts to weigh down on you and things pile up until eventually it becomes too much and you want the pain to end, so many start considering suicide as they believe it will save them and their loved ones the pain life brings them or they feel they have no hope of things ever getting better for them.”); Public Comment of Wendy Walsh at 2, Apr. 25, 2011, available at <http://www.eusccr.com/Walsh,%20Wendy.pdf> (last visited Sept. 15, 2011) (“I can’t bring my son back. ... No mother should ever have to lose their 13-year-old child to intolerance and anti-gay harassment, especially in a

Religion

Bullying based on students' religion is also a problem in America's schools. Recent media reports give demonstrative, albeit largely anecdotal, evidence of the issue.

Bullying of Muslim students has reportedly increased since the September 11, 2001 terrorist attacks.¹⁰¹ In one incident during the 2009-2010 school year, a middle school student in Staten Island, NY was taunted, teased, and ultimately attacked by his classmates because he was Muslim.¹⁰² The student told the *New York Post*, "They punched me. They spit in my face. They tripped me on the floor. They kicked me with their feet and punched me And as they were kicking and laughing, they kept saying, 'You f---ing terrorist, f---ing Muslim, you f--ing terrorist.'"¹⁰³ Sikh children have also reported an increase of bullying incidents since

September 11. Although the Sikh religion is distinct from Islam, students purportedly target

One student had his orbital bone broken at school. Another one had his turban set on fire by a bully. Two had their hair, which [Sikhs are] required to maintain uncut, forcibly cut by bullies.

– Rajdeep Singh, Sikh Coalition
(Briefing Transcript, p. 195)

place that should be providing them with an education and putting them on a path to a promising future.”); Public Comment of Rep. Keith Ellison, U.S. House of Representatives, at 1, Apr. 27, 2011, *available at* <http://www.eusccr.com/29.%20U.S.%20Rep.%20Keith%20Ellison.pdf> (last visited June 23, 2011) [hereinafter Ellison Comment] (“Nine enrolled or recently graduated middle and high school students [in a single school district in Minnesota] committed suicide in 2010, including three who were gay or lesbian.”).

¹⁰⁰ See Herek Statement, *supra* note 74, at 21 (“The negative psychological effects of bullying and peer victimization appear to last after students leave high school. In a study of sexual and gender minority young adults (21-25 years old), experiencing school victimization during the teen years was associated with higher current levels of depression, more suicidal thoughts, lower self-esteem, and less life satisfaction.”); Ryan Comment, *supra* note 96, at 2 (“We found that ... LGBT young adults who reported high levels of LGBT school victimization during adolescence were 5.6 times more likely to report having attempted suicide, 5.6 times more likely to report a suicide attempt that required medical care, 2.6 times more likely to report clinical levels of depression, and more than twice as likely to have been diagnosed with a sexually transmitted disease and to report risk for HIV infection, compared with peers who reported low levels of school victimization.”).

¹⁰¹ See Sabrina Holcomb, Muslims in America: When Bullying Meets Religion, <http://www.nea.org/home/42528.htm> (last visited May 6, 2011) (citing reports that bullying of Muslim students has increased since the September 11 terrorist attacks).

¹⁰² Ikimulisa Livingston & Leonard Greene, *Terrorized for Being a Muslim*, N.Y. POST, Oct. 12, 2010, *available at* http://www.nypost.com/p/news/local/staten_island/terrorized_for_being_muslim_8rQSU8Z5ibbMOeJnDGFOR (last visited May 8, 2011). The student reported being kicked in the head and the groin until he bled. *See id.*

¹⁰³ *Id.*; see also Statement of Kenneth L. Marcus, Exec. V.P. & Dir. of the Anti-Semitism Initiative, Inst. for Jewish & Cmty. Research, at 4, May 13, 2011, *available at* <http://www.eusccr.com/15.%20Kenneth%20L.%20Marcus.%20Institute%20for%20Jewish%20%20Community%20Research.pdf> (last visited June 23, 2011) [hereinafter Marcus Statement]; Holcomb, *supra* note 101 (“The

Sikh students out of confusion stemming from Sikhs' visible religious articles such as turbans and uncut hair.¹⁰⁴ A 2010 survey by the Sikh Coalition, conducted in the San Francisco Bay Area in California, found that 47 percent of local Sikh youth were subjected to bullying.¹⁰⁵ Of the boys who wear turbans (or patkas), 74 percent reported being subjected to bullying.¹⁰⁶ The survey found bullying to be most prevalent in Alameda County, where 86 percent of Sikh boys reported being targeted.¹⁰⁷ Likewise, a 2007 Sikh Coalition survey of Sikh youth in New York City found that 58.4 percent of local Sikh students had been subjected to bullying.¹⁰⁸ The survey found that 62.2 percent of boys who wear turbans (or patkas) reported that they were bullied and 42 percent reported being physically hit or involuntarily touched.¹⁰⁹ In the borough of Queens, as high as 77.5 percent of boys reported being bullied.¹¹⁰

Religion-based bullying is not limited to Muslims and Sikhs. Media reports in recent years describe students in numerous schools engaging in a so-called “Kick a Jew Day,” where groups of students target and kick their Jewish classmates.¹¹¹ And the U.S. Department of

dimension that makes the bullying of Muslim students particularly disturbing centers around the open prejudices and fears of adults, giving the green light to non-Muslim children that it's okay—even patriotic—to discriminate”).

¹⁰⁴ See Statement of Rajdeep Singh, Dir. of Law & Policy, Sikh Coalition, at 1, May 13, 2011, http://www.eusccr.com/17_Rajdeep_Singh_Sikh_Coalition.pdf (last visited June 23, 2011) [hereinafter Singh Statement] (“Although the Sikh turban is a symbol of nobility and signifies a commitment to upholding freedom, justice, and dignity for all people, the physical appearance of a Sikh is often ignorantly conflated with images of foreign terrorists, some of whom also wear turbans and many of whom have received copious publicity in our mainstream media in the post-9/11 environment.”). In an incident described to the Commission, a Sikh boy from the San Francisco Bay Area was called “diaper head” from the first grade; in middle school he was “called names, pushed, shoved, beaten up, had his books stolen, [turban] ripped off, lockers broken, and the day before his class final, his folder was stolen.” *Id.* at 2.

¹⁰⁵ SIKH COALITION, SIKH COALITION BAY AREA CIVIL RIGHTS REPORT 7 (2010), available at http://www.sikhcoalition.org/documents/Bay_Area_Civil_Rights_Agenda.pdf (last visited May 6, 2011) [hereinafter SIKH COALITION BAY AREA].

¹⁰⁶ *Id.* at 3; see also Singh Statement, *supra* note 104, at 2.

¹⁰⁷ SIKH COALITION BAY AREA, *supra* note 105, at 3.

¹⁰⁸ SIKH COALITION, HATRED IN THE HALLWAYS: A PRELIMINARY REPORT ON BIAS AGAINST SIKH STUDENTS IN NEW YORK CITY'S PUBLIC SCHOOLS 5, 8 (2007), available at http://www.sikhcoalition.org/documents/hatred_in_the_hallways.pdf (last visited May 6, 2011) [hereinafter SIKH COALITION NYC].

¹⁰⁹ *Id.* at 5; see also Singh Statement, *supra* note 104, at 2; Marcus Statement, *supra* note 103, at 4.

¹¹⁰ SIKH COALITION NYC, *supra* note 108, at 5.

¹¹¹ See George Bassler, *Vestal Officials Investigating Incident at High School*, PRESSCONNECTS.COM, Jan. 20, 2011, <http://www.spme.net/cgi-bin/articles.cgi?ID=7616> (last visited May 8, 2011); Katherine Albers, *10 North Naples Middle School Students Suspended for Taking Part in “Kick a Jew Day”*, NAPLESNEWS.COM, Nov. 23, 2009, <http://www.naplesnews.com/news/2009/nov/23/north-naples-middle-suspended-kick-a-jew-day-email> (last visited May 8, 2011); see also Marcus Statement, *supra* note 103, at 4-5.

Education's Office for Civil Rights has received complaints of students being harassed for their Christian faith.¹¹²

Legal Protections

This report addresses federal efforts to enforce prohibitions on peer-to-peer violence rooted in discrimination that takes place in public K-12 schools. Several civil rights statutes protect students from such harassment, including Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act.¹¹³

These statutes apply to private suits for damages, ED's administrative enforcement, and both private and DOJ suits for injunctive relief. As a background to ED and DOJ's enforcement efforts, this section discusses the legal standards developed by courts in the context of private suits for damages. Both ED and DOJ use somewhat different legal standards in their administrative enforcement and suits for injunctive relief, respectively.¹¹⁴

Title IX

Title IX of the Education Amendments of 1972 (Title IX) prohibits public and private schools that receive federal financial assistance from discriminating on the basis of sex.¹¹⁵

¹¹² See Kenneth L. Marcus, Deputy Asst. Sec'y for Enforcement, Delegated the Authority of the Asst. Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges, Sept. 13, 2004, available at <http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html> (last visited May 8, 2011) ("OCR has recently encountered allegations of racial and sex discrimination, commingled with aspects of religious discrimination against Christian students.").

¹¹³ In addition to these statutes, OCR also enforces the Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.* (2006), and the Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905 (2006); DOJ also enforces Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.* (2006), and the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703 (2006), and it may intervene in private suits alleging violations of anti-discrimination statutes and/or the Fourteenth Amendment to the U.S. Constitution. When enforcing Title IV, which protects against discrimination based on race, color, religion, sex, or national origin, DOJ interprets that title to be consistent with case law under Title VI and Title IX, and thus applies the same legal standards under Title IV as it does under the those titles.

¹¹⁴ For further information regarding the legal standards used by ED and DOJ, see *infra* pp. 28-42.

¹¹⁵ 20 U.S.C. § 1681(a) (2006) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"); see also *id.* at § 1681(c) ("For purposes of this chapter an

Schools in violation of Title IX can be subject to termination of their federal funding or other administrative remedies,¹¹⁶ or to civil suit for damages or injunctive relief.¹¹⁷

Courts treat sexual harassment as a form of sex discrimination prohibited by Title IX, though the statute does not reference it directly. In *Franklin v. Gwinnett County Public Schools*, the Supreme Court held that teacher-on-student sexual harassment qualifies as sex-discrimination under Title IX.¹¹⁸ The Court expanded that holding in *Davis v. Monroe County Board of Education* to include student-on-student sexual harassment as well.¹¹⁹ In addition to sexual harassment, courts have also defined sex discrimination to include sexual violence¹²⁰ and sex-stereotyping.¹²¹

In private suits for damages, courts have set a high bar for school liability for peer-to-peer harassment under Title IX.¹²² First, the harassment at issue must be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”¹²³ Second, school officials

educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education . . .”). For a discussion of federal enforcement efforts under Title IX involving students who are targeted in part due to their sexual orientation or gender identity, see Chapter Six.

¹¹⁶ *Id.* § 1682.

¹¹⁷ See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75-76 (1992).

¹¹⁸ *Id.* at 75. (“Unquestionably, Title IX places on [schools] the duty not to discriminate on the basis of sex, and ‘when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.’ We believe the same rule should apply when a teacher sexually harasses and abuses a student.”) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

¹¹⁹ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) (“[S]tudent-on-student sexual harassment, if sufficiently severe, can . . . rise to the level of discrimination actionable under [Title IX].”).

¹²⁰ See, e.g., *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 WL 4446712 at *12 (D. Ariz. Sept. 30, 2008) (citing *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999)) (holding that rape of plaintiff constituted “severe, pervasive, and objectively offensive” sexual harassment); *Kelly v. Yale Univ.*, No. Civ. A. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003) (“There is no question that a rape . . . constitutes severe and objectively offensive sexual harassment . . .”); *S.S. v. Alexander*, 177 P.3d 724, 741 (Wash. Ct. App. 2008) (stating that “[i]n the Title IX context, there is no ‘one free rape’ rule”).

¹²¹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute on other grounds* (holding that sex-stereotyping is actionable under Title VII); see also, e.g., *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) (“Discrimination because one’s behavior does not ‘conform to stereotypical ideas’ of one’s gender can amount to actionable discrimination ‘based on sex’”) (citing *Howell v. N. Cent. Coll.*, 320 F.Supp. 2d 717 (N.D. Ill. 2004)); *Snelling v. Fall Mountain Reg’l Sch. Dist.*, No. Civ. 99-488-JD, 2001 WL 276975, at *4 (D. N.H. Mar. 21, 2001) (“The plaintiffs respond that the harassment they experienced arose from the perpetrators’ sex-based stereotypes of masculinity . . . [T]he plaintiffs articulate an actionable basis for their Title IX claim . . .”).

¹²² See generally Goss Graves Statement, *supra* note 37, at 4-7, 9-10.

¹²³ *Davis*, 526 U.S. at 650.

“with the authority to take corrective action to end the discrimination”¹²⁴ must have actual knowledge of the conduct.¹²⁵ And finally, those officials must have been “deliberately indifferent” to the sexual harassment.¹²⁶

Title VI

Title VI of the Civil Rights Act of 1964 (Title VI) prohibits public and private schools that receive federal financial assistance from discriminating on the basis of race, color, or national origin.¹²⁷ As with Title IX, schools in violation of Title VI can be subject to termination of their federal funding or other administrative remedies,¹²⁸ or to civil suit for damages or injunctive relief.¹²⁹ Because the language of Titles VI and IX is nearly identical, courts have generally applied the same standards to peer-to-peer harassment under Title VI that the Supreme Court developed regarding peer-to-peer harassment under Title IX.¹³⁰ As with Title IX, in private suits for damages the race-, color- or national-origin-based harassment must be “so severe, pervasive, and objectively offensive” that it deprives students of educational opportunities or benefits;¹³¹ school officials must have actual knowledge of the conduct;¹³² and the officials must be “deliberately indifferent” to the harassment.¹³³

¹²⁴ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

¹²⁵ *Davis*, 526 U.S. at 650; *see also Gebser*, 524 U.S. at 290.

¹²⁶ *Davis*, 526 U.S. at 650; *see also Gebser*, 524 U.S. at 290.

¹²⁷ 42 U.S.C. § 2000d (2006) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”); *see also id.* § 2000d-4a(2)(B) (2006), 3(A)(ii) (“For the purposes of this subchapter, the term ‘program or activity’ and the term ‘program’ mean all of the operations of ... a local educational agency ..., system of vocational education, or other school system [or] an entire corporation, partnership, or other private organization ... which is principally engaged in the business of providing education ...”). For a discussion of federal enforcement efforts under Title VI involving students who are targeted in part due to their religion, *see* Chapter 6.

¹²⁸ *Id.* § 2000d-1 (2006).

¹²⁹ *See Barnes v. Gorman*, 536 U.S. 181, 185-89 (2002); *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582, 597-603 (1983).

¹³⁰ *See, e.g., DT v. Somers Cent. Sch. Dist.*, 348 Fed. App’x 697, 699 & n.2 (2d Cir. 2009) (“Because Title VI and Title IX use parallel language, we construe them similarly.”); *Whitfield v. Notre Dame Middle Sch.*, No. 09-2649, slip op., 2011 WL 94735 at *3 & n.2 (3d Cir. Jan. 12, 2011) (“We construe Titles VI and IX similarly because they use parallel language.”); *Bryant v. Indep. Sch. Dist. No. 1-38 of Garvin County, Okla.*, 334 F.3d 928, 934 (10th Cir. 2003) (“The Court’s reasoning in *Davis* guides our resolution of the instant case because Congress based Title IX on Title VI; therefore, the Court’s analysis of what constitutes intentional sexual discrimination under Title IX directly informs our analysis of what constitutes intentional racial discrimination under Title VI (and vice versa).”); *see also Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

¹³¹ *See Davis*, 526 U.S. at 650; *see also, e.g., Qualls v. Cunningham*, 183 Fed. App’x 564, 567 (7th Cir. 2006) (“To establish a hostile educational environment under Title VI, [the plaintiff] must show that the alleged

Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act

Courts have also found that both Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II) protect students from peer-to-peer harassment based on disability. Section 504 prohibits public and private schools that receive federal financial assistance from discriminating against students due to disability.¹³⁴ Likewise, Title II¹³⁵ prohibits public entities, including state or local governments, from discriminating against individuals due to disability.¹³⁶ Both statutes state that violators are subject to the same remedies as under Title VI,¹³⁷ which include loss of

harassment was severe or pervasive enough to deprive him of access to educational benefits.”); *Whitfield*, 2011 WL 94735 at *3 (“The harassment must be ‘severe, pervasive, and objectively offensive,’ and rise above the level of ‘simple acts of teasing and name-calling among school children ... even where these comments target differences in [race].’”) (quoting *Davis*, 236 U.S. at 652).

¹³² See *Davis*, 526 U.S. at 650; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); see also, e.g., *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 & n.6 (2d Cir. 1999) (citing *Gebser*, 118 S. Ct. at 1996-99).

¹³³ See *Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 290; see also, e.g., *Bryant*, 334 F.3d at 934 (directing the district court to apply the *Davis* test for deliberate indifference); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) (“When a district is ‘deliberately indifferent’ to its students’ right to a learning environment free of racial hostility and discrimination, it is liable for damages under Title VI.”) (citing *Gebser*, 524 U.S. 274).

¹³⁴ See 29 U.S.C. § 794(a) (2006) (“No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”); see *id.* § 794(b)(2)(B)-(3)(A) (2006) (“For the purposes of this section, the term ‘program or activity’ means all of the operations of ... a local educational agency, system of vocational education, or other school system [or] an entire corporation, partnership, or other private organization ... which is principally engaged in the business of providing education ...”).

¹³⁵ In addition, Title III of the Americans with Disabilities Act also prohibits *private* educational institutions from discriminating against individuals due to disability. See, e.g., 42 U.S.C. § 12182 (2006) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”); *id.* § 12181(7)(J) (2006) (“The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce ... a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education.”). Title III is outside the scope of this report, which addresses prohibitions against harassment in *public* K-12 schools.

¹³⁶ See 42 U.S.C. § 12132 (2006) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”); *id.* § 12131(1)(B) (“The term ‘public entity’ means ... any department, agency, special purpose district, or other instrumentality of a State or States or local government ...”).

¹³⁷ See *id.* § 12133 (2006) (“The remedies, procedures, and rights set forth in [29 U.S.C. § 794a] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability”); 29 U.S.C. § 794a(a)(2) (2006) (“The remedies, procedures, and rights set forth in title VI of the

federal funding, or civil suit for damages or injunctive relief.¹³⁸ Because they are so similar, courts generally analyze Section 504 and Title II together when addressing claims related to peer-to-peer violence.¹³⁹

Furthermore, because the texts of Section 504 and Title II mirror the language used in Titles IX and VI, several courts have analyzed peer-to-peer harassment of students with disabilities under the framework set forth by the Supreme Court in *Davis*.¹⁴⁰ In order to make a claim in private suits for damages, students must allege that, due to their disability, they have suffered from harassment “so severe, pervasive, and objectively offensive”¹⁴¹ that it deprives them of educational opportunities or benefits; that school officials had actual knowledge of the conduct;¹⁴² and that the officials were “deliberately indifferent” to the harassment.¹⁴³

Civil Rights Act of 1964 ... shall be available to any person aggrieved by any act or failure to act by an recipient of Federal assistance ... under section 794 of this title.”)

¹³⁸ See generally *Barnes v. Gorman*, 536 U.S. 181, 185-90 (2002).

¹³⁹ See, e.g., *Werth v. Bd. of Dirs. of the Pub. Schs. of Milwaukee*, 472 F. Supp. 2d 1113, 1126 (E.D. Wis. 2007) (“Because the reach of both statutes is the same, claims under these provisions are analyzed together.”) (citing *K. M. ex rel. D. G. v. Hyde Park Cent. Sch. Dist.*, 381 F.Supp. 2d 343 (S.D.N.Y. 2005)).

¹⁴⁰ See, e.g., *K.M.*, 381 F. Supp. 2d at 359-61. Although a few cases have instead applied legal precedent related to hostile work environment under Title VII, this line began with a case published pre-*Davis*, and does not appear to be the prevailing approach. See, e.g., *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 313-15 (D. Mass. 1997); *Cabrea-Diaz v. Penn Kidder Campus Jim Thorpe Sch. Dist.*, No. 3:08-2192, slip op., 2010 WL 5818289, at *11 (M.D. Pa. Aug. 9, 2010) (citing *Guckenberger*); *Derrick F. v. Red Lion Area Sch. Dist.*, 586 F. Supp. 2d 282, 308-09 (M.D. Pa. 2008) (citing *Guckenberger*).

¹⁴¹ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999); see also, e.g., *Werth*, 472 F. Supp. 2d at 1129; *P.R. ex rel. Rawl v. Metro. Sch. Dist. of Wash. Twp.*, Slip Copy, No. 1:08-cv-1562-WTL-DML, 2010 WL 4457417, at *5, 7 (S.D. Ind. Nov. 1, 2010).

¹⁴² See *Davis*, 526 U.S. at 650; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); see also, e.g., *Werth*, 472 F. Supp. 2d at 1129; *P.R.*, 2010 WL 4457417, at *7-8.

¹⁴³ See *Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 290; see also, e.g., *S.S. v. Eastern Ky. Univ.*, 532 F.3d 445, 453-56 (6th Cir. 2008); *Biggs v. Bd. of Educ. of Cecil County, Md.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002).

Chapter 3. FEDERAL ENFORCEMENT EFFORTS: THE DEPARTMENT OF EDUCATION

The Department of Education's Office for Civil Rights (OCR) plays the dominant role in evaluating complaints alleging discrimination based on race/national origin, sex, and disability in schools. From 2005 to March 21, 2011,¹⁴⁴ OCR received 4,433 complaints alleging harassment based on race/national origin, sex, and disability.¹⁴⁵

In addition to complaints processing, OCR is involved in a number of other activities related to combating bullying and other forms of peer-to-peer violence. In these efforts, ED has joined the Departments of Health and Human Services, Justice, Defense, Agriculture, and Interior, as well as the National Council on Disability and the Federal Trade Commission, as members of the Federal Partners in Bullying Prevention Steering Committee. In addition to holding a summit in August 2010, the Steering Committee participated in a White House-sponsored Conference on Bullying, and launched StopBullying.gov, a website that provides information on preventing bullying.¹⁴⁶ ED also works with the Departments of Labor, Health and Human Services, Housing and Urban Development, and the Office of National Drug Control Policy, as part of the National Forum on Youth Violence Prevention, which supports the creation of youth-violence prevention initiatives in six communities in the United States.¹⁴⁷

The Department of Education's Civil Rights Complaint Processing System

OCR enforces Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination

¹⁴⁴ The Commission submitted interrogatories and document requests to ED on March 18, 2011. In response to these requests, ED provided data on complaints received through March 21, 2011.

¹⁴⁵ See U.S. Department of Education Response to the U.S. Commission on Civil Rights' Interrogatories and Document Requests at 16 (April 18, 2011) [hereinafter ED Response]. OCR defines "harassment" to "include peer-to-peer harassment, peer-to-peer bullying, and peer-to-peer violence, as well as incidents of harassment, bullying, and violence by school or school-district staff or by related third parties." *Id.* OCR has received 38,974 total complaints during that period. *See id.* at 8.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 27.

Act of 1975, Title II of the Americans with Disabilities Act of 1990, and the Boy Scouts of America Equal Access Act.

Titles VI and IX, Section 504, and the Age Discrimination Act grant OCR jurisdiction over institutions that receive federal financial assistance from ED, as well as other institutions for which other federal agencies have delegated authority to OCR.¹⁴⁸ Title II grants OCR jurisdiction over public elementary and secondary education systems and institutions, public institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and public libraries, even if these institutions do not receive federal financial assistance.¹⁴⁹ The Boy Scouts Act grants OCR jurisdiction over public elementary schools, public secondary schools, local educational agencies, and state educational agencies that receive funds through ED.¹⁵⁰

Evaluation of Complaints

OCR generally uses three factors to evaluate whether a complaint will be investigated. In order for a complaint to be investigated it must:

- Allege a violation of one or more of the laws that OCR enforces;¹⁵¹
- Be timely filed within 180 calendar days of the alleged discrimination, or be granted a request for waiver of the timeliness requirement;¹⁵² and
- Contain sufficient details for OCR to infer that a violation may have occurred.¹⁵³

In addition to these general requirements, OCR may dismiss a complaint after evaluation if its allegations have been resolved;¹⁵⁴ if the complainant's allegations have already been

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *See id.*; U.S. Dep't of Educ., Office for Civil Rights, OCR Complaint Processing Procedures, <http://www2.ed.gov/about/offices/list/ocr/complaints-how.html> (last visited June 9, 2011) [hereinafter OCR CPP].

¹⁵² *See* U.S. Dep't of Educ., Office for Civil Rights, OCR Case Processing Manual, §§ 106-07, <http://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.html> (last visited July 28, 2011) [hereinafter OCR CPM]; OCR CPP, *supra* note 151. If a complaint is not timely filed, OCR will inform the complainant of the opportunity to request a waiver.

¹⁵³ *See* OCR CPM, *supra* note 152, § 108; OCR CPP, *supra* note 151. OCR will contact the complainant if it requires additional information to process the complaint, and will grant the complainant 20 calendar days to respond to its request. *See* OCR CPM, *supra* note 152, § 108.

investigated by another federal, state, or local civil rights agency or through a school's internal grievance procedures, including due process proceedings;¹⁵⁵ if its allegations against the school are already being addressed in state or federal court;¹⁵⁶ if the allegations are preempted by federal courts, the U.S. Secretary of Education, ED's Civil Rights Reviewing Authority, or OCR policy determinations;¹⁵⁷ or if OCR is unable to complete the investigation due to difficulty contacting the complainant or lack of cooperation from the complainant or injured party.¹⁵⁸ OCR may also close a complaint if the same allegations have been filed against the same school by someone other than the complainant.¹⁵⁹

Investigation of Complaints

Once OCR opens a complaint for investigation, it issues letters of notification to the complainant and to the complainant's school.¹⁶⁰ During the investigation, OCR serves as a neutral fact finder, evaluating whether there is sufficient evidence that the school has acted in noncompliance with its legal obligations.¹⁶¹ An OCR investigation may include interviewing witnesses, conducting site visits, and reviewing documentary evidence.¹⁶²

Early Complaint Resolution

OCR also has an Early Complaint Resolution (ECR) process designed to facilitate voluntary resolution of disputes as soon as an investigation is opened. Though the agency encourages parties to utilize ECR early in the investigation, ECR may take place at any time during the investigative process.¹⁶³ Both parties must agree to participate and the details of the ECR,

¹⁵⁴ See OCR CPM, *supra* note 152, § 110.

¹⁵⁵ See *id.* If a complaint is still pending before another forum, the forum's resolution process must conform to certain procedural standards before OCR will close a complaint. OCR will only close a complaint if it believes that there will be a "comparable resolution process under comparable legal standards." See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*; OCR CPP, *supra* note 151.

¹⁵⁸ See OCR CPM, *supra* note 152, § 110; OCR CPP, *supra* note 151.

¹⁵⁹ See OCR CPM, *supra* note 152, § 110.

¹⁶⁰ See *id.* § 109.

¹⁶¹ See OCR CPP, *supra* note 151.

¹⁶² See *id.*

¹⁶³ See OCR CPM, *supra* note 152.

including any records related to the process, are confidential.¹⁶⁴ If the ECR is successful, the parties sign a statement indicating that the allegation has been resolved.¹⁶⁵ OCR will then notify the parties in writing of the resolution.¹⁶⁶ In the event that the ECR is unsuccessful, OCR will proceed with its investigation.¹⁶⁷ Although OCR does not monitor agreements reached between parties in ECR, the complainant may file another complaint with OCR if the school does not comply with the terms of the agreement.¹⁶⁸

Resolution of Complaints

If, after conducting its investigation, OCR determines that there is *insufficient* evidence to determine that the school violated its legal obligations, OCR will issue a Letter of Finding(s) to the parties, which includes:

- A description of the issues raised by the complaint;
- A description of OCR's jurisdiction over the complaint; and
- A discussion of the relevant legal standard and factual analysis.¹⁶⁹

If OCR determines that a preponderance of evidence supports a determination that the school failed to comply with its legal obligations, OCR will attempt to negotiate a Voluntary Resolution Agreement with the school.¹⁷⁰ A Voluntary Resolution Agreement is a written agreement with the school that describes the remedial actions that the school agrees to take to resolve its noncompliance.¹⁷¹ OCR subsequently monitors the school's compliance with the agreement.¹⁷²

If the school does not immediately agree to negotiate a Voluntary Resolution Agreement, OCR gives the school 30 days to state its intent to resolve its noncompliance voluntarily.¹⁷³ If

¹⁶⁴ See *id.* §§ 202-03; OCR CPP, *supra* note 151.

¹⁶⁵ See OCR CPM, *supra* note 152, § 204.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* § 205.

¹⁶⁸ See *id.* § 204(a); OCR CPP, *supra* note 151.

¹⁶⁹ See OCR CPM, *supra* note 152, § 303(a).

¹⁷⁰ See *id.* § 303(b); OCR CPP, *supra* note 151.

¹⁷¹ See OCR CPM, *supra* note 152, § 304; OCR CPP, *supra* note 151.

¹⁷² See OCR CPM, *supra* note 152, § 307; OCR CPP, *supra* note 151.

¹⁷³ See OCR CPM, *supra* note 152, § 303(b); OCR CPP, *supra* note 151.

the school fails to so notify OCR, then OCR will issue a Letter of Finding(s) to the parties explaining OCR's legal and factual basis for any finding of noncompliance.¹⁷⁴ Likewise, if negotiations reach an impasse, OCR will issue its Letter of Finding(s) within 10 days of the impasse, unless the parties reach a resolution agreement during that time.¹⁷⁵

Initiating Enforcement Actions

If the school persists in its refusal to voluntarily resolve its noncompliance, OCR issues a Letter of Impending Enforcement Action.¹⁷⁶ If the school still refuses to negotiate an agreement, OCR may suspend, terminate, or refuse to grant federal financial assistance to the school through administrative proceedings, or it may refer the case to DOJ for court proceedings.¹⁷⁷

OCR Complaint Processing System: Statistical Data by Calendar Year

OCR receives thousands of complaints each year.

Total number of complaints received by OCR, by year:¹⁷⁸

2005	2006	2007	2008	2009	2010	2011
5,671	5,771	5,963	6,242	6,637	7,043	1,647

OCR's complaint tracking system does not perfectly align with the inquiry of this report. OCR tracks complaints related to "harassment," which it defines to include both peer-to-peer harassment as well as harassment of students by staff and third parties.¹⁷⁹ As a result, no mechanism currently exists for isolating data related solely to OCR's work on peer-to-peer incidents.¹⁸⁰ Nevertheless, with this caveat, OCR's data provides an indication of the volume

¹⁷⁴ See OCR CPM, *supra* note 152, § 303(b); OCR CPP, *supra* note 151.

¹⁷⁵ See OCR CPM, *supra* note 152, § 303(b).

¹⁷⁶ See *id.* § 305; OCR CPP, *supra* note 151.

¹⁷⁷ See OCR CPM, *supra* note 152, Art. IV; OCR CPP, *supra* note 151.

¹⁷⁸ ED Response, *supra* note 145, at 8. For this and all subsequent tables in this chapter, 2011 data covers January 1, 2011 through March 21, 2011.

¹⁷⁹ *Id.* at 16. More specifically, as discussed *supra* note 145, OCR states that their "harassment" category "includes peer-to-peer harassment, peer-to-peer bullying, and peer-to-peer violence, as well as incidents of harassment, bullying, and violence by school or school-district staff or by related third parties." *Id.*

¹⁸⁰ "Harassment" within OCR's jurisdiction covers peer-to-peer bullying and other violence "based on race, color, national origin, sex, or disability [that] is sufficiently serious that it creates a hostile environment and ... is encouraged, tolerated, inadequately addressed, or ignored by school employees." *Id.* at 5.

of harassment-related complaints that OCR receives compared to its entire complaint workload, as well as a comparison of the quantity of complaints filed by protected class.

Total number of harassment complaints received by OCR, by year:¹⁸¹

2005	2006	2007	2008	2009	2010	2011
523	527	610	790	774	1,016	193

Race/National Origin

Of those complaints received generally, the following represent complaints related to race or national origin by year:¹⁸²

Calendar Year	2005	2006	2007	2008	2009	2010	2011
Total Number of Complaints Received	2,229	2,251	2,278	1,772	1,919	2,013	346
Black, Not Hispanic	1,006	994	1,076	1,089	1,089	1,197	202
Hispanic	253	255	231	202	233	262	51
Asian or Pacific Islander	79	82	87	74	90	89	8
American Indian or Alaskan Native	45	40	44	56	33	42	7
All of the Above/Class Action	45	54	40	52	130	36	8
Other/Unknown	945	993	940	216	269	332	67
Minority White	67	63	72	53	37	41	5
Non-Minority White	114	117	142	83	77	70	11

Of those complaints based on harassment, the following represent complaints related to race or national origin by year:¹⁸³

Calendar Year	2005	2006	2007	2008	2009	2010	2011
Total Number of Complaints Received	232	231	255	339	361	438	86
Black, Not Hispanic	156	155	173	214	221	273	54
Hispanic	33	31	31	37	43	49	10
Asian or Pacific Islander	16	13	9	21	16	23	2
American Indian or Alaskan Native	10	9	7	15	10	15	3
All of the Above/Class Action	2	2	1	3	1	2	3

¹⁸¹ *Id.* at 16.

¹⁸² *Id.* at 8. ED notes, “Please note that the sum of the subcategories may not equal the total number of complaints received, because complaints alleging discrimination on the basis of more than one racial category are included in each subcategory.” *Id.*

¹⁸³ *Id.* at 19.

Other/Unknown	0	0	1	26	47	57	12
Minority White	10	10	16	11	9	7	1
Non-Minority White	11	13	19	17	14	14	2

Sex

Of those complaints received generally, the following represent complaints related to sex, by year:¹⁸⁴

Calendar Year	2005	2006	2007	2008	2009	2010	2011
Number of Complaints Received	651	659	732	762	824	936	282

Of those complaints based on harassment, the following represent complaints related to sex by year:¹⁸⁵

Calendar Year	2005	2006	2007	2008	2009	2010	2011
Number of Complaints Received	150	153	184	231	220	304	54

Disability

Of those complaints received generally, the following represent complaints related to disability:¹⁸⁶

Calendar Year	2005	2006	2007	2008	2009	2010	2011
Number of Complaints Received	3,447	3,543	3,659	3,847	3,913	4,164	731

Of those complaints based on harassment, the following represent complaints related to disability by year:¹⁸⁷

Calendar Year	2005	2006	2007	2008	2009	2010	2011
Number of Complaints Received	196	193	233	318	284	399	79

¹⁸⁴ *Id.* at 9.

¹⁸⁵ *Id.* at 20.

¹⁸⁶ *Id.* at 9.

¹⁸⁷ *Id.* at 20.

Sexual Orientation/Gender Identity & Religion

ED has not historically tracked complaints alleging discrimination based solely on sexual orientation or gender identity, or based on religion.

Because ED does not have jurisdiction to address complaints of discrimination based solely on sexual orientation or gender identity, it has never tracked complaints alleging discrimination or harassment on that basis.¹⁸⁸ When ED has received complaints based solely on sexual orientation or gender identity, those complaints have been closed for lack of jurisdiction without ever being coded as “harassment.”¹⁸⁹ As a result, there is no mechanism for determining how many such complaints OCR has received.¹⁹⁰ Where ED has processed complaints based on sexual harassment or gender-based harassment of LGBT students, those complaints have been tracked as sex-based harassment cases, without distinguishing whether the student identifies as LGBT.

Likewise, because ED does not have jurisdiction to address complaints of discrimination based solely on religion, it has never tracked complaints alleging discrimination or harassment on that basis either.¹⁹¹ When ED receives such complaints, it closes those complaints for lack of jurisdiction without ever coding them for “harassment.”¹⁹² As with harassment based on sexual orientation, there is no means for tracking how many complaints ED has received based solely on religion.

Beginning on October 1, 2010, ED began coding complaints based on “shared ancestry or ethnic characteristics.”¹⁹³ ED has coded 12 complaints alleging discrimination generally based on shared ancestry or ethnic characteristics.¹⁹⁴ Of those, 5 complaints were coded as

¹⁸⁸ See *id.* at 15, 25. For further discussion of ED’s jurisdiction to address harassment of actual or perceived LGBT students, please see *infra* Chapter 5.

¹⁸⁹ See *id.* at 15.

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 14, 23-24. For further discussion of ED’s jurisdiction to address harassment of members of religious groups, please see *infra* Chapter 5.

¹⁹² See *id.* at 15.

¹⁹³ See *id.* at 14. ED has retroactively coded some open cases that may have been received prior to October 1, 2010. Not all cases, however, were retroactively coded. See *id.*

¹⁹⁴ *Id.* at 14.

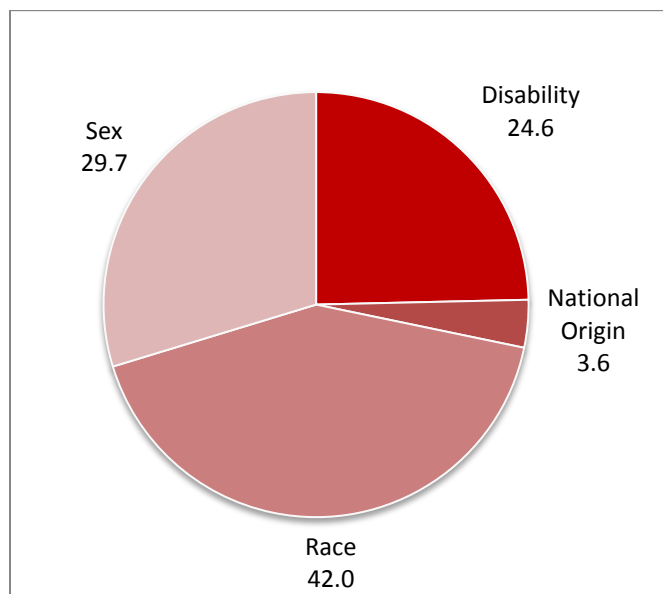
racial harassment.¹⁹⁵ Prior to October 1, 2010, when ED processed complaints based on shared ancestry or ethnic characteristics of students that belonged to a religious group, those complaints were tracked as race-based harassment cases, without any reference to religion.¹⁹⁶

While the data collected by OCR does not distinguish between staff-to-student and student-to-student (peer-to-peer) harassment, the Commission was able to extract a small sample of strictly student-to-student harassment for analysis. We obtained copies of all OCR voluntary resolution agreements (and accompanying Letters of Finding) related to harassment issued between 2005 and March 2011. From this set of 292 agreements, we culled 138 related only to peer-to-peer harassment in K-12 schools.

Of the 138 resolution agreements, the following represents the percentage that involved allegations of harassment based on race, national origin, disability, and sex:

Figure 3.1

Percent of Resolution Agreements Involving Peer-to-Peer Harassment in Elementary and Secondary Schools, 2005 to March 21, 2011, by the Primary Civil Rights Basis.



Source: Data compiled and analyzed by U.S. Commission on Civil Rights from resolution agreements and associated documents provided by the U.S. Department of Education.

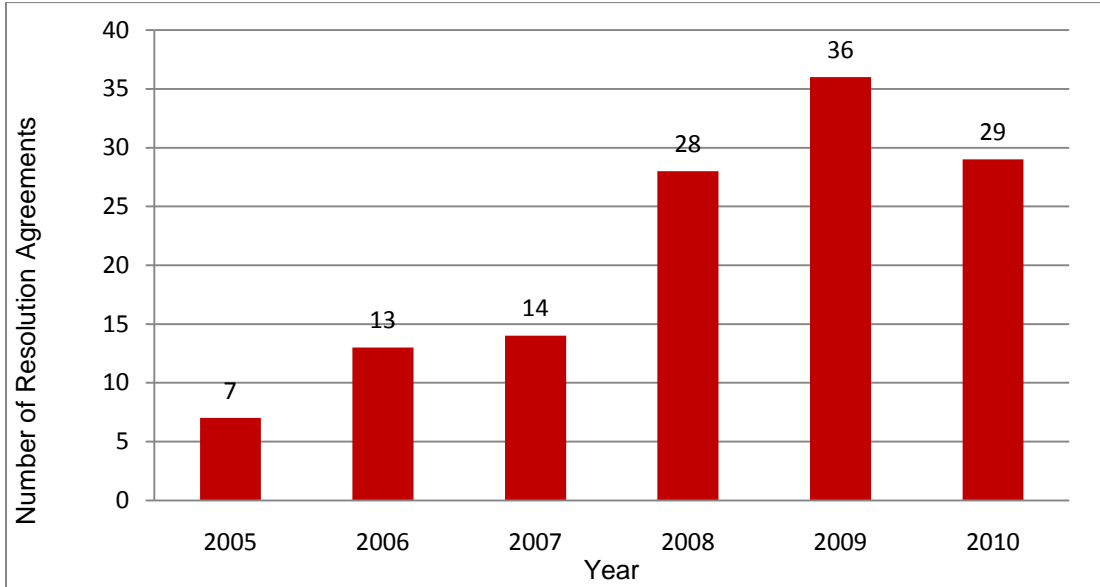
¹⁹⁵ *Id.* at 23-24.

¹⁹⁶ *See id.* at 14.

The following represents the number of resolution agreements related to peer-to-peer harassment per year, from 2005 to 2010:

Figure 3.2

Number of Resolution Agreements Involving Peer-to-Peer Harassment in Elementary and Secondary Schools by Year, 2005 to 2010.¹



¹The U.S. Department of Education also negotiated 11 resolution agreements in January to March 2011. They are not included in the figure because they represent only part of the year.

Source: Data compiled and analyzed by U.S. Commission on Civil Rights from resolution agreements and associated documents provided by the U.S. Department of Education.

The following represents the number of resolution agreements by state, from 2005 to March 2011:

Table 3.1

Number of Resolution Agreements Involving Peer-to-Peer Harassment in Elementary and Secondary Schools by State (Including the District of Columbia), 2005 to March 21, 2011.

State	Number	State	Number	State	Number
California	18	Maryland	2	New Hampshire	1
Missouri	17	Michigan	2	New Mexico	1
Illinois	9	Minnesota	2	Rhode Island	1
Georgia	7	Mississippi	2	Vermont	1
Colorado	6	North Carolina	2	Washington	1
Ohio	6	Oregon	2	West Virginia	1
Oklahoma	6	South Dakota	2	Arkansas	0
Texas	6	Tennessee	2	Delaware	0
Pennsylvania	5	Utah	2	Indiana	0
Arizona	4	Alaska	1	Iowa	0
Connecticut	4	District of Columbia	1	Nebraska	0
Kansas	4	Florida	1	New Jersey	0
Massachusetts	4	Hawaii	1	North Dakota	0
Kentucky	3	Idaho	1	South Carolina	0
New York	3	Maine	1	Virginia	0
Alabama	2	Montana	1	Wisconsin	0
Louisiana	2	Nevada	1	Wyoming	0

Source: Data compiled and analyzed by U.S. Commission on Civil Rights from resolution agreements and associated documents provided by the U.S. Department of Education.

Chapter 4. FEDERAL ENFORCEMENT EFFORTS: THE U.S. DEPARTMENT OF JUSTICE

The Department of Justice enforces federal statutes that prohibit discrimination in public K-12 schools. Through the Educational Opportunities Section (EOS) of its Civil Rights Division, the Department has opened more than 300 inquiries into complaints of discrimination and harassment from 2001 to April 18, 2011.¹⁹⁷ Beyond responding to complaints, EOS has engaged in a number of activities to address what it has termed a “bullying pandemic,” including participating in an inter-agency taskforce to develop a federal response to bullying in schools, participating in the planning of national bullying summits and a youth summit on a variety of issues facing the LGBT community, including bullying, and conducting community outreach to educate groups on EOS’s jurisdiction and possible collaboration with advocacy groups to assist students who have been subjected to harassment in their schools.¹⁹⁸

Educational Opportunities Section Investigation Process

Generally, EOS enforces laws including Title IV of the Civil Rights Act of 1964, the Equal Educational Opportunities Act of 1974, and Titles II and III of the Americans with Disabilities Act. EOS may also initiate enforcement activities upon receiving a referral from other agencies to enforce Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Individuals with Disabilities Education Act. Further, EOS may intervene in private litigation that alleges violations of the Equal Protection Clause or relevant education-related antidiscrimination statutes as listed above, as well as participate in such litigation as *amicus curiae*.¹⁹⁹ EOS receives complaints by mail, email, telephone, and in person, and it also monitors incidents

¹⁹⁷ U.S. Department of Justice Response to the U.S. Commission on Civil Rights’ Interrogatories and Document Requests at 1 (April 18, 2011) [hereinafter DOJ Response]. The Commission submitted interrogatories and document requests to DOJ on March 18, 2011. The DOJ responded to these requests on April 18, 2011. The DOJ provided data on complaints received through the date of its response.

¹⁹⁸ *Id.* at 2.

¹⁹⁹ *Id.* at 1.

of harassment through media and other reports. “After an initial inquiry into a complaint, EOS will determine, based on the information available and subject to resource constraints, whether to open an investigation.”²⁰⁰ EOS reports that it has not received a referral from ED’s Office of Civil Rights since at least 2001.²⁰¹

Available Complaint Information by Calendar Year

Because of its different jurisdictional mandates and complaint/referral mechanisms, DOJ handles far fewer peer-to-peer harassment matters per year than ED. The below data represents those complaints and referrals which resulted in DOJ opening an investigation, as described above. Unlike ED’s data discussed above, DOJ’s data tracks back to 2001 and attempts to isolate inquiries involving only peer-to-peer harassment.²⁰²

Total EOS opened inquiries:²⁰³

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
26	22	23	38	29	34	51	29	38	26	6

Total EOS opened inquiries related to peer-to-peer harassment, where such violence may be attributable to the students’ race, national origin, religion, disability, or sex.²⁰⁴

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
4	8	4	14	13	14	33	14	14	5	3

Race/National Origin

Of those complaints received generally, the following represent opened inquiries related to race or national origin by year:²⁰⁵

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
10	13	11	22	13	14	21	17	23	19	3

²⁰⁰ *Id.* at 5.

²⁰¹ *Id.*

²⁰² Only DOJ’s data regarding peer-to-peer harassment cases are shown here.

²⁰³ DOJ Response, *supra* note 197, at 6. These figures do not include complaints raised in ongoing desegregation cases or cases opened prior to 2000.

²⁰⁴ *Id.* at 8. Please note that, like OCR, EOS jurisdiction only covers peer-to-peer bullying and other violence that meets the legal definition of harassment. The data reported under “sex” can include sexual harassment of LGBT students and harassment of LGBT students for failure to conform to gender stereotypes.

²⁰⁵ *Id.* at 6. Where complaints involved allegations of discrimination based on membership in more than one protected class, the complaints are listed in each relevant category. *Id.* at 2.

Of those complaints received based on peer-to-peer harassment, the following represent opened inquiries related to race or national origin by year.²⁰⁶

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
2	5	2	6	3	2	13	9	8	4	1

Sex

Of those complaints received generally, the following represent opened inquiries related to sex by year.²⁰⁷

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
7	4	2	6	1	3	5	3	8	2	2
(2 SH)	(2 SH)	(1 SH)	(4 SH)	(1 SH)	(1 SH)	(4 SH)	(1 SH)	(3 SH)	(1 SH)	(1 SH)

Of those complaints received based on peer-to-peer harassment, the following represent opened inquiries related to sex by year.²⁰⁸

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
2	2	1	3	1	1	5	3	4	1	2

Disability

Of those complaints received generally, the following represent opened inquiries related to disability by year.²⁰⁹

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
9	4	3	0	2	4	7	0	5	5	2

EOS did not track peer-to-peer violence based on disability prior to March 2011.²¹⁰

²⁰⁶ *Id.* at 9.

²⁰⁷ *Id.* at 7. The figures in this chart reflect inquiries where such information was available regarding the nature of the complaint; EOS does not track its complaints by the specific gender of the students involved or the specific nature of the sex-based complaint. Where ascertainable, sexual harassment complaints are denoted "SH."

²⁰⁸ *Id.* at 9.

²⁰⁹ *Id.* at 6.

²¹⁰ *Id.* at 9.

Religion

EOS reports that it tracks complaints related to religion-based harassment separately from harassment based on shared ancestry or ethnic characteristics (i.e., national origin) under Title IV.²¹¹

Of those complaints received generally, the following represent opened inquiries related to religion by year:²¹²

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
1	3	8	13	14	15	24	13	4	0	0

Of those complaints received based on peer-to-peer harassment, the following represent opened inquiries related to religion by year:²¹³

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
1	2	3	8	10	11	18	5	3	0	0

Sexual Orientation/Gender Identity

Although EOS does not maintain information on the sexual orientation and gender identity of its complainants, it has opened inquiries into sex-based discrimination based on sex stereotypes. The Section reports that it opened four such inquiries in 2009, two in 2010, and one to date in 2011.²¹⁴

²¹¹ *Id.* at 7-8, 10-11.

²¹² U.S. Dep't of Justice, Supplemental Response Pursuant to Affected Agency Review (July 26, 2011).

²¹³ DOJ Response, *supra* note 197, at 7-8, 10-11.

²¹⁴ *Id.* at 8.

Chapter 5. THE U.S. DEPARTMENT OF EDUCATION'S DEAR COLLEAGUE LETTER

The U.S. Department of Education issues Dear Colleague Letters as policy guidance under the laws that it enforces. Generally, a Dear Colleague Letter offers guidance to help schools fully understand their legal responsibilities and appreciate the extent of their lawful authority.²¹⁵ It is ED's position that, "when school officials understand their legal duties and the extent of their authority, they are in the best position to prevent peer harassment and to respond effectively when it occurs."²¹⁶ To date, ED has released seven Dear Colleague Letters regarding harassment and three other guidance documents regarding sexual harassment and racial harassment.²¹⁷ The guidance documents range in topic, discussing harassment and bullying generally,²¹⁸ sexual violence,²¹⁹ sexual harassment,²²⁰ disability harassment,²²¹ racial harassment,²²² harassment of Muslim and Arab students,²²³ religion-based harassment,²²⁴ and First Amendment rights.²²⁵ On October 26, 2010, ED issued a Dear Colleague Letter to schools that provided guidance regarding their obligations

²¹⁵ See Ali Statement, *supra* note 6, at 5.

²¹⁶ See *id.* at 7.

²¹⁷ See ED Response, *supra* note 145, at 5-6.

²¹⁸ See Harassment/Bullying DCL, *supra* note 40.

²¹⁹ See Sexual Violence DCL, *supra* note 36.

²²⁰ See Stephanie Monroe, Asst. Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Harassment Issues, Jan. 25, 2006, available at <http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> (last visited May 11, 2011) [hereinafter Sexual Harassment DCL]; see also SEXUAL HARASSMENT: IT'S NOT ACADEMIC, *supra* note 35; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (last visited Apr. 28, 2011) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE].

²²¹ See Disability DCL, *supra* note 63.

²²² See Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11,448 (Mar. 10, 2004), available at <http://www2.ed.gov/about/offices/list/ocr/docs/race394.html> (last visited May 11, 2011) [hereinafter Racial Incidents and Harassment Guidance].

²²³ See Rod Paige, Sec'y of Educ., U.S. Dep't of Educ., Dear Colleague Letter: Harassment Against Muslim and Arab Students, Sept. 19, 2001, available at <http://www2.ed.gov/about/offices/list/ocr/docs/arabletter.html> (last visited May 2, 2011) [hereinafter Muslim/Arab DCL].

²²⁴ See Kenneth L. Marcus, Dep. Asst. Sec'y for Enforcement, U.S. Dep't of Educ., Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges, Sept. 13, 2004, available at <http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html> (last visited May 11, 2011) [hereinafter Religion DCL].

²²⁵ See Gerald A. Reynolds, Asst. Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: First Amendment, July 28, 2003, available at <http://www2.ed.gov/about/offices/list/ocr/firstamend.html> (last visited May 11, 2011) [hereinafter First Amendment DCL].

with respect to bullying and harassment.²²⁶ In addition to outlining schools' general obligations under federal civil rights laws, the Letter provided a series of hypotheticals and advised schools on how best to respond to them. According to Assistant Secretary for Civil Rights Russlynn Ali, while the legal standards discussed in the Letter were not new,²²⁷ the Letter was the "first time ... that Department of Education has put forth such comprehensive guidance on bullying and harassment across all of its statutes. It is the first time that [they] have presented it in these very real-life hypothetical ways."²²⁸

The Letter was intended as a reminder to schools "that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department's Office for Civil Rights."²²⁹ ED explained that OCR enforces Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990.²³⁰ It noted, however, that "[w]hile this letter concerns [schools'] legal obligations under the laws enforced by OCR, other federal, state, and local laws impose additional obligations on schools."²³¹ ED said that "harassing conduct" can come in many forms, including verbal acts and name-calling, graphic and written statements (including statements via electronic media such as mobile phones or the

²²⁶ ED worked closely with DOJ on developing the Dear Colleague Letter. *See* Samuels Statement, *supra* note 61, at 6.

²²⁷ *See, e.g.*, Briefing Transcript, *supra* note 7, at 61:8-13 (Ali Testimony) ("The letter was not, as some critics may imply, a break with or an expansion of the Office for Civil Rights' previous interpretation of Title IX, and it was consistent with the cases that had come out between the 2001 guidance and what happened in 2010"); Marcus Statement, *supra* note 103, at 18 app. A ("[The Dear Colleague Letter] is neither new nor a bullying policy. Rather, it is a repackaging of longstanding OCR interpretations of harassment law."); Goss Graves Statement, *supra* note 37, at 8-9 ("The letter was not, as some critics have implied, a break with or an expansion of OCR's previous interpretation of Title IX.").

²²⁸ Transcript, Secretary's Press Conference Call on Bullying and Harassment Guidance, at 18, Oct. 26, 2010, available at <http://www2.ed.gov/news/av/audio/2010/10/10262010.doc> (last visited May 2, 2011) [hereinafter Conference Call Transcript].

²²⁹ Harassment/Bullying DCL, *supra* note 40, at 1; *see also* Conference Call Transcript, *supra* note 228, at 5 (Statement of Russlynn Ali) ("Schools and districts know their community best and to help them we are ensuring today both students and parents are aware of their rights and that schools, districts, colleges and universities are aware of their responsibilities under the federal civil rights laws."); *id.* at 8 (Statement of Russlynn Ali) ("The guidelines are intended to make clear for schools, colleges, universities and school districts across the country what their obligations are when they know or should've known about harassing our [sic] bullying happening in their schools and what to do about it. They are charged with stopping it, with fixing the problem and with preventing it so that it never happens again and students have a safe place to learn.").

²³⁰ *See* Harassment/Bullying DCL, *supra* note 40, at 1.

²³¹ *Id.* at 2.

Internet), and other conduct that may be physically threatening, harmful, or humiliating.²³² Where the harassment is based on race, color, national origin, sex, or disability, and where such conduct creates a “hostile environment” —*i.e.*, “when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school” —it triggers the civil rights laws enforced by OCR.²³³

The Letter further said that a school must address harassment incidents “about which it knows or reasonably should have known.”²³⁴ A school has such notice where “a responsible employee knew, or in the exercise of reasonable care should have known, about the harassment.”²³⁵ ED advised that, “[w]hen responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred.”²³⁶ The steps of this investigation will differ depending on the circumstances.²³⁷

According to ED, where the investigation shows that unlawful harassment has taken place, “a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.”²³⁸ Depending on the circumstances of the harassment, responses can include: “separating the accused harasser and the target”; “providing counseling for the target and/or harasser”; “taking disciplinary actions against the harasser”; providing “training or other interventions ... for the larger school community”; providing “additional services to the student who was harassed in order to address the effects of the harassment”; “issu[ing] new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures)”; or “wide distribution of the contact information for the district’s Title IX and Section 504/Title II coordinators.”²³⁹ Finally, the Letter advised that the school should take

²³² *See id.*

²³³ *See id.*

²³⁴ *Id.*

²³⁵ *Id.* at 2 n.9.

²³⁶ *Id.* at 2.

²³⁷ *See id.*

²³⁸ *Id.* at 2-3.

²³⁹ *Id.* at 3.

steps to prevent harassment or retaliation against persons who made the initial complaint or assisted the school's investigation: "[a]t a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems."²⁴⁰

When responding to incidents, the Letter advised that obligations under federal civil rights laws are triggered by the "nature of the conduct itself," rather than by the "label used to describe the incident (*e.g.*, bullying, hazing, teasing)"²⁴¹ Furthermore, when these laws are implicated, the Letter encouraged schools to "look beyond simply disciplining the perpetrators [because] the unique effects of discriminatory harassment may demand a different response than would other types of bullying."²⁴²

The Dear Colleague Letter then provided five hypotheticals to illustrate incidents of race, color, or national origin harassment, sexual harassment, gender-based harassment, and disability harassment. After each hypothetical, ED described how the incident would trigger obligations under federal civil rights laws, where the hypothetical school erred in its response, and how the school should have responded.²⁴³

Of note, one of the hypotheticals involved harassment of Jewish students; the Letter said, "[H]arassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices."²⁴⁴ Another hypothetical involved a student who was gay and who did not conform

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 3-4.

²⁴³ *See generally id.* at 4-9.

²⁴⁴ *Id.* at 5-6; *see also* Conference Call Transcript, *supra* note 228, at 17 (Statement of Russlynn Ali)

("[A]lthough the department does not hold jurisdiction over religion, much of the anti-religious, if you will, bullying that we're seeing across the country is not because students are Jewish or because students are Muslim or any details about their faith or their worship. It is about the harasser perceiving them as being members of a special ethnic group or a national origin. It is there where we will vigorously enforce the civil rights laws to

to masculine stereotypes; the Letter reasoned, “Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.”²⁴⁵ In the press release issued by ED to announce the Dear Colleague Letter, ED explained that this guidance “makes clear that while current laws enforced by the department do not protect against harassment based on religion or sexual orientation, they do include protection against harassment of members of religious groups based on shared ethnic characteristics as well as gender and sexual harassment of gay, lesbian, bi-sexual, and transgender individuals.”²⁴⁶

In closing the Letter, Assistant Secretary Ali wrote, “I encourage you to reevaluate the policies and practices your school uses to address bullying and harassment to ensure that they comply with the mandates of the federal civil rights laws.”²⁴⁷

protect those students from a harassing environment.”). For further discussion of the Dear Colleague Letter’s analysis of Title VI implications for harassment of religious groups, please see *infra* Chapter 6.

²⁴⁵ Harassment/Bullying DCL, *supra* note 40, at 7-8. For further discussion of the Dear Colleague Letter’s analysis of Title IX implications for harassment of actual or perceived LGBT students and students that do not conform to gender stereotypes, please see *infra* Chapter 6.

²⁴⁶ Press Release, U.S. Dep’t of Educ., Guidance Targeting Harassment Outlines Local and Federal Responsibility, Oct. 26, 2010, available at <http://www.ed.gov/news/press-releases/guidance-targeting-harassment-outlines-local-and-federal-responsibility> (last visited May 3, 2011).

²⁴⁷ Harassment/Bullying DCL, *supra* note 40, at 9.

Chapter 6. JURISDICTION: PEER-TO-PEER VIOLENCE RELATED TO LGBT STATUS AND RELIGION

The Departments of Education and Justice have been both lauded and criticized for addressing peer-to-peer student violence related to LGBT youth and members of religious groups.²⁴⁸ Although Title IX grants jurisdiction to ED and DOJ to enforce prohibitions against sex discrimination, it does not mention discrimination based on sexual orientation or gender identity; and although Title VI grants jurisdiction to ED and DOJ to enforce prohibitions against discrimination based on race, color, or national origin, it does not mention discrimination based on religion. Critics have asserted that ED and DOJ’s legal interpretations amount to an attempt to “bootstrap” unprotected groups into Titles IX and VI protection.²⁴⁹ This chapter will address each issue in turn.

Title IX and Peer-to-Peer Violence Related to Sexual Orientation or Gender Identity

While Title IX does not prohibit discrimination on the basis of sexual orientation,²⁵⁰ its prohibitions against sex discrimination and sexual harassment protect all students, including

²⁴⁸ As discussed *supra* Chapter 5, ED and DOJ reason that Title IX protects all students—including LGBT students—from sex discrimination, and that Title VI protects all students—including those belonging to groups with a common faith—from discrimination based on ethnicity, national origin, or race. DOJ also addresses religion-based discrimination in schools under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c. ED does not enforce this provision.

²⁴⁹ See, e.g., Statement of Roger Clegg, President & Gen. Counsel, Ctr. for Equal Opportunity, at 7, May 13, 2011, available at <http://www.eusccr.com/6.%20Roger%20Clegg,%20Center%20for%20Equal%20Opportunity.pdf> (last visited June 22, 2011) [hereinafter Clegg Statement] (“After all, ‘sex’ does not mean ‘sexual orientation,’ and it certainly did not mean that in 1972. That’s all there is to it. . . . [T]hey have concocted a legal argument that says the use of ‘sexual stereotypes’ is banned by the laws that ban discrimination on the basis of sex, and they are using this argument to bootstrap in a ban on sexual orientation.”); Public Comment of Hans Bader, Senior Att’y & Counsel for Special Projects, Competitive Enter. Inst., at 2, Mar. 22, 2011, available at http://www.mindingthecampus.com/originals/2011/03/ by hans_bader_theres.html (last visited Sept. 9, 2011) (“The [Dear Colleague Letter] incorrectly equates homophobic harassment with sexual harassment forbidden by the sex discrimination law Title IX.”); Marcus Statement, *supra* note 103, at 24-25 app. A (discussing OCR’s prior reluctance to address anti-Semitic harassment under Title VI).

²⁵⁰ See, e.g., ED Response, *supra* note 145, at 24 (“Title IX does not prohibit discrimination based solely on sexual orientation; so OCR does not have jurisdiction over complaints alleging discrimination, including harassment, based on sexual orientation.”).

those who are LGBT or perceived to be LGBT. Title IX also protects against sex discrimination and harassment of students who do not conform to gender stereotypes. Both ED and DOJ enforce Title IX in this regard.

In January 2001, ED issued a document titled *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*.²⁵¹ While the guidance addressed sexual harassment generally, with respect to LGBT students it stated, in part:

Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.²⁵²

The guidance further explained that:

[G]ender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.²⁵³

ED re-circulated this guidance to schools in January 2006, enclosed with a Dear Colleague Letter issued by then-Assistant Secretary for Civil Rights Stephanie Monroe.²⁵⁴

In September 2008, ED again issued guidance on sexual harassment, which addressed sexual harassment of LGBT students. In a pamphlet titled *Sexual Harassment: It's Not Academic*, ED posed the question, "Are gay and lesbian students protected from sexual harassment?"²⁵⁵

²⁵¹ REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 220.

²⁵² *Id.* at 3.

²⁵³ *Id.*

²⁵⁴ See Sexual Harassment DCL, *supra* note 220 ("Longstanding legal authority establishes that harassment of students can be a form of sex discrimination covered by Title IX I am enclosing the Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties issued by OCR in January 2001."). Assistant Secretary Monroe's letter addressed sexual harassment issues generally; it did not specifically discuss sexual harassment of LGBT students or gender-based harassment.

The pamphlet answered:

Title IX prohibits harassing conduct that is of a sexual nature if it is unwelcome and denies or limits a student's ability to participate in or benefit from a school's program, regardless of whether the harassment is aimed at gay or lesbian students or is perpetrated by individuals of the same or opposite sex. *Title IX* does not address discrimination or other issues related to sexual orientation.²⁵⁶

ED once again issued guidance to schools in the Dear Colleague Letter released by Assistant Secretary for Civil Rights Russlynn Ali on October 26, 2010.²⁵⁷ In its discussion of gender-based harassment, ED explained:

Title IX prohibits harassment of both male and female students regardless of the sex of the harasser—*i.e.*, even if the harasser and target are members of the same sex. It also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to gender stereotypical notions of masculinity or femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.²⁵⁸

Further elaborating on Title IX protections of LGBT students, ED stated:

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also ... be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its

²⁵⁵ SEXUAL HARASSMENT: IT'S NOT ACADEMIC, *supra* note 35, at 8.

²⁵⁶ *Id.*

²⁵⁷ For further discussion of the Harassment/Bullying Dear Colleague Letter, please see *supra* Chapter 5.

²⁵⁸ Harassment/Bullying DCL, *supra* note 40, at 7-8; *see also* Marcus Statement, *supra* note 103, at 23-24 app. A ("The new OCR policy recognizes this legal development [that courts have interpreted sex discrimination to include various forms of sex-stereotyping], which is hardly new, and describes it in terms that are hardly radical").

obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment.²⁵⁹

On January 3, 2011, DOJ filed an amicus brief in *Pratt v. Indian River Cent. Sch. Dist.*²⁶⁰ that provided a legal argument for this Title IX analysis.²⁶¹ *Pratt* is an ongoing private civil suit, filed by a student who alleges that he has been targeted for harassment by classmates and school staff because he does not conform to masculine stereotypes and because of his sexual orientation; the student asserts that his school violated his rights under Title IX and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The DOJ participated in the case as amicus curiae.

The DOJ based its analysis on two U.S. Supreme Court cases, *Price Waterhouse v. Hopkins*²⁶² and *Oncale v. Sundowner Offshore Svcs., Inc.*²⁶³ Although both cases concerned allegations of sex discrimination under Title VII of the Civil Rights Act of 1964,²⁶⁴ which prohibits discrimination in the employment context, “[c]ourts examine Title VII precedent when analyzing discrimination ‘on the basis of sex’ under Title IX.”²⁶⁵

²⁵⁹ Harassment/Bullying DCL, *supra* note 40, at 8; *see also* Marcus Statement, *supra* note 103, at 23 app. A (“[This language] means only that a lesbian student who faces sexist treatment will get the same protections as any other girl. This proposition is entirely uncontroversial.”); Goss Graves Statement, *supra* note 37, at 11 (“[N]o federal law prohibits *per se* LGBT-based bullying or harassment. Although Title IX covers LGBT-related bullying and harassment when such conduct targets a student’s failure to conform to sex stereotypes, it does not prohibit LGBT bullying and harassment more generally.”).

²⁶⁰ *See* Brief of the United States as Amicus Curiae, *Pratt v. Indian River Cent. Sch. Dist.*, No. 09-0411 (N.D.N.Y. Aug. 13, 2010), available at www.justice.gov/crt/about/edu (follow “Cases” hyperlink under “Education”; then follow “Amicus Memorandum” hyperlink under “Pratt v. Indian River Central School District (N.D.N.Y.)”). The federal district court ultimately agreed with DOJ’s interpretation of Title IX as described in its brief. *See Pratt v. Indian River Cent. Sch. Dist.*, No. 7:09-CV-0411, slip op., 2011 WL 1204804, at *11 (N.D.N.Y. Mar. 29, 2011).

²⁶¹ *See also generally* Memorandum of Law in Support of the United States’ Motion to Intervene, *J.L. v. Mohawk Cent. Sch. Dist.*, No. 09-943 (N.D.N.Y. Jan. 14, 2010), available at <http://www.justice.gov/crt/about/edu/documents/mohawkmotion.pdf> (last visited May 11, 2011) (intervening in case regarding gender-stereotype harassment of an openly gay teenager based on jurisdiction under Title IX); Stipulation and Settlement Agreement, *J.L. v. Mohawk Cent. Sch. Dist.*, No. 09-943 (N.D.N.Y. Mar. 29, 2010), available at <http://www.justice.gov/crt/about/edu/documents/mohawksettle.pdf> (last visited May 11, 2011); Samuels Statement, *supra* note 61, at 5 (discussing *Mohawk* case); Complaint in Intervention, *Lovins v. Pleasant Hill Pub. Sch. Dist., R-III*, No. 99-0550 (W.D. Mo. July 20, 2000), available at <http://www.justice.gov/crt/about/edu/documents/lovinscom.php> (last visited May 20, 2011); Consent Order, *Lovins v. Pleasant Hill Pub. Sch. Dist., R-III*, No. 99-0550 (W.D. Mo. July 31, 2000), available at <http://www.justice.gov/crt/about/edu/documents/lovinsor.php> (last visited May 20, 2011).

²⁶² 490 U.S. 228 (1989), *superseded by statute on other grounds*.

²⁶³ 523 U.S. 75 (1998).

²⁶⁴ 42 U.S.C. § 2000e-2 (2006).

²⁶⁵ Brief of the United States as Amicus Curiae, *Pratt v. Indian River Cent. Sch. Dist.*, No. 09-0411, at 7 n.5 (N.D.N.Y. Aug. 13, 2010), available at www.justice.gov/crt/about/edu (follow “Cases” hyperlink under

Price Waterhouse involved the allegation that an accounting firm subjected a female employee to sex discrimination based on evidence that the firm declined to promote her due to her nonconformity with feminine stereotypes. A plurality of the Court concluded that, “[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”²⁶⁶ It reasoned further, “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”²⁶⁷ Likewise, agreeing with the plurality in concurrence, Justice O’Connor noted that “[t]here has been a strong showing that the employer has done exactly what Title VII forbids”²⁶⁸

Oncale involved allegations of male-on-male sexual harassment in the workplace. While working on an oil platform, the plaintiff was “subjected to sex-related, humiliating actions,” “physically assaulted ... in a sexual manner [and] threatened ... with rape,” and “‘picked [on] ... all the time ...’ and called ... a name suggesting homosexuality.”²⁶⁹ The Court found that same-sex sexual harassment is cognizable under Title VII. It held, “[N]othing in Title VII necessarily bars a claim of discrimination ‘because of ... sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”²⁷⁰

In its amicus brief in *Pratt*, DOJ asserted that harassment based on nonconformity with sex stereotypes is a cognizable claim under Title IX and the Equal Protection Clause. To support this statement, DOJ cited *Price Waterhouse*, noting that the Court held that “harassment

“Education”; then follow “Amicus Memorandum” hyperlink under “Pratt v. Indian River Central School District (N.D.N.Y.)” (citing *Davis*, 526 U.S. at 631; *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74 (1992)).

²⁶⁶ *Price Waterhouse*, 490 U.S. at 251.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 266 (O’Connor, J., concurring). Justice O’Connor’s agreement with the plurality on this issue means that a majority of the Court believed that Title VII forbids discrimination based on sex stereotypes.

²⁶⁹ *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 77 (1998) (citations omitted).

²⁷⁰ *Id.* at 79.

based on sex stereotyping constitute[s] discrimination on the basis of sex under Title VII.”²⁷¹ The DOJ said further that “[t]he standards for proving gender-based harassment under Title VII that were enunciated [by the Supreme Court] in *Oncale* are often cited by courts reviewing similar claims under Title IX.”²⁷²

The DOJ then listed several district-court cases that have found claims of harassment based on nonconformity with sex stereotypes to be cognizable under Title IX:

See, e.g., Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) (“Discrimination because one’s behavior does not ‘conform to stereotypical ideas’ of one’s gender can amount to actionable discrimination ‘based on sex’”); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (“The language set forth in the OCR Guidance and the holding in *Oncale* clearly support the conclusion that a female student, subjected to pejorative, female homosexual names by other female students, can bring a claim of sexual harassment under Title IX”); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 964-65 (D. Kan. 2005) (recognizing that a gender stereotyping claim may be used to establish that same-sex harassment is based on sex under Title IX); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d [1080,] 1090-93 [D. Minn. 2000] (relying on *Price Waterhouse*, *Oncale*, *Davis*, and the relationship between Title VII and Title IX to hold that the plaintiff had stated a cognizable harassment claim for nonconformity with sex stereotypes under Title IX).²⁷³

The DOJ next stated that the presence of sexual orientation harassment does not defeat a claim of sex stereotyping harassment.²⁷⁴ As the brief explained, “[B]eing gay does not deny a student his right to be free from sex-based discrimination pursuant to Title IX and the Equal Protection Clause.”²⁷⁵ In response to the assertion that the sex stereotyping claim is a means of “somehow trying to ‘bootstrap protection for sexual orientation’ into Title IX,” DOJ said

²⁷¹ See Brief of the United States as Amicus Curiae, *Pratt v. Indian River Cent. Sch. Dist.*, No. 09-0411, at 7 (N.D.N.Y. Aug. 13, 2010), available at www.justice.gov/crt/about/edu (follow “Cases” hyperlink under “Education”; then follow “Amicus Memorandum” hyperlink under “Pratt v. Indian River Central School District (N.D.N.Y.)”) (citing *Price Waterhouse*, 490 U.S. at 251-52).

²⁷² *Id.* at 7 n.5 (citing *Oncale*, 523 U.S. 75; *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1091 (D. Minn. 2000)).

²⁷³ *Id.* at 7-8.

²⁷⁴ See *id.* at 9 (“[H]arassment ‘based on sexual orientation does not immunize these Defendants from liability under Title IX for harassment and discrimination based on sex.’”) (quoting Pls.’ Mem. at 21).

²⁷⁵ *Id.* at 12 n.9 (citing OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES at 3 (Jan. 2001); *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

that the U.S. Supreme Court in *Oncale* “cautioned against drawing such superficial, perfunctory conclusions about sex-based harassment”²⁷⁶ It then quoted *Oncale*:

“In same sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. ... The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”²⁷⁷

As an example of such “careful consideration,” DOJ quoted at length the district court’s decision in *Montgomery v. Indep. Sch. Dist. No. 709*:

“Plaintiff contends that the students engaged in the offensive conduct at issue not only because they believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity. The facts alleged in plaintiff’s complaint support this characterization of the students’ misconduct. He specifically alleges that some of the students called him ‘Jessica,’ a girl’s name, indicating a belief that he exhibited feminine characteristics. Moreover, the Court finds important the fact that plaintiff’s peers began harassing him as early as kindergarten. It is highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference, or for that matter, that he even understood what it meant to be ‘homosexual’ or ‘heterosexual.’ The likelihood that he openly identified himself as gay or that he engaged in any homosexual conduct at that age is quite low. It is much more plausible that the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy. Plaintiff thus appears to plead facts that would support a claim of harassment based on the perception that he did not fit his peers’ stereotypes of masculinity.”²⁷⁸

Likewise, DOJ also approvingly described the district court’s interpretation of *Oncale* in *Riccio v. New Haven Bd. of Educ.* In response to the defendants’ assertion that a female plaintiff did not suffer sexual harassment where her ridicule contained anti-gay slurs, the *Riccio* court stated:

²⁷⁶ *Id.* at 11.

²⁷⁷ *Id.* (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81-82 (1998)).

²⁷⁸ *Id.* at 11-12 (quoting *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. Aug. 23, 2000)).

“In *Oncale*, the plaintiff was a male being harassed physically and verbally by other males. The derogatory language directed at Mr. Oncale was homosexual in its nature, as in [the plaintiff’s] case. Despite the language being of a homosexual nature in *Oncale*, the Supreme Court concluded that the harassment constituted sexual harassment.”²⁷⁹

The DOJ concluded, “Because the case law establishes that a plaintiff can concurrently assert claims for sex-based harassment and sexual-orientation-based harassment (even if the latter claims are not cognizable under the same laws), [the plaintiff] should be given an opportunity to prove that the alleged harassment is based on sex under Title IX and the Equal Protection Clause.”²⁸⁰

Although ED and DOJ enforce Title IX to protect LGBT students where they are sexually harassed or harassed based on sex stereotyping, a gap remains in their enforcement: federal civil rights law does not protect against harassment based on sexual orientation or gender identity.²⁸¹ Thus, students are not protected by federal law if they are harassed based solely on their sexual orientation or gender identity without accompanying sexual harassment or sex-stereotyping.²⁸² Such a dichotomy may create a perverse incentive for alleged discriminators to evade Title IX liability by asserting that students’ harassment is based entirely on homophobic animus.²⁸³ Advocates have urged Congress to pass legislation to

²⁷⁹ *Id.* at 10 (quoting *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. Dec. 26, 2006)).

²⁸⁰ *Id.* at 12.

²⁸¹ *See, e.g.*, Ali Statement, *supra* note 6, at 4 (“Title IX does not prohibit discrimination based solely on sexual orientation.”).

²⁸² *See* Byard Statement, *supra* note 73, at 7 n.18 (“To be sure, LGBT students may be protected by such laws when they are victims of otherwise covered action—such as in cases where sexual harassment occurs, and the victim of the harassment is a gay student. That protection, however, is not the same as protection against anti-gay harassment affecting that student.”); Public Comment of Sen. Al Franken, U.S. Senate, at 3, Apr. 29, 2011, available at <http://www.eusccr.com/29.%20U.S.%20Sen.%20Al%20Franken.pdf> (last visited June 22, 2011) [hereinafter Franken Comment] (“[S]ince Title IX can only protect LGBT students from bullying based on gender stereotyping, they lack its protection against bullying based on sexual orientation Without Title IX protections, many victims of LGBT bullying, harassment, and discrimination therefore remain without recourse. This is a significant gap in protection for a group of students that currently faces severe harassment and discrimination in schools.”).

²⁸³ *See, e.g.*, *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 225 (D. Conn. 2006) (“[Defendant] contends that the thrust of the slurs were of a sexual orientation nature and not gender specific. Therefore, [Defendant] argues that Andree does not have a claim for sexual harassment because Title IX does not provide a remedy for discrimination based on sexual orientation.”) (citation omitted). It should be noted that the *Riccio* court rejected this argument based on the facts of the case.

address this issue²⁸⁴ and, to this end, several relevant bills have been introduced in the 112th Congress. The Student Non-Discrimination Act is designed to address “the significant gap in protection” for LGBT students who, under Title IX, “lack protection against bullying based on sexual orientation.”²⁸⁵ In addition, a more general anti-bullying bill, the Safe Schools Improvement Act, enumerates sexual orientation as one of several protected groups.²⁸⁶

Title VI and Peer-to-Peer Violence Related to Religion

Although Title VI does not prohibit discrimination on the basis of religion, it does forbid discrimination on the basis of race, color, or national origin. Both ED and DOJ²⁸⁷ have taken the position that Title VI prohibits discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics, regardless of whether those groups share a common faith.²⁸⁸

²⁸⁴ See, e.g., Public Comment of Rep. Jared Polis & Rep. Ileana Ros-Lehtinen, U.S. House of Representatives, at 2, May 4, 2011, available at <http://www.eusccr.com/30.%20U.S.%20Rep.%20Jared%20Polis%20&%20U.S.%20Rep.%20Ileana%20Ros-Lehtinen.pdf> (last visited June 22, 2011) (“While Title IX of the Education Amendments does afford protections against sex and gender-based discrimination, including harassment, the Congress must empower OCR to do more to properly protect LGBT students by passing explicit statutory protections on the basis of sexual orientation and gender. Such a step would serve to fill a glaring existing gap in our federal civil rights laws that leave one of the most vulnerable students [sic] populations without the protections they need.”).

²⁸⁵ Franken Comment, *supra* note 282, at 3. The bill provides, in part:

SEC. 4. PROHIBITION AGAINST DISCRIMINATION.

(a) **IN GENERAL.**—No student shall, on the basis of actual or perceived sexual orientation or gender identity of such individual or of a person with whom the student associates or has associated, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(b) **HARASSMENT.**—For purposes of this Act, discrimination includes harassment of a student on the basis of actual or perceived sexual orientation or gender identity of such student or of a person with whom the student associates or has associated.

S. 555, 112th Cong. (2011). The companion bill in the House of Representatives is H.R. 998, 112th Cong. (2011).

²⁸⁶ H.R. 1648, 112th Cong. (2011); S. 506, 112th Cong. (2011). The Safe Schools Improvement Act would establish state reporting requirements, needs assessment, and technical assistance, and require local educational agency discipline policies, indicators, and grievance procedures, and data collection by the Commissioner for Education Statistics. According to its sponsor, Representative Linda Sanchez, H.R. 1648 was designed “to ensure that schools and districts develop and use comprehensive and effective student conduct policies that include clear prohibitions regarding bullying and harassment ... and ... ensure that States and districts maintain and report data regarding incidents of bullying and harassment” Public Comment of Rep. Linda Sanchez, U.S. House of Representatives, at 1, May 12, 2011, available at <http://www.eusccr.com/31.%20U.S.%20Rep.%20Linda%20T.%20Sanchez.pdf> (last visited June 22, 2011).

²⁸⁷ The DOJ also addresses religion-based discrimination under Title IV.

²⁸⁸ See, e.g., ED Response, *supra* note 145, at 23 (“Although OCR does not have the statutory authority to respond to complaints based solely on religion, a group’s common faith does not divest OCR of its Title VI

On September 19, 2001—eight days after the September 11 terrorist attacks—Secretary of Education Rod Paige issued a Dear Colleague Letter expressing concern about “increasing news reports of incidents of harassment and violence directed at persons perceived to be Arab Americans or of Middle Eastern or South Asian origin, including children.”²⁸⁹ Secretary Paige noted that harassment “can take many forms, from abusive name calling to violent crimes directed at a student because of his or her race or ancestry, the country of origin of the student’s family, or the student’s cultural traditions.”²⁹⁰ He continued, “I take this opportunity to highlight our responsibilities under Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination based on race, color, or national origin by recipients of federal financial assistance.”²⁹¹ He further stated:

Racial or ethnic harassment is unlawful. It can deny or limit a student’s ability to receive or participate in the benefits, services, or opportunities in a school’s program—simply speaking it denies students the right to an education free of discrimination. The existence of a racially hostile environment that is encouraged, accepted, or tolerated by a school, college, or university constitutes different treatment of students on the basis of race.

In response to last week’s events specifically, I urge you to make sure that assemblies, classroom discussions, and other school activities held to honor victims of the tragedies do not inadvertently foster the targeting of Arab-American students for harassment or blame.²⁹²

In September 2004, ED issued guidance further elaborating on its enforcement of Title VI with respect to members of religious groups. In a Dear Colleague Letter by Kenneth L. Marcus, then-Acting Assistant Secretary for Civil Rights, ED explained, “Although OCR’s jurisdiction does not extend to religious discrimination, OCR does aggressively enforce Title VI, which prohibits discrimination on the basis of race or national origin In OCR’s experience, some cases of religious discrimination may also involve racial [or] ethnic ...

jurisdiction over discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics.”); Marcus Statement, *supra* note 103, at 6 (“[Because federal civil rights laws are silent as to religion,] the federal administrative civil rights apparatus lacks jurisdiction to investigate religious discrimination claims in the public schools for cases involving student-on-student harassment or other forms of religious discrimination. By contrast, [OCR], which I once led, would have jurisdiction in those same situations if the basis of the harassment claims were racial, ethnic or disability-related rather than religious.”).

²⁸⁹ Muslim/Arab DCL, *supra* note 223.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

discrimination.”²⁹³ The Letter warned, “[W]e must remain particularly attentive to the claims of students who may be targeted for harassment based on their membership in groups that exhibit both ethnic and religious characteristics, such as Arab Muslims, Jewish Americans and Sikhs.”²⁹⁴ It continued:

Groups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith.^[295] Similarly, the existence of facts indicative of religious discrimination does not divest OCR of jurisdiction to investigate and remedy allegations of race or ethnic discrimination. OCR will exercise its jurisdiction to enforce the Title VI prohibition against national origin discrimination, regardless of whether the groups targeted for discrimination also exhibit religious characteristics. Thus, for example, OCR aggressively investigates alleged race or ethnic harassment against Arab Muslim, Sikh and Jewish students.²⁹⁶

On September 8, 2010, in a letter from Assistant Attorney General Thomas Perez to Assistant Secretary Russlynn Ali, DOJ endorsed the approach to Title VI outlined in the 2004 Dear Colleague Letter. Asked to address “whether, and under what circumstances, discrimination against persons belonging to discrete religious groups may violate Title VI,” DOJ quoted the 2004 Dear Colleague Letter at length.²⁹⁷

²⁹³ Religion DCL, *supra* note 224.

²⁹⁴ *Id.*

²⁹⁵ Mr. Marcus has indicated that this policy was not enforced prior to 2004 or between 2004 and 2010. *See* Marcus Statement, *supra* note 103, at 6 (“[U]ntil 2004, OCR typically refused to investigate anti-Semitism complaints on the grounds that Jews are a religious group, not a racial or national origin group.”); *see also id.* at 7 (“Over the following six years, my OCR successors generally did not adhere to these policy statements [addressed in the 2004 Dear Colleague Letter.]”); *id.* at 25 app. A (“OCR’s leadership during the second George W. Bush administration and at the outset of the Obama administration were differently inclined, and they tended to disregard the 2004 policy.”). Current OCR leadership takes a different view, stating that “OCR’s interpretation of its Title VI jurisdiction has not changed” from 2001 to present: “Although OCR does not have the statutory authority to respond to complaints based solely on religion, a group’s common faith does not divest OCR of its title VI jurisdiction over discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics.” ED Response, *supra* note 145, at 23.

²⁹⁶ Religion DCL, *supra* note 224. The 2004 Dear Colleague Letter also addressed the enforcement of Title IX with respect to students who are members of religious groups. Upon describing “allegations of race and sex discrimination against white, male Christian students,” the Letter stated: “While OCR lacks jurisdiction to prohibit discrimination against students based on religion per se, OCR will aggressively prosecute harassment of religious students who are targeted on the basis of race or gender, as well as racial or gender harassment of students who are targeted on the basis of religion.” *Id.*

²⁹⁷ *See* Letter from Thomas E. Perez, Asst. Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Russlynn H. Ali, Asst. Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Sept. 8, 2010, at 1, *available at* http://www.justice.gov/crt/about/cor/TitleVI/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf (last visited June 22, 2010).

It then concluded:

We agree with that analysis. Although Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other religious groups violates Title VI when that discrimination is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than its members' religious practice. Title VI further prohibits discrimination against an individual where it is based on actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.²⁹⁸

ED subsequently issued similar guidance to schools in its Dear Colleague Letter of October 26, 2010. After providing a hypothetical involving anti-Semitic harassment in a middle school, ED explained:

While Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (*e.g.*, Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices. A school also has responsibilities under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.²⁹⁹

Although ED enforces Title VI with respect to harassment of members of religious groups based on their shared ancestry or ethnic characteristics, Title VI itself leaves a hole in ED's enforcement. That is, Title VI does not protect against harassment of students based solely on their religious faith, nor does it protect against harassment of students who belong to religious groups that do not have shared ancestry or ethnic characteristics.³⁰⁰ As a result, ED

²⁹⁸ *Id.* at 1-2.

²⁹⁹ Harassment/Bullying DCL, *supra* note 40, at 5 (footnotes omitted).

³⁰⁰ See Briefing Transcript, *supra* note 7, at 234:19-235:1 (Marcus Testimony) (“[T]here are some religions that do not claim any sort of ethnic or ancestral particularity, but rather more of a universal characteristic and I think that is a large percentage of the students in the United States, who do not belong to such. So I would say that most forms of religious harassment would not be covered.”).

cannot protect students from the “peculiar harms created by religious bigotry.”³⁰¹ Furthermore, under current law, religious groups with shared ancestry or ethnic characteristics receive certain protections that religious groups without shared ancestry or ethnic characteristics do not receive;³⁰² and would-be discriminators can evade Title VI liability by claiming that students harass based solely on religious bigotry.³⁰³

Advocates urge Congress to close this “loophole” by passing legislation that protects against harassment of students based on their religion.³⁰⁴ Even the current OCR policy, of enforcing Title VI to prohibit harassment of religious groups based on shared ancestry or ethnic characteristics, has not always been followed consistently and may not be followed in the future without a clearer statutory framework.³⁰⁵

Two recent bills before Congress have addressed harassment based on religion. The Safe Schools Improvement Act lists religion as one of several groups enumerated for protection from bullying and harassment.³⁰⁶ And in the 111th Congress, the legislature considered a bill

³⁰¹ Marcus Statement, *supra* note 103, at 8; *see also id.* at 9 (“Congress must prohibit religious discrimination in the public schools if religious students are to enjoy the equal educational opportunity guaranteed by the Equal Protection Clause of the Fourteenth Amendment and the full range of religious freedoms protected under the Free Exercise Clause of the First Amendment.”).

³⁰² *See id.* at 11-12.

³⁰³ *See id.* at 10.

³⁰⁴ *See id.* at 8 (“Assistant Secretary Ali’s policy is a marvelous step forward, but it does not fully encompass the forms of religious harassment that students still face in the public schools for the simple reason that her agency lacks the authority to do so without further legislation.”); Singh Statement, *supra* note 104, at 4 (urging Congress to “resolve [this] lingering deficiency in federal anti-discrimination law”); *id.*:

It is our experience that Sikh students are often targeted for bullying, violence, and harassment because of their Sikh identity. . . . Given that religion is recognized as a protected category in the context of employment and accommodations under the 1964 Civil Rights Act; given that religion is recognized as a protected category under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA); and given the historic significance of religion as our nation’s first freedom, there is no reason why religion should be excluded as a protected category under Title VI. (emphasis in original)

³⁰⁵ *See* Marcus Statement, *supra* note 103, at 13 (“OCR’s adherence to its own guidance has been questionable at best over the last few years. Indeed, its failure to enforce the 2004 Policy between 2005 and 2010 suggests that more formal action is required to save the Ali Policy from the same non-enforcement that its predecessor had faced.”) (footnote omitted); *see also* Public Comment of Zionist Organization of America, at 3, May 27, 2011, available at

<http://www.eusccr.com/ZOA%20statement%20to%20US%20Civ%20Rts%20Cmsn%20on%20fed%20resp%20to%20bullying%205-11.pdf> (last visited on Sept. 15, 2011) (“Title VI protections should not be subject to agency interpretation. Congress should enact legislation that enshrines in the law that federally funded schools must protect students from religious harassment and intimidation, in the same way that they are already obligated to protect against discrimination based on ‘race, color, or national origin’ under Title VI.”).

³⁰⁶ H.R. 1648, 112th Cong. (2011); S. 506, 112th Cong. (2011); *see also supra* note 286.

to “amend Title VI of the Civil Rights Act of 1964 to prohibit discrimination on the grounds of religion in educational programs or activities.”³⁰⁷

³⁰⁷ H.R. 6216, 111th Cong. (2010); *see also* S. 3821, 111th Cong. (2010).

Chapter 7. ADDITIONAL CONCERNS RELATED TO THE FEDERAL RESPONSE

Aside from jurisdiction, concerns regarding the federal response to harassment have focused on enforcement standards, issues of federalism/local control, and the First Amendment.

Enforcement Standards

Some commentators have criticized ED due to the scope of its anti-harassment policy. They contend that the legal standards set forth in ED’s Dear Colleague Letter, and elsewhere, are more expansive than the legal standards established by case law.³⁰⁸ The DOJ applies these same standards when it seeks injunctive relief in court. There are three specific standards at issue:

- **Notice Requirement.** The Dear Colleague Letter instructs that a school “is responsible for addressing harassment incidents about which it *knows or reasonably should have known.*”³⁰⁹ This differs from the Supreme Court’s statement in *Davis v. Monroe County Board of Education* that schools are liable for damages “only where they are *deliberately indifferent* to [harassment], of which they have *actual* knowledge”³¹⁰
- **Hostile Environment, Prong I.** The Dear Colleague Letter says that harassment “creates a hostile environment when the conduct is sufficiently severe, pervasive *or*

³⁰⁸ See Statement of Francisco M. Negrón, Jr., Gen. Counsel, Nat’l Sch. Bds. Ass’n, at 5, May 13, 2011, available at <http://www.eusccr.com/24.%20Francisco%20Negrón,%20National%20School%20Boards%20Association.pdf> (last visited June 22, 2011) [hereinafter Negrón Statement] (“From a legal perspective, OCR has opted to adopt a stricter agency enforcement standard, even though the liability standard under federal laws handed down in *Davis* very clearly limits a school district’s legal obligations”); see also, e.g., Statement of Dr. John C. Eastman, Professor, Chapman Univ. Sch. of Law, at 5-6, May 13, 2011, available at <http://www.eusccr.com/7.%20John%20Eastman,%20Chapman%20University%20School%20of%20Law.pdf> (last visited June 22, 2011) [hereinafter Eastman Statement].

³⁰⁹ Harassment/Bullying DCL, *supra* note 40, at 2 (emphasis added).

³¹⁰ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) (emphasis added); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); see also Eastman Statement, *supra* note 308, at 5-6 (discussing the notice standard).

persistent”³¹¹ *Davis*, however, says that damages are available “only where the behavior is so severe, pervasive, and *objectively offensive*”³¹²

- **Hostile Environment, Prong II.** The Dear Colleague Letter further states that a hostile environment exists where, in part, the harassment “interfere[s] with or limit[s] a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”³¹³ *Davis*, meanwhile, says that a hostile environment requires that the harassment “can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”³¹⁴

The Supreme Court in Gebser and Davis was explicit that the liability standards established in those cases are limited to private actions for monetary damages.

Russlynn Ali, Dept. of Education

Letter to Francisco M. Negrón, Jr.
(March 25, 2011).

ED has defended its notice standard on grounds that, whereas *Davis* involved a private suit for monetary damages, OCR standards are part of their administrative enforcement:

The Supreme Court in *Gebser* [*v. Lago Vista Indep. School Dist.*] and *Davis* was explicit that the liability standards established in those cases are limited to private actions for monetary damages. The Court was concerned with the possibility of a monetary damages award against a school for harassment about which it had not known. In contrast, the process of OCR’s administrative enforcement requires OCR to make schools aware of civil rights violations and to seek voluntary corrective action to

achieve compliance before pursuing fund termination or other enforcement mechanisms.³¹⁵

Because of this distinction, ED says that it may apply a different notice standard in its administrative enforcement than courts apply in private suits for money damages.³¹⁶

³¹¹ Harassment/Bullying DCL, *supra* note 40, at 2 (emphasis added).

³¹² *Davis*, 526 U.S. at 652 (emphasis added).

³¹³ Harassment/Bullying DCL, *supra* note 40, at 2.

³¹⁴ *Davis*, 526 U.S. at 650.

³¹⁵ Letter from Russlynn Ali, Asst. Sec’y for Civil Rights, U.S. Dep’t of Educ., to Francisco M. Negrón, Jr., Gen’l Counsel, Nat’l Sch. Bds. Ass’n, at 3-4, Mar. 25, 2011, available at <http://www.nsba.org/SchoolLaw/Issues/Equity/Resources/ED-Response-to-NSBA-GCs-Letter-to-ED-on-OCR-Bullying-Guidelines.pdf> (last visited May 12, 2011) [hereinafter Ali Letter to Negrón]; see also Briefing Transcript, *supra* note 7 at 13:10-14 (Ali Testimony) (“[W]e are talking in [*Davis*] about very different circumstances. We’re talking about monetary damages in the private litigation sense. Courts have recognized that we set different standards, [*Davis*] itself did.”).

Specifically, ED cites the Supreme Court in *Gebser*, which notes the distinction between standards used in administrative enforcement and private suits for damages:

[T]he failure to promulgate a grievance procedure does not itself constitute “discrimination” under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute’s nondiscrimination mandate, even if those requirements do not purport to represent a definition of discrimination under the statute. We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.³¹⁷

ED has further stated that the hostile-environment standards it uses are consistent with *Davis*, even if they include different terms:

Although the terms used by the Court in *Davis* are in some ways different from the words used to define hostile environment harassment in OCR’s guidance documents, the definitions are consistent. As we explained in our 2001 Sexual Harassment Guidance: “Both the Court’s and the Department’s definitions are contextual descriptions intended to capture the same concept—that under Title IX, the conduct must be sufficiently serious that it adversely affects a student’s ability to participate in or benefit from the school’s program. In determining whether harassment is actionable, both *Davis* and the Department tell schools to look at the ‘constellation of surrounding circumstances, expectations and relationships,’ and the Court in *Davis* cited approvingly the underlying core factors described in the 1997 guidance for evaluating the context of the harassment.”³¹⁸

³¹⁶ See Ali Letter to Negrón, *supra* note 315, at 4 (“The Court has acknowledged the authority of Federal agencies, such as the Department, to ‘promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate’ in circumstances that would not give rise to a claim for monetary damages.”) (citing *Gebser*, 524 U.S. at 292); see also Marcus Statement, *supra* note 103, at 22 app. A (“It is at least arguable that federal funding institutions’ obligations to ensure that their funds are not used in a manner that violates constitutional requirements may sometimes entail standards that are more stringent than those that courts craft for damages cases.”); Briefing Transcript, *supra* note 7, at 58:23-59:6 (Goss Graves Testimony) (“[E]ven though some courts around the country have interpreted the Title IX standards for damages in ways that have really raised the bar for being able to bring these cases, the standard for administrative enforcement and for injunctive relief is whether school officials knew or should have known about the harassment. And this [‘]should have known[’] standard applies also when individuals file a lawsuit seeking injunctive relief only.”); *id.* at 59:14-18 (Goss Graves Testimony) (“[T]he purpose of the [*Davis*] standard is to really ensure that the school is held liable for damages for its own acts and not responding to harassment not for a third party’s act.”).

³¹⁷ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 292 (1998) (citations omitted).

³¹⁸ Ali Letter to Negrón, *supra* note 315, at 4-5 (quoting REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 220, at vi (citing *Davis*, 526 U.S. at 651)).

Finally, ED has stated that the standards outlined in the Dear Colleague Letter are not new, but are instead a restatement of standards that OCR has used for nearly 20 years:

They are the same standards that were set forth by OCR in its 1994 guidance on racial harassment, 1997 guidance on sexual harassment, 2000 guidance on disability harassment, 2001 revised guidance on sexual harassment, which was reissued with an accompanying Dear Colleague Letter in 2006, and a 2008 pamphlet on sexual harassment.³¹⁹

Nevertheless, critics have expressed concerns with the standards OCR uses. At the Commission’s Briefing on May 13, 2011, one panelist, Professor John Eastman, of Chapman University School of Law, criticized ED’s use of standards that differ from *Davis*. He interpreted *Gebser* more narrowly than OCR does,³²⁰ and asserted that “[a]n agency can impose regulations that are ancillary to the enforcement of a statute authorized by an enumerated power, such as rules requiring the reporting of certain data that is necessary to determine compliance with the underlying statute, but it cannot make up new prohibitions and substantive requirements that are not part of the relevant statute.”³²¹ He concluded that “[t]he latitude given to the agencies is narrow, and the deviations between the Department’s ‘Dear Colleague’ letter last October and the reasonable interpretation of the relevant civil rights statute are large”³²² Professor Eastman expressed specific concerns

Agencies generally have authority to promulgate and enforce requirements that effectuate the statute’s nondiscrimination mandate ... even if those requirements do not purport to represent a definition of discrimination under the statute.

Gebser v. Lago Vista

Indep. Sch. Dist.

524 U.S. 274, 290, 292 (1998)

³¹⁹ *Id.* at 2. See also Marcus Statement, *supra* note 103, at 20-21 app. A (“In fairness, it should be acknowledged that this deviation is not unique to the Obama administration’s approach, since the new policy merely reiterates a standard that OCR announced as early as 1994 and which OCR reiterated during the second George W. Bush administration.”) (citations omitted).

³²⁰ Eastman Statement, *supra* note 308, at 4 (“[T]he Department’s claim that the liability standards of *Davis* do not limit the terms of its funding contracts with school districts is highly misleading—at best.”).

³²¹ *Id.*; see also Briefing Transcript, *supra* note 7, at 96:20-23 (Eastman Testimony) (“The Department seems to claim such authority when it cites the *Gebser* case from 1998, but I think it’s misreading that case.”).

³²² See Eastman Statement, *supra* note 308, at 4; see also Briefing Transcript, *supra* note 7, at 96:9-19 (Eastman Testimony) (“[Congress] may not use its spending power as a pretext to accomplish indirectly what it cannot do directly. ... [I]t is even more clearly the case that an administrative agency cannot impose new conditions on the receipt of federal funding that are not authorized by law.”); *id.* at 109:14-20 (Eastman Testimony) (“And the Court has also been very clear that we can’t use the spending power to accomplish things that we don’t have other authority to accomplish. What OCR seems to be doing here is using its conditions on spending in an effort to obtain a regulatory regime that they could not do directly”).

regarding the Dear Colleague Letter's discussions of the notice standard, the kinds of conduct that constitute harassment, and remedial requirements.³²³ Critiques have been made regarding each of OCR's enforcement standards. One criticism, for instance, focuses on the breadth of OCR's notice standard. Critics state that, whereas OCR holds schools accountable for harassment about which they "know or reasonably should have known," this is looser than the *Davis* requirement that schools only be liable for damages for harassment about which they have "actual knowledge" and are "deliberately indifferent." Under this reasoning, OCR's notice standard could, at least in theory, include conduct that a school is not actually aware of, or that it knows about but does not treat with deliberate indifference; under *Davis*, the same school would not be liable for damages in a private suit. OCR, however, has disagreed with this critique, drawing a distinction between retrospective liability addressed in *Davis* and prospective remedies in OCR's administrative-enforcement proceedings.³²⁴ OCR asserts that no school would be punished in such a manner because OCR provides schools with notice of their violation and an opportunity to correct it before it pursues termination of federal funding.³²⁵

Another critique of OCR's standards centers on the first part of the "hostile environment" standard, that the conduct be "sufficiently severe, pervasive, or persistent." By using a disjunctive standard ("or persistent"), OCR might find a single incident to rise to the level of a civil rights violation where it is "sufficiently severe" but not pervasive or persistent.³²⁶ Jocelyn Samuels, of the U.S. Department of Justice, noted this in her testimony to the Commission.³²⁷ This standard differs from the conjunctive *Davis* standard ("so severe, pervasive, and objectively offensive"), which precludes a single incident from triggering

³²³ See Eastman Statement, *supra* note 308, at 5-7.

³²⁴ Letter from Arthur R. Goldman, Customer Serv. & Tech. Team Leader, Office for Civil Rights, U.S. Dep't of Educ., to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights, at 5, July 15, 2011 ("The concern over imposing *retrospective* liability for damages where a school did not have actual knowledge that its actions were unlawful is of no moment in administrative-enforcement proceedings, where the remedies are prospective and where even any prospective loss of federal funding can be absolutely avoided by curing the violation.") (emphasis in original).

³²⁵ See, e.g., Ali Letter to Negrón, *supra* note 315, at 4 ("[T]he process of OCR's administrative enforcement requires OCR to make schools aware of civil rights violations and to seek voluntary corrective action to achieve compliance before pursuing fund termination or other enforcement mechanisms.").

³²⁶ See, e.g., Marcus Statement, *supra* note 103, at 21 app. A.

³²⁷ See Briefing Transcript, *supra* note 7, at 48:24-49:4 ("[W]e do not have jurisdiction and would not take action against single incidents of playground taunting absent something like physical conduct that made a single incident sufficiently severe or pervasive to create a hostile environment.").

damages liability.³²⁸ Critics have said that this difference risks overstepping by the federal government³²⁹ and violations of students' free speech rights,³³⁰ and may misinterpret Supreme Court precedent.³³¹ A second critique of ED's hostile-environment standard has involved the potential breadth of the second prong. Whereas the Dear Colleague Letter states that harassment creates a hostile environment where it, in part, "interfere[s] or limit[s] a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school," *Davis* says the harassment must "deprive the victims of access to educational opportunities or benefits provided by the school." The Foundation for Individual Rights in Education, for instance, criticized the standard's potential breadth in its Public Comment, saying, "This is problematic because 'limit' is a broad term that could encompass effects of widely varying severity, setting a far lower bar for conduct that constitutes harassment."³³²

Others have pointed out that the terms used in the 2010 Dear Colleague Letter's hostile-environment standard differ from those used in previous guidance issued by OCR. Specifically, OCR uses the phrase "interfere with or limit" rather than the phrase from the

³²⁸ The standard has also been criticized for allegedly omitting "an objective component—a 'reasonable person' standard—in the assessment of harassment claims." See Public Comment of Foundation for Individual Rights in Education (FIRE), at 3, May 26, 2011, available at <http://thefire.org/public/pdfs/6aefda8e736cc0f8d633980f9549eeae.pdf?direct> (last visited Sept. 9, 2011) [hereinafter FIRE Comment]. It has been alleged that "[t]he loss of the crucial 'reasonable person' standard means that a school's most sensitive students effectively determine what speech is prohibited." *Id.* ED, however, maintains that this analysis is incorrect; it is ED's policy to "consider[] the conduct from both a subjective and objective perspective." See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 220, at 5 (citations omitted); First Amendment DCL, *supra* note 225 ("OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position").

³²⁹ See Briefing Transcript, *supra* note 7, at 251:3-254:5 (Negrón Testimony). For further discussion of federalism concerns, please see pp. 68-73.

³³⁰ See *id.* at 297:14-298:21 (Volokh Testimony); Public Comment of National Coalition Against Censorship, at 2-7, May 27, 2011, available at <http://www.scribd.com/doc/56492194/Comments-on-Federal-Anti-Bullying-Policy-on-Free-Expression> (last visited Sept. 9, 2011) [hereinafter National Coalition Against Censorship Comment]; FIRE Comment, *supra* note 328, at 2 ("Because of the careful balance struck by the Court in enunciating the *Davis* standard, we believe that any new guidance or legislation must ... explicitly reference or incorporate the *Davis* standard to ensure that students' right to free expression is not inadvertently compromised by schools' efforts to address and eliminate harassment."). For further discussion of First Amendment concerns, please see pp. 74-84.

³³¹ See, e.g., Marcus Statement, *supra* note 103, at 22 app. A ("OCR would face a steep challenge in defending its policy in federal court, given that the Supreme Court rejected the single-incident approach based not upon such issues as punitive damages or lawyers' fees but upon its assessment of congressional intent in drafting the relevant language.").

³³² FIRE Comment, *supra* note 328, at 3.

2001 Revised Sexual Harassment Guidance, “denies or limits.”³³³ Critics claim that the word “interfere”—instead of “deny”—shifts the standard away from the standard in *Davis*. OCR has maintained, meanwhile, that the 2010 definition “is neither new nor inconsistent with *Davis*.”³³⁴ Although the words in the 2001 Revised Sexual Harassment Guidance were put forth soon after the *Davis* decision, and were more similar to the *Davis* standard than previous standards (it changed the previous term, “limit,”³³⁵ to “denies or limits”), ED explicitly stated at the time that it did not intend its 2001 guidance to change its standards in response to *Davis*. Indeed, in its November 2000 Notice of Proposed Revised Guidance, ED said:

An agency can impose regulations that are ancillary to the enforcement of a statute ... but it cannot make up new prohibitions and substantive requirements that are not part of the relevant statute.

John Eastman, Chapman University School of Law

Written Statement p. 4.

[I]n the proposed revised guidance the definition of conduct that creates a hostile environment is substantively the same as in the 1997 guidance, but the discussion contains

several revisions to clarify that the *Davis* definition and the guidance definition are consistent. ... Although the terms used by the Court in *Davis* are in some ways different from the words used to define hostile environment harassment in the 1997 guidance, the definitions are consistent. The Court’s definition, like the Department’s 1997 guidance, is a contextual description intended to capture the same concept—that under Title IX the conduct must

³³³ See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 220, at 5.

³³⁴ See Ali Letter to Negrón, *supra* note 315, at 5. In fact, OCR, has used somewhat different terminology throughout its guidance documents on harassment. For instance, its 1994 Racial Harassment guidance used the term “interfere with or limit,” see Racial Incidents and Harassment Against Students Guidance, *supra* note 222, at 11,449 (“A violation of title VI may also be found if a recipient has created or is responsible for a racially hostile environment—i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent *so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges* provided by a recipient.”) (emphasis added), and its 2000 Disability Dear Colleague Letter used the term “adversely affect.” See Disability DCL, *supra* note 63 (“A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to *adversely affect* the student’s ability to participate in or benefit from the educational program.”) (emphasis added).

³³⁵ OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE (1997) available at <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (last visited June 8, 2011) (“sufficiently severe, persistent, or pervasive to *limit* a student’s ability to participate in or benefit from an education program or to create a hostile or abusive educational environment”) (emphasis added).

be sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program.³³⁶

Because insertion of the word “deny” into the 2001 guidance was not intended to alter OCR's standard or match the standard enumerated in *Davis*, replacing the word with “interfere”—a term that had been used to describe the hostile environment standard pre-*Davis*³³⁷—does not necessarily alter the standard either. However, even if the differences between the terms used in OCR's guidance documents are not substantive, this critique highlights that OCR's use of different terms in different documents can be confusing, particularly where it does not explain the changes that it is making. In addition to these targeted critiques, Francisco M. Negrón, Jr., General Counsel of the National School Boards Association, has also offered a broader criticism of OCR's use of stricter standards than those set forth in *Davis*, suggesting that the approach may confuse local school officials. “[N]uanced legal distinctions,” he said, “can create confusion that detracts from an understanding of the requirements of the law and could have the unwelcome effect of chilling educators' actions for fear of legal liability under federal civil rights laws.”³³⁸ He also feared that The Dear Colleague Letter's standards could lead to additional litigation if courts adopt OCR's standards for private suits that do not involve damages.³³⁹ Mr. Negrón further believed that, while the standards articulated in the Dear Colleague Letter are not new, “[t]he tone of the 2010 [Dear Colleague Letter] is significantly different from that of past guidance.”³⁴⁰ Instead of using “a relatively hands-off approach,” he reasoned, the 2010 Letter's discussion of examples, mistakes, and remedies “is creating an expectation that

³³⁶ Notice, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66,092, 66,096-97, Nov. 2, 2000 (citations omitted).

³³⁷ See Racial Incidents and Harassment Guidance, *supra* note 222, at 11,449 (“A violation of title VI may also be found if a recipient has created or is responsible for a racially hostile environment—i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to *interfere* with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient.”) (emphasis added).

³³⁸ Negrón Statement, *supra* note 308, at 5; see also Briefing Transcript, *supra* note 7, at 251:20-23 (Negrón Testimony) (“OCR's position confuses the standards between liability and enforcement, making it more difficult for school officials to understand the requirements of the law.”).

³³⁹ Briefing Transcript, *supra* note 7, at 252:17-253:17 (Negrón Testimony) (“Courts are starting to use the OCR standard, granting the Department administrative deference for guidance that has not the same weight as officially promulgated rules under the Administrative Procedures Act. . . . Our fear is that plaintiffs' lawyers may be emboldened by such an approach to pursue litigation against schools.”).

³⁴⁰ Negrón Statement, *supra* note 308, at 3.

school officials are to respond to each and every offensive incident as if it were a civil rights violation.³⁴¹

Federalism

Several commentators have also expressed concerns related to federalism—that is, whether, and in what contexts, peer-to-peer violence is best addressed by states, local school boards, and local officials, rather than by the federal government. In her response to such critiques, Assistant Secretary Russlynn Ali has agreed that “[n]o universal, one-size-fits-all approach will be right for every school or all students”³⁴² She has explained:

[T]he remedies in the [Dear Colleague Letter] may not be required or appropriate in every case. Each case is fact-specific, and OCR will make individual determinations based on the particular circumstances at a school. The [Dear Colleague Letter] does not change this. ... The DCL does not diminish the importance of administrators’ professional judgment; rather it provides examples of appropriate remedies to help inform administrators’ decisions.³⁴³

Likewise, at the Commission’s Briefing on May 13, 2011, Assistant Secretary Ali said:

[O]ur policy guidance does not attempt to mandate [a one-size-fits-all approach]. Keeping the schools free from harassment is primarily a local responsibility. Teachers’ and school administrators’ good judgment, common sense, and knowledge of the school community are critical to crafting an effective response to harassment. And parents and community organizations play no less important a role. We therefore encourage and support community-based approaches to addressing peer harassment and changing the school climate so that it does not recur.³⁴⁴

³⁴¹ *Id.* at 3-4; *see also id.* at 4 (“This standard may needlessly drain school resources and attention from the more crucial task of fostering an appropriate climate while minimizing the professional discretion of local educators to craft workable, individualized solutions.”).

³⁴² Ali Statement, *supra* note 6, at 6.

³⁴³ Ali Letter to Negrón, *supra* note 315, at 6.

³⁴⁴ *Id.* Similarly, DOJ stated, “we absolutely think that schools are in the best position to address harassment and ensure the safety of their school environments and that’s why, first of all, we only get involved when there has been a failure of the school district to take the necessary steps.” Briefing Transcript, *supra* note 7, at 49:22-50:3 (Samuels Testimony).

According to Assistant Secretary Ali, “[E]ach school has the ultimate responsibility to create a safe learning environment and to ensure that its policies, practices, and procedures protect all students from discrimination based on race, national origin, sex, and disability. OCR will step in when necessary to ensure that schools fulfill their legal duties.”³⁴⁵

‘Federalizing’ bullying may chill the ability of educators to respond in otherwise appropriate ways for fear of agency action or litigation.

Francisco Negrón, National School Boards Association

(Written Statement, p. 9)

When OCR does “step in,” she explained, its role can be somewhat limited:

[O]ur administrative enforcement procedures require us to give schools notice of alleged civil rights violations and to seek voluntary corrective action before we can even consider pursuing fund termination or referring the matter to the Department of Justice for litigation. We take full advantage of the opportunity that our procedures afford to educate school officials about their obligations under the civil rights laws, and to help them develop policies to prevent and appropriately respond to harassment.³⁴⁶

Despite OCR’s assurances, several critics remain skeptical about the federal government’s role in anti-bullying efforts, as well as the use of federal civil rights laws to combat bullying generally.

Some advocates assert that OCR’s and DOJ’s active roles in combating bullying make it more difficult for schools to address this issue because schools’ conduct will be driven by fear of litigation rather than on-the-ground needs. For instance, Francisco Negrón warned that addressing school bullying through civil rights laws at all “will tend to federalize every instance of bullying and harassment by causing school leaders to over-identify every incident of teasing and name-calling as possible harassment.”³⁴⁷ Civil rights law, he asserted, “is

³⁴⁵ Ali Statement, *supra* note 6, at 6.

³⁴⁶ *Id.* at 7.

³⁴⁷ Negrón Statement, *supra* note 308, at 5.

considerably too blunt an instrument to address the problem of bullying.”³⁴⁸ He explained, “What school leaders need, instead of an overly heightened awareness of potential liability and an overly broad definition of bullying, is recognized discretion to exercise professional judgment about the situations on the ground.”³⁴⁹ What “[s]chools do not need,” however, is “the specter of protracted litigation, money damages, or federal enforcement to inform their choices about school safety.”³⁵⁰ He feared that “a school district may adopt, for instance, a more strict enforcement standard following the [Dear Colleague Letter’s] guidelines and then somehow adopt for itself some sort of legal liability.”³⁵¹

Mr. Negrón and others likewise believed that bullying incidents are most effectively addressed both at the local level and within local schools’ discretion. “A bullying incident is best addressed by local entities taking into account the characteristics and priorities of the communities,”³⁵² he reasoned, and “educators should be free to use whatever tools exist in their professional arsenal to address any conflict between students, including bullying[,

³⁴⁸ *Id.* at 6.

³⁴⁹ *Id.* at 5.

³⁵⁰ *Id.* at 6. *See also id.* at 9 (“[F]ederalizing’ bullying may chill the ability of educators to respond in otherwise appropriate ways for fear of agency action or litigation. ... [I]f every instance implicates a federal right, educators will have no choice but to take formal steps in even the most mundane of cases to avoid agency liability and prepare for a legal defense. Such an insalubrious approach places form over function, restricting the educator’s ability to use discretion and to respond effectively with the fewest resources necessary to resolve a conflict.”); Public Comment of Neal McCluskey, Assoc. Dir., Ctr. for Educ. Freedom, Cato Inst., at 5, *available at* <http://www.eusccr.com/28.%20Neal%20McCluskey,%20Cato%20Institute.pdf> (last visited June 22, 2011) [hereinafter McCluskey Comment] (“The major problem stemming from such after-the-fact governance is clear: The strong incentive it gives school officials is to overreact to incidents that could even remotely be connected to group-based harassment or bullying, even if they are not.”); Statement of Kenneth S. Trump, President and CEO, Nat’l Sch. Safety and Sec. Serv., Inc., at 9-10, May 13, 2011, *available at* <http://www.eusccr.com/26.%20Kenneth%20Trump,%20National%20School%20Safety%20and%20Security%20Services,%20Inc.pdf> (last visited June 22, 2011) [hereinafter Trump Statement] (describing the Dear Colleague Letter as “counterproductive” and “overreach,” and predicting increased litigiousness); *id.* at 9 (“[school administrators’] concerns were not one of being questioned or second-guessed, but a concern about the role, experience, competence, and legitimacy of federal civil rights investigators with school climate and discipline issues (bullying).”).

³⁵¹ Briefing Transcript, *supra* note 7, at 278:9-13 (Negrón Testimony); *see also id.* at 65:20-22 (Clegg Testimony) (“[L]ocal schools are going to be caught in this bind where they’re afraid of being sued if they do, they’re afraid of being sued if they don’t.”).

³⁵² Negrón Statement, *supra* note 308, at 7; *see also id.* (“School boards across the country are doing this right now, and have been for the past several years. State legislatures and educational agencies are passing laws and model policies to direct school boards’ policy formation. ... At last count, 45 states had passed an anti-bullying statute. The vast majority of these statutes require local school boards to address bullying through policy, with the participation of the community.”).

which] could mean using the lowest level of intervention necessary.”³⁵³ Mr. Negrón suggested that “the first thing we need to do is make sure that our policies empower educators. Educators know that they have the ability to act, to correct whatever situation comes before them, whether it’s bullying or harassment.”³⁵⁴ “But also,” he warned, “we need to not chill their ability to do that. We need teachers not to believe that there will be an impending federal lawsuit if they do not treat a specific set of circumstances as a federal civil rights violation.”³⁵⁵

Other critics have averred that the line-drawing involved in anti-bullying efforts—such as determining the distinctions between free speech and unlawful harassment, sex-stereotype harassment and sexual-orientation harassment, and hostile and non-hostile environments—are best left to local authorities.³⁵⁶ As

Roger Clegg, President and General Counsel of the Center for Equal Opportunity, stated:

I would rather have the lines drawn at the most local level possible. ... The presumption should be for only a limited federal role in matters of local schools and local school discipline.”

Roger Clegg,
Center for Equal Opportunity
Written Statement, p. 5.

[T]he question is where and how to draw the line and who should draw it. The line-drawing in this area will not always be easy—there are gray areas

³⁵³ *Id.* at 9; see also Briefing Transcript, *supra* note 7, at 143:3-12 (Clegg Testimony) (“[T]he federal government’s involvement will actually make matters worse, because it’s much more difficult for the federal government to draw these nuanced lines on the basis of local conditions, what was actually happening in the school, what the student actually said, all of that—much more difficult for the federal government to design a policy that is going to be sensitive to all that—than leaving it to the local schools.”)

³⁵⁴ Briefing Transcript, *supra* note 7, at 286:13-17 (Negrón Testimony).

³⁵⁵ *Id.* at 286:18-22.

³⁵⁶ See, e.g., McCluskey Comment, *supra* note 350, at 5 (“[W]hat is the ‘right’ way to handle bullying—especially in light of free speech and equal protection concerns—is far from a settled matter, which is all the more reason that the federal government should be very reticent about acting even if it has the authority to do so.”); Clegg Statement, *supra* note 249, at 5 (“I would rather have the lines drawn at the most local level possible. ... The presumption should be for only a limited federal role in matters of local schools and local school discipline. Sometimes—as with racial discrimination—that presumption can rightly be overcome. But I cannot imagine that this is the case here.”); Briefing Transcript, *supra* note 7, at 63:25-64:5 (Clegg Testimony) (“[T]his is a very difficult area with a lot of difficult line-drawing that has to be done. When does protected speech become unprotected speech, and become harassment? When does harassment become a threat? When does a threat become an actual physical assault? And so forth.”); cf. Trump Statement, *supra* note 350, at 7 (“Other questions include not only how will school climate be defined, but who will be defining it? Will it be D.C. bureaucrats? Will the definition be influenced by special interest groups lobbying for their agendas under ‘anti-bullying’ and ‘school safety’ labels?”).

between argument and teasing and harassment, between threats and horseplay and assault—and certainly the line, even if rightly drawn in theory, will often be crossed by politically correct government bureaucrats in Washington and the lawsuit-shy educators who are intimidated by them.³⁵⁷

“This kind of nuanced line-drawing,” Clegg reasoned, “is something where reasonable people can differ, and where people are going to draw the lines differently, depending on local circumstances.”³⁵⁸ Panelists also argued that addressing bullying locally, rather than federally, would allow schools to develop and implement a variety of solutions,³⁵⁹ and do so based on local characteristics and individualized circumstances.³⁶⁰

When confronted with these federalism arguments, other advocates responded that active federal involvement in peer-to-peer violence is necessary because, in their experience, localities are failing to adequately address the issue on their own. Eliza Byard, Executive Director of GLSEN, reasoned, if “schools responded when conduct crossed the line into bullying and physical violence, we would not be here today. That is not what is happening. Schools are not responding in a way sufficient to protect the educational access, physical well-being and emotional well-being of young people who are facing violence and harassment every day.”³⁶¹

Ms. Byard and others believe that federal intervention is a necessary backstop where local schools and communities fail to act to protect their students, particularly students targeted due to their membership in an unpopular identity group.³⁶² Rajdeep Singh, Director of Law

³⁵⁷ Clegg Statement, *supra* note 249, at 4.

³⁵⁸ Briefing Transcript, *supra* note 7, at 113:4-7 (Clegg Testimony).

³⁵⁹ See McCluskey Comment, *supra* note 350, at 5 (“In keeping with the genius of the American federal design, it is better to let fifty states experiment with different remedies than to impose one on all Americans. That allows numerous potential remedies to be tried, and prevents a poor—or even dangerous—one from being imposed on the entire nation.”).

³⁶⁰ See Negrón Statement, *supra* note 308, at 7 (“A bullying incident is best addressed by local entities taking into account the characteristics and priorities of the community.”).

³⁶¹ Briefing Transcript, *supra* note 7, at 154:4-11 (Byard Testimony); *see also id.* at 283:20-22 (Aaberg Testimony) (“[W]ith all the kids around the country coming to me and telling me what’s going on in their district, obviously local involvement is not working.”).

³⁶² *See id.* at 88:5-17 (Byard Testimony):

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

and Policy at the Sikh Coalition, for instance, noted that although New York City has adopted a strong anti-bullying regulation, the policy has not been implemented or enforced effectively.³⁶³ He proffered, “[W]here children’s civil rights are being repeatedly violated, and where school officials take a casual approach toward their obligations to protect children from harm, federal intervention becomes a moral imperative.”³⁶⁴

Similarly, Helen Gym, of Asian Americans United, discussed her own experiences regarding racial tensions and violence at South Philadelphia High School in Philadelphia, PA, reasoning that federal intervention was necessary to address the conflict. She said, “As appalling as the December 2009 attacks were, it was the egregious conduct of school officials in the months leading up to that day and in the months following that warranted federal intervention. It is this experience which has shaped our firm belief in the necessity of federal intervention in bias-based harassment at schools.”³⁶⁵ She also praised DOJ, which addressed the incident, for its “collaboration with communities to implement at South Philadelphia High School what we hope is a groundbreaking settlement agreement to address bias in schools across the country.”³⁶⁶

[The response of school officials to the December 2009 Philadelphia attacks] shaped our firm belief in the necessity of federal intervention in bias-based harassment at schools.

Helen Gym, Asian Americans
United
(Briefing Transcript p. 169)

Although 45 states³⁶⁷ and countless localities have anti-bullying policies, these advocates asserted that the current legal patchwork is inadequate to protect all students nationwide.³⁶⁸

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

See also, e.g., Singh Statement, supra note 104, at 3 (“[W]e believe that vigorous federal intervention is needed to hold schools and school districts accountable for their actions and, just as importantly, their inaction.”).

³⁶³ *See Singh Statement, supra note 104, at 3-4.*

³⁶⁴ *Id.* at 4.

³⁶⁵ Briefing Transcript, *supra* note 7, at 169:15-22 (Gym Testimony).

³⁶⁶ *Id.* at 169:24-170:2.

³⁶⁷ *See* Anti-Defamation League, Ultimate ADL Chart of State Anti-Bullying Statutes, *available at* <http://www.eusccr.com/ppvb.htm> (follow “ADL Attachment - Ultimate ADL Chart of State Anti-Bullying Statutes” hyperlink).

As Paula Goldberg, Executive Director of the PACER Center, said, “[W]e have 45 states that have their own laws, but it is not working. We wouldn’t be here today, you wouldn’t have this hearing today, if it was working. It’s not working. Therefore, we need something consistent.”³⁶⁹

First Amendment

Finally, commentators have expressed concerns that ED and DOJ’s response to peer-to-peer violence and bullying, and public schools’ anti-bullying policies generally, might conflict with protections guaranteed by the First Amendment of the U.S. Constitution.³⁷⁰ Specifically, these concerns involve students’ rights to free speech, including religious speech.³⁷¹

³⁶⁸ See, e.g., Briefing Transcript, *supra* note 7, at 91:22-92:1 (Byard Testimony) (“For every Jackson, Mississippi, and Park City, Utah, there are places where bullying-prevention efforts do not explicitly protect all students and where the consequences are real.”); Aaberg Statement, *supra* note 99, at 6 (“It is not right that kids in one part of the country have laws that protect them more than others. In some areas kids barely have any protections at all or if they have a policy in place it is not enforced. . . . All of our kids should have the same protections across the country no matter what city or state they live in.”); Anti-Defamation League Statement, *supra* note 31, at 2 (“Federal leadership on these important issues helps nurture a climate and a culture in which the vast majority of members of the community are willing to condemn bigotry, bullying, cyberbullying, and harassment.”); see also generally Briefing Transcript, *supra* note 7, at 290:6-9 (Lauter Testimony) (noting that the Anti-Defamation League has created a chart of anti-bullying statutes of all 45 states); *id.* at 291 (Lauter Testimony) (“[F]or us this combination of having state laws as well as the Federal Government doing the big picture would be enormously helpful . . .”).

³⁶⁹ Briefing Transcript, *supra* note 7, at 215:16-21 (Goldberg Testimony).

³⁷⁰ See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

³⁷¹ See, e.g., Statement of Eugene Volokh, Professor, Univ. of Cal., L.A., at 1, May 13, 2011, *available at* <http://www.eusccr.com/27.%20Eugene%20Volokh.%20UCLA%20School%20of%20Law.pdf> (last visited June 22, 2011) [hereinafter Volokh Statement] (“I would caution against policies that are written using vague terms such as ‘bullying,’ ‘harassment,’ or ‘hostile educational environment,’ especially when the policies cover speech that isn’t targeted to a particular person, as well as speech that is said off-campus.”); Negrón Statement, *supra* note 308, at 10 (“[T]he OCR approach appears to ask schools to regulate speech it deems to constitute bullying and harassment, only to risk suit by the parents of the disciplined students.”); Marcus Statement, *supra* note 103, at 27 app. A (“OCR’s failure to recognize First Amendment limitations is particularly conspicuous in its new policy document, given the aggressive position that it is taking on the legal standards for establishing harassment. To the extent that OCR will find harassment in single-incident cases of offensive speech which are merely ‘severe, pervasive, or persistent,’ First Amendment concerns will inevitably arise.”) (emphasis in original); Statement of Hiram S. Sasser, III, Dir. of Litig., Liberty Inst., at 14, May 13, 2011, *available at* <http://www.eusccr.com/11.%20Hiram%20S.%20Sasser.%20III.%20Liberty%20Institute.pdf> (last visited June 22, 2011) [hereinafter Sasser Statement] (“It is tempting to engage in censorship of some students to benefit others, but the cause of freedom is never advanced by selective censorship of those messages with which the government disagrees.”); McCluskey Comment, *supra* note 350, at 3 (“While much that is called bullying and harassment is no doubt behavior intended to threaten or intimidate, identifying motive can be very difficult, and empowering government-employed educators to decide what is behavior or speech intended to harass or intimidate, rather than to express and an [sic] opinion, is very dangerous.”); National Coalition Against

According to Assistant Secretary Ali, “very little of the harassment that [ED sees] involves any protected speech.”³⁷² She explained:

Physical harassment, violence, and threats are *never* constitutionally protected. Nor is harassment the same thing as unpopular or offensive speech. . . . [S]tudent-on-student harassment violates federal civil rights laws only if it is sufficiently serious to create a hostile environment that interferes with or limits a student’s ability to participate in or benefit from the services, activities, or opportunities that the school offers. The First Amendment’s Free Speech Clause does not give students license to say whatever they want, whenever they want, without regard to the effect of their speech on other students. Schools cannot tolerate discriminatory harassment that interferes with providing a safe, nurturing learning environment for all students.³⁷³

Even when certain speech is constitutionally protected, Assistant Secretary Ali explained, “schools have other means, apart from disciplining wrongdoers, to ameliorate the harms.”³⁷⁴ She noted that schools may provide training or other educational programs to teachers, students, and parents, as well as counseling services and medical resources to harassment victims.³⁷⁵

ED acknowledged First Amendment concerns in its Dear Colleague Letter, stating that “[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression.”³⁷⁶ ED had previously addressed harassment and the First Amendment in a Dear Colleague Letter issued on July 28, 2003.³⁷⁷ The 2003 Letter said that, to implicate

Censorship Comment, *supra* note 330, at 2 (“By stretching the definition of harassment to encompass various kinds of verbal interactions in schools and colleges, the letter threatens the delicate balance the Supreme Court has struck between the right to equality at work and school and the right to free speech, an approach reflected in OCR pronouncements until recently.”).

³⁷² Ali Statement, *supra* note 6, at 6.

³⁷³ *Id.* at 6 (emphasis in original); *see also infra* note 406; *but see infra* note 401.

³⁷⁴ Ali Statement, *supra* note 6, at 6.

³⁷⁵ *See id.*

³⁷⁶ Harassment/Bullying DCL, *supra* note 40, at 2 n.8; *see also* Conference Call Transcript, *supra* note 228, at 14-15 (Statement of Russlynn Ali) (“We interpret our regulations both at the elementary and secondary level and the college and university level consistent with constitutional principles in the first amendment.”); *id.* at 17 (Statement of Russlynn Ali) (responding to a question regarding the balance of religious free speech and protecting against anti-gay bullying) (“We would balance first amendment protections of that case. But together working with school and faculty officials we would work to make sure that all students had a safe place and healthy place to learn.”).

³⁷⁷ *See* First Amendment DCL, *supra* note 225; *see also* Harassment/Bullying DCL, *supra* note 40, at 2 n.8 (referring to the First Amendment DCL for more information).

federal civil rights laws, alleged conduct must involve more than mere political incorrectness:

Harassment, ... to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program. Thus, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age.³⁷⁸

The Letter elaborated:

OCR has consistently maintained that the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech. Harassment of students, which can include verbal or physical conduct, can be a form of discrimination prohibited by the statutes enforced by OCR. Thus, for example, in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.³⁷⁹

The Letter further advised that "schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech."³⁸⁰ It explained, "OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment."³⁸¹ Likewise, "[t]here is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First

³⁷⁸ First Amendment DCL, *supra* note 225.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

Amendment.”³⁸² ED provided similar guidance in its *Revised Sexual Harassment Guidance* issued in January 2001.³⁸³

Addressing First Amendment implications of alleged discrimination under Title IX, including sexual harassment, ED explained:

[W]hat is really at issue here, is are we going to use the government to stamp out thoughts and beliefs and speech with which the government disagrees?

Hiram Sasser,
Liberty Institute
(Briefing Transcript, p. 126)

Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX. In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student’s ability to participate in or benefit from the education program.³⁸⁴

The guidance advised that, “in regulating the conduct of its students and its faculty ... a school must formulate, interpret, and apply its rules so as

to protect academic freedom and free speech rights.”³⁸⁵

Nevertheless, critics remain concerned. For instance, several advocates have expressed fear that anti-bullying policies could be used by schools and the federal government as a form of viewpoint discrimination. As Hiram Sasser, Director of Litigation at the Liberty Institute, explained, “[t]he rights of students to express their views on issues, even from a religious

³⁸² *Id.*

³⁸³ See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 220, at 22-23; see also Harassment/Bullying DCL, *supra* note 40, at 2 n.8 (referring to the REVISED SEXUAL HARASSMENT GUIDANCE for more information).

³⁸⁴ REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 220, at 22 (citations omitted).

³⁸⁵ *Id.*; see also *id.* (“For instance, while the First Amendment may prohibit a school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard. The age of the students involved and the location or forum may affect how the school can respond consistently with the First Amendment.”).

viewpoint, are clearly established in the law.”³⁸⁶ They worried that schools might use anti-bullying policies to unconstitutionally prevent students from expressing their beliefs on issues such as the morality of homosexuality, and that such school practices could be exacerbated by expansive federal intervention. Mr. Sasser, for instance, noted several recent court cases involving schools disciplining students for religious expression at school.³⁸⁷ He said that, “what is really at issue here, is are we going to use the government to stamp out thoughts and beliefs and speech with which the government disagrees.”³⁸⁸ Roger Clegg, likewise, said, “I think that part of what’s going on here, part of what’s being pushed, is an agenda that seeks to use the power of the federal government to vilify and marginalize people who believe that gay sex is a sin. And they don’t want that kind of thought to go unpunished.”³⁸⁹ Mr. Sasser worried, similarly, that anti-bullying policies can be a form of government indoctrination,³⁹⁰ and that they may be used by schools to intimidate and harass religious students.³⁹¹

[T]he words faggot and dyke are not part of any religious creed. And harassment and assault are crimes.

Eliza Byard, GLSEN
(Briefing Transcript, p. 91)

In response to these critiques, several advocates disagreed that the bullying and harassment addressed in ED’s Dear Colleague Letter—or even in this report by the Commission—involved constitutionally protected speech; they believed that the viewpoint-discrimination

³⁸⁶ Sasser Statement, *supra* note 371, at 12; *see also id.* (“It is incumbent upon the Commission to review court decisions confirming that censorship of disfavored speech, including religious speech, is no solution and can actually increase tension within the schools rather than addressing any perceived problems.”).

³⁸⁷ *See id.* at 6-11.

³⁸⁸ Briefing Transcript, *supra* note 7, at 126:15-18 (Sasser Testimony).

³⁸⁹ *Id.* at 125:18-23 (Clegg Testimony); *see also id.* at 124:12-18 (Eastman Testimony) (“It is a very dangerous slope to head down, on such a contested issue as this, to basically tell people that, if you engage in such speech, that some people might interpret as harassment because you don’t like the lifestyle or the conduct or what have you, that will then lead to federal intervention . . .”).

³⁹⁰ *See Sasser Statement, supra* note 371, at 15-16 (“Advocates for more aggressive federal intervention to prevent bullying have also called for system-wide indoctrination of students to counteract a perceived anti-homosexual climate. Such system-wide indoctrination will only worsen matters for the religious liberty and free speech rights of students and will lead to further attempts to stop religious thought and expression by students.”) (citation omitted); *see also id.* at 3 (“The First Amendment protects everybody from forced government indoctrination, even if some, or even many, perceive such indoctrination to be good.”).

³⁹¹ *See id.* at 11-12 (“Unfortunately, unconstitutional censorship of student speech is commonplace in public schools, and school officials particularly target students expressing statements that advance or comment upon religious issues.”) (citation omitted); *see also id.* at 6-13.

arguments were essentially a red herring.³⁹² “Let me be very clear here,” said Eliza Byard, the words faggot and dyke are not part of any religious creed. And harassment and assault are crimes.”³⁹³ Ms. Byard elaborated that bullying and harassment involves “behavior, not belief,”³⁹⁴ and “ugly speech ... [does] not unto [itself] constitute bullying or harassment. ... There is a context.”³⁹⁵ She further noted that, on the state level, a definition for bullying and harassment has emerged that “includes the concept that the student has a reasonable fear of physical harm, as a result of what they are facing, and even a word as ugly as faggot or dyke ... has to be used in a context where it produces that expectation in a student in order to constitute bullying, or to constitute harassment.”³⁹⁶

Other panelists agreed with Ms. Byard’s assessment. For example, Professor Ilan Meyer, of Columbia University, explained:

[N]othing in my testimony [and in others’ testimony] is about speech at all. What I was talking about is about schools supporting affirmatively a gay student ... against the types of evidence that I have quoted about being injured, about physical assault, about rape, about being threatened, about having their property stolen, about being threatened with a knife or a weapon. So these are not issues about whether somebody, as Mr. Clegg referred to before, one student thinking it’s a sin and another student thinking that it’s not a sin.³⁹⁷

Professor Gregory Herek, of the University of California, Davis, concurred:

[W]hat we are talking about is children and youth who aren’t simply having a reasoned discussion or disagreeing about a philosophical or religious point. What we are talking about is kids who are feeling that their safety—that they are not safe. They are feeling that they are going to be subjected to physical violence and in fact sometimes have been

³⁹² See, e.g., Public Comment of Lambda Legal, at 6-9, May 12, 2011, available at <http://www.eusccr.com/Lambda%20Legal.pdf> (last visited Sept. 19, 2011) (distinguishing between “negative or discomforting viewpoints” and epithets, crude words, and “harassing, intimidating or threatening speech directed at specific students”); *id.* at 3 (“[Student] speech has bounds, especially when it truly—not speculatively—disrupts a school’s functioning or interferes with the rights of other students to secure the full range of educational advantages and benefits that are their due.”).

³⁹³ Briefing Transcript, *supra* note 7, at 91:16-18 (Byard Testimony); see also *supra* text accompanying note 373.

³⁹⁴ Briefing Transcript, *supra* note 7, at 136:8 (Byard Testimony).

³⁹⁵ *Id.* at 136:20-22 (Byard Testimony).

³⁹⁶ *Id.* at 137:2-9.

³⁹⁷ *Id.* at 127:11-25 (Meyer Testimony).

subjected to physical violence, and that this is something that pervades their life. ... [T]his is something that often ends up being very pervasive and it's something that confronts them on a frequent basis, sometimes on a daily basis, and so that just requires huge amounts of psychological resources to respond to.³⁹⁸

Responding to these assertions that bullying and harassment are not constitutionally protected speech, Professor Eugene Volokh, of UCLA School of Law, disagreed:

I wish that were true, but it seems to me that if you look at what the actual material—for example, the Dear Colleague Letter from the Department of Education says, it really is in considerable measure about speech. That what is labeled bullying and harassment are capacious enough to include speech, including speech that is protected by the First Amendment [I]f you look at the Dear Colleague Letter, it specifically talks about how harassment was defined to include verbal acts. That's lawyer speak for speech or statements.³⁹⁹

Professor Volokh expressed further concerns regarding the risk of over breadth of anti-bullying and anti-harassment policies generally. Noting that a “school might have considerable constitutional authority to restrict such speech if the specific statements pose a substantial risk of materially disrupting the school,”⁴⁰⁰ he warned, there is “[n]o categorical ‘harassment exception’ to the First Amendment.”⁴⁰¹

³⁹⁸ *Id.* at 146:2-147:12 (Herek Testimony). *See also id.* at 102:3-103:3 (Meyer Testimony):

We are not talking about ... as some of the panelists characterized it, as something like teasing or saying things. [These children] suffer from persistent, chronic, day-in and day-out, harassment, intimidation, things that, from a stress perspective, require immense adaptation if they are to sustain themselves in that environment. ... So this is not minor events, not minor teasing and it is not about freedom of speech. This is about making the environment completely intolerable for these kids and that is why they suffer from these types of outcomes that I described before.

³⁹⁹ *Id.* at 262:15-263:2 (Volokh Testimony); *see also id.* at 297:18-25 (“Sometimes the claim is ‘this is conduct, not speech,’ even though the conduct consists of verbal acts, which is another way of saying speech. Sometimes the claim is ‘it’s harassment and not speech,’ even though if you label speech sedition or harassment or intentional infliction of emotional distress, that doesn’t strip it of constitutional protection.”).

⁴⁰⁰ Volokh Statement, *supra* note 371, at 2 (citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)).

⁴⁰¹ *See id.* at 2 (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (Opinion of then-Judge Alito) (“[T]he free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications [W]hen anti-discrimination laws are ‘applied to ... harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose content-based, viewpoint-discriminatory restrictions on speech.”)); *see also* Negrón Statement, *supra* note 308, at 10-11 (discussing constitutional limitations for disciplining students for on-campus, non-school sponsored speech); *but see infra* notes 406-412.

He asserted: A policy that threatens students with disciplinary action for [speech that creates a “hostile or offensive environment”] is likely to deter a good deal of speech that speakers think *might* be found by the [school] administration to create a “hostile or offensive environment,” and not just speech that is indeed ultimately found (after protracted litigation) to actually create a hostile or offensive environment.⁴⁰²

[M]y worry is that with letters like this ... that do not really acknowledge the First Amendment issue and don't chart out through examples and specific exclusions what kind of speech should be protected, the inevitable effect is that there will be substantial deterrence of constitutionally protected speech.

Eugene Volokh,
UCLA School of Law
(Briefing Transcript, pp. 298-99)

Professor Volokh also suggested that a First Amendment conflict could exist with respect to the Dear Colleague Letter's definition of harassment, which does not require the conduct to be directed at a specific target or involve repeated incidents. According to Professor Volokh, “This means that political or religious statements ... could be treated as ‘harassment’ if they are seen as ‘severe’ enough by an administrator, or if they aren't even severe but are seen as ‘pervasive’ or persistent.”⁴⁰³

Even if the federal government only focuses on harassment that is “the most egregious” and that usually includes violence, Professor Volokh noted, ED and DOJ “also seek[] school policies that are much broader than the particular cases that are the

most egregious cases,” and urge schools to stop harassment before it becomes “egregious.”⁴⁰⁴ If “you put all this together,” he reasoned, “there's a hard to deny First Amendment problem.”⁴⁰⁵

Some public commenters, however, have downplayed many of the First Amendment concerns expressed by Professor Volokh and others where the harassment in question, for

⁴⁰² Volokh Statement, *supra* note 371, at 3 (emphasis in original).

⁴⁰³ *See id.* at 5-6; *see also* Briefing Transcript, *supra* note 7, at 297 (Volokh Testimony).

⁴⁰⁴ *See* Briefing Transcript, *supra* note 7, at 267:9-19 (Volokh Testimony).

⁴⁰⁵ *Id.* at 267:19-21.

instance, disrupts a school's educational environment, or is discriminatory.⁴⁰⁶ Dean Erwin Chemerinsky, of the University of California, Irvine School of Law, stated in a Public Comment that "[t]he line between protected speech and harassment ... is not settled with regard to schools,"⁴⁰⁷ and where tension does exist, "courts are very likely to defer to the judgment of school officials as to how to best educate their students."⁴⁰⁸ He reasoned:

Schools may prohibit all conduct, including speech, that constitutes harassment or threats on the basis of characteristics such as race, gender, religion, and sexual orientation. The more speech is simply the expression of ideas, even offensive ideas, the greater the likelihood that it is protected by the First Amendment. However, courts recognize the need for schools to protect their students from harassment and courts are thus likely to be very deferential to school officials in deciding when speech is harassment or threats that can be prohibited and punished. Those who advise the Commission of greater limits on schools, such as in some of the testimony the Commission received, are expressing their views about what they want the law to be; they are not describing the law as it exists.⁴⁰⁹

Similarly, Professor Stuart Biegel, of UCLA Graduate School of Education & Information Studies and UCLA School of Law, stated that "[local] [e]ducation officials have broad power [under the First Amendment] to restrict expressive activity that is reasonably likely to lead to

⁴⁰⁶ See, e.g., GLAAD Comment, *supra* note 91, at 2 ("[Based on Supreme Court precedent], speech posing the threat of disruption, speech considered offensive or indecent, and speech contrary to the basic educational mission of a school can all be controlled [in schools]. Bullying of one student by another, in any context, falls into all three of the above categories."); Public Comment of National Center for Lesbian Rights, at 3, May 9, 2011, available at [http://www.eusccr.com/NCLR%20USCCR%20Briefing%20Peer-to-Peer%20Violence%20\(jurisdiction\).pdf](http://www.eusccr.com/NCLR%20USCCR%20Briefing%20Peer-to-Peer%20Violence%20(jurisdiction).pdf) (last visited Sept. 15, 2011) ("The [Supreme] Court has repeatedly held that anti-discrimination laws, including prohibitions of harassment, are valid under the First Amendment, because such laws are primarily aimed at the *act* of discrimination, not speech.") (emphasis in original) (citing *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 572 (1995); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006)); *id.* at 4-5 ("Anti-discrimination laws prohibit harassment because harassing behavior in schools or workplaces creates a hostile environment that can deprive targeted individuals of the opportunity to participate equally just as effectively as being excluded outright It is well settled that these prohibitions on harassment, long required by federal law and enforced by the courts, do not violate the First Amendment."); Anti-Defamation League Statement, *supra* note 31, at 9 ("There is a high bar before any speech or conduct can amount to legally recognizable harassment. Nevertheless, conduct that threatens, harasses or intimidates particular Jewish students to the point that their ability to participate in and benefit from their college experience is impaired should not be deemed unactionable simply because that conduct is couched as 'anti-Israel' or 'anti-Zionist.'").

⁴⁰⁷ Public Comment of Erwin Chemerinsky, Dean, Univ. of Cal., Irvine Sch. of Law, at 2, May 23, 2011, available at <http://www.eusccr.com/Chemerinsky%20-%20KTolhurst%20Ltr%200011-0523.pdf> (last visited Sept. 15, 2011).

⁴⁰⁸ *Id.* at 4.

⁴⁰⁹ *Id.* at 3.

material and substantial disruption or to interference with the rights of others.”⁴¹⁰ He noted that the 7th Circuit has recently “affirmed the right of school officials to draw reasonable boundaries in this area, and ... rejected the notion that First Amendment absolutist arguments should be controlling in a K-12 education setting”⁴¹¹ with respect to school-climate policies. Professor Biegel quoted an opinion by Judge Richard Posner at length:

“Severe harassment ... blends insensibly into bullying, intimidation, and provocation, which can cause serious disruption of the decorum and peaceable atmosphere of an institution dedicated to the education of youth. School authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission, because they have the relevant knowledge of and responsibility for the consequences.”⁴¹²

In addition to these broad concerns, Professor Volokh and others were also troubled by the Dear Colleague Letter’s suggestion that anti-bullying and anti-harassment policies should apply to interactions and statements that occur off-campus, including via email, websites, or social-networking sites.⁴¹³ Describing such policies as “attempt[s] at 24-7 control of student

⁴¹⁰ Public Comment of Stuart Biegel, Univ. of Cal., L.A. Graduate Sch. of Educ. and Info. Studies & Sch. of Law, at 3, May 18, 2011, available at <http://www.eusccr.com/Biegel,%20USCCR%20Statement%2051811.pdf> (last visited Sept. 15, 2011) [hereinafter Biegel Comment]; see also Public Comment of Am. Civil Liberties Union, at 6, May 27, 2011, available at http://www.aclu.org/files/assets/aclu_comments_to_the_usccr_on_bullying_violence_and_harassment_2.pdf (last visited Sept. 9, 2011) (“A school may not single out speech for disfavored treatment simply because it disagrees with the viewpoint expressed by the student. But when something about the speech other than its viewpoint becomes invasive of the rights of others, schools have the constitutional authority to act.”).

⁴¹¹ Biegel Comment, *supra* note 410, at 4.

⁴¹² *Id.* at 5 (quoting *Zamecnik v. Indian Prairie Sch. Dist. #204*, 636 F.3d 874 (7th Cir. 2011); see also *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 671(7th Cir. 2008) (Posner, J.) (“A heavy federal constitutional hand on the regulation of student speech by school authorities would make little sense. The contribution that kids can make to the marketplace in ideas and opinions is modest and a school’s countervailing interest in protecting its students from offensive speech by their classmates is undeniable. ... People are easily upset by comments about their race, sex, etc., including their sexual orientation, because for most people these are major components of their personal identity—none more so than a sexual orientation that deviates from the norm. Such comments can strike a person at the core of his being.”); *id.* at 674-75 (“[H]igh-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students.”).

⁴¹³ See Volokh Statement, *supra* note 371, at 3-5; Negrón Statement, *supra* note 308, at 8-9 (“If schools are to be held accountable for all bullying behavior that may constitute harassment under federal civil rights laws, including that which takes place in cyberspace but makes its way onto campus overtly or by effect, schools will understandably feel the need to patrol electronic communications by students.”); *id.* at 9 (“The current confusion among courts as to what off-campus behavior can be regulated by schools, combined with the OCR enforcement position, results in an untenable expectation that schools police off-campus online behavior while ultimately facing liability for conduct over which they have no control.”).

speech,”⁴¹⁴ Volokh reasoned, “[A]ny restrictions on off-campus speech ... would pose especially serious constitutional problems—and, in my view, would be unconstitutional—even if the [school] administration argues that they are ‘severe or pervasive’ enough to create an on-campus ‘hostile or offensive environment.’”⁴¹⁵

ED, in response to such concerns related to off-campus conduct, has asserted that the Dear Colleague Letter does not implicate the First Amendment in this way:

[T]he [Dear Colleague Letter] notes that there are many remedial measures that schools can employ to respond to harassment that cannot be resolved by discipline or otherwise prevented. In some such cases, a school may be able to effectively remedy a hostile environment by, for example, making available counseling services and resources, and educating the school community on civil rights laws and expectations of tolerance—all of which do not implicate the First Amendment.⁴¹⁶

It is clear that the constitutionality of a given school’s anti-bullying or anti-harassment policy is complicated, heavily fact-driven, and situation-specific.⁴¹⁷ But for this reason, Professor Volokh concluded that, on First Amendment issues, ED’s Dear Colleague Letter is confusing. He did not believe that its mention of the First Amendment in a footnote or reference to prior guidance “suffice[d] to limit the scope of the proposed restrictions, or clarify their vagueness.”⁴¹⁸ Instead, he said, the footnote is “not terribly helpful to school districts ... if they need to know what exactly it is that they should be protecting under the First Amendment.” Professor Volokh explained:

They’re generally not lawyers. Here they have this long letter with all of these examples of mostly conduct, physical violence, that needs to be restricted but also with statements, well, yes, analogous kinds of speech should be restricted, too, and occasional general references to things posted on websites and so on and so forth.⁴¹⁹

⁴¹⁴ Briefing Transcript, *supra* note 7, at 265:23-24 (Volokh Testimony).

⁴¹⁵ See Volokh Statement, *supra* note 371, at 5.

⁴¹⁶ Ali Letter to Negrón, *supra* note 315, at 8.

⁴¹⁷ See, e.g., *Nuxoll*, 523 F.3d at 675-76 (upholding a school policy that forbids identity-based derogatory comments generally, but holding that a specific t-shirt that says “Be Happy, Not Gay” —a “tepidly negative” statement—does not provoke harassment or poison the educational atmosphere).

⁴¹⁸ Volokh Statement, *supra* note 371, at 6.

⁴¹⁹ Briefing Transcript, *supra* note 7, at 298:7-18 (Volokh Testimony).

He continued:

[The Dear Colleague Letter contains] no meaningful examples of “Here are things that you shouldn’t be restricting” or “Here are things that whether or not you should be restricting we don’t mean to cover.” “Here are the kinds of political or religious or social or personal commentary on campus or off campus that should be protected.” It just is not offering any real guidance to the school districts. ...⁴²⁰

... [W]hen there’s a very big hammer out there, the threat of federal investigation, then that has a disproportionate impact—as opposed to perhaps a threat of a civil lawsuit for vindication of First Amendment rights. So my worry is that with letters like this, approaches like this, that do not really acknowledge the First Amendment issue and don’t chart out examples and specific exclusions of what kind of speech should be protected, the inevitable effect is that there will be substantial deterrence of constitutionally protected speech.⁴²¹

While reasonable minds differ on the precise limits of the First Amendment, detailed guidance could indeed be useful to schools as they develop their anti-bullying policies.

⁴²⁰ *Id.* at 298:14-21.

⁴²¹ *Id.* at 299:4-14; *see also* Public Comment of Student Press Law Ctr., at 3, May 27, 2011, *available at* http://www.splc.org/pdf/bullying_comments.pdf (last visited Sept. 9, 2011) (“The DOE guidance begs the question when and how the Department envisions schools punishing speech that has *not* reached the level of threatening or harassing behavior. Without better guidance, the directive that schools are to take affirmative steps to prevent bullying—to include the use of disciplinary sanctions—is an invitation for schools to ‘preventatively’ punish speech that has not yet exceeded the boundaries of constitutional protection and may never do so.”).

FINDINGS AND RECOMMENDATIONS

Findings

1. Bullying and harassment, including bullying and harassment based on sex, race, national origin, disability, sexual orientation, or religion, are harmful to American youth.

[Commissioners Castro, Thernstrom, Achtenberg & Yaki voted in favor; Commissioners Gaziano, Heriot & Kirsanow voted against; Commissioner Kladney abstained.]

2. Current federal civil rights laws do not provide the U.S. Department of Education with jurisdiction to protect students from peer-to-peer harassment that is solely on the basis of religion.

[Commissioners Castro, Thernstrom, Achtenberg & Yaki voted in favor; Commissioners Gaziano, Heriot & Kirsanow voted against; Commissioner Kladney abstained.]

3. Current federal civil rights laws do not protect students from peer-to-peer harassment that is solely on the basis of sexual orientation.

[Commissioners Castro, Thernstrom, Achtenberg & Yaki voted in favor; Commissioners Gaziano, Heriot & Kirsanow voted against; Commissioner Kladney abstained.]

Recommendations

1. The U.S. Departments of Education and Justice should track their complaints/inquiries regarding peer-to-peer harassment separately from complaints/inquiries regarding staff-to-student harassment.

[Commissioners Castro, Thernstrom, Achtenberg & Yaki voted in favor; Commissioners Gaziano, Heriot, Kirsanow & Kladney abstained.]

2. The U.S. Departments of Education and Justice should track their complaints/inquiries regarding sexual harassment or gender-based harassment by creating a category that explicitly encompasses LGBT youth.

[Commissioners Castro, Thernstrom, Achtenberg & Yaki voted in favor; Commissioners Gaziano & Heriot voted against; Commissioners Kirsanow & Kladney abstained.]

3. The U.S. Departments of Education and Justice should track complaints that they receive regarding harassment based solely on sexual orientation that are closed for lack of jurisdiction.

[Commissioners Castro, Thernstrom, Achtenberg, Gaziano, Heriot, Kirsanow, Kladney & Yaki voted in favor.]

4. The U.S. Department of Education should track complaints that it receives regarding harassment based solely on religion that are closed for lack of jurisdiction.

[Commissioners Castro, Thernstrom, Achtenberg, Gaziano, Heriot & Yaki voted in favor; Commissioners Kirsanow & Kladney abstained.]

5. The U.S. Department of Education should consider issuing a new Dear Colleague Letter regarding the First Amendment implications of anti-bullying policies. The new Letter should provide concrete examples to clarify the guidance that the Department of Education previously provided in its Dear Colleague Letter on the First Amendment dated July 28, 2003.

[Commissioners Castro, Thernstrom, Achtenberg & Yaki voted in favor; Commissioners Gaziano, Heriot & Kirsanow voted against; Commissioner Kladney abstained.]

6. The U.S. Department of Education should strive to use consistent language when it articulates legal standards, such as its enforcement standards, in its Dear Colleague Letters and guidance documents. When the Department of Education uses different, even if consistent, terms in its Dear Colleague Letters and guidance documents, it should explain the reasoning behind its use of different wording.

[Commissioners Castro, Thernstrom, Achtenberg, Gaziano, Heriot, Kirsanow, Kladney & Yaki voted in favor.]

COMMISSIONER STATEMENTS AND REBUTTALS

STATEMENT OF CHAIRMAN MARTIN R. CASTRO

"Bullying can have destructive consequences for our young people and it's not something we have to accept. As parents and students, as teachers and members of the community, we can take steps—all of us—to help prevent bullying."

*--President Barack Obama
March 2011*

Introduction

President Obama is right: We all can do something to prevent the destructive consequences of bullying. That is why I am proud that this briefing on “Peer-to-Peer Violence and Bullying” is the first briefing I conducted as Chair of the Commission. As I said at the briefing, this is an extremely important issue for us all. Every one of us has children in our lives that we love and care for, whether they are our own children, grandchildren, nieces, nephews, students, godchildren, or neighbors. We all want those children to have safe, happy, and long lives and reach their full potential. Not only is this a personal desire, but I also believe it is a civil and human right.

As I also stated at the briefing, I know that each of us, regardless of our Party affiliation or our political ideology, wants to have communities and schools that are safe for our children, regardless of their race, national origin, sex, religion, disability status or sexual orientation. Where we may differ is how to accomplish that goal. I hope that this Statutory Enforcement Report is viewed as a constructive contribution to the discussion on how our Constitution and laws do and *should* protect the most vulnerable among us—our children.

I want to thank our staff, especially our Office of the General Counsel, for their extraordinary work in the organization of the briefing and the preparation of our Report. I also wish to commend my fellow Commissioners for the bi-partisan manner in which we conducted the briefing and for the fact that we were even able to promulgate some findings and

recommendations unanimously. I also wish to thank our distinguished panelists and all of those individuals and organizations that provided voluminous written testimony to the Commission. While every submission may not be included in the Report, every submission was important to our effort to address this important issue.

I am very proud of the Report. This Statement will highlight some points I consider to be of special importance.

Why Is the Commission Concerned About Peer-to-Peer Violence and Bullying?

When student violence, harassment or bullying is motivated by race, national origin, religion, disability, gender, gender identity and gender stereotypes, it falls within the Commission’s mandate to shine a light on the issue in an effort to remedy the wrong. As the Third Circuit Court of Appeals said in the *Sypniewski* case, “there is no constitutional right to be a bully.”¹

While the Report contains a “disclaimer” that some “critique the usefulness or accuracy” of data presented by state and federal agencies, academics and interests groups about the scope of the bullying problem, there can be no doubt that what is being reported in the data is real—that our youth are being bullied on the basis of race, national origin, disability, gender, religion, or sexual orientation. Whether the number of students is in the tens of thousands or hundreds of thousands is certainly fertile ground for further empirical studies, but no one should be able to deny that this is a problem in the United States.

During our briefing, in the written submissions, and in virtually daily news accounts, we see uncontroverted evidence that American youth are being bullied, harassed and having violence perpetrated against them by their peers, in whole or in part, because of their membership or perceived membership in certain protected or demographic classes. When that happens, I believe the Federal government has an important role to play. I applaud the U.S. Departments of Justice and Education for their efforts to address these types of cases of bullying, violence and harassment. That is why I also am a strong proponent of giving them the additional jurisdiction

¹ *Sypniewski v. Warren Hills Reg. Bd. of Educ.*, 307 F.3d 243,264 (3d Cir. 2002).

they need to fully address the instances of the type of conduct that infringe on students' Constitutional rights to life, liberty and happiness.

While there are 45 states with anti-bullying laws, the current state-level anti-bullying laws neither protect all students nationwide nor provide all students with equal and consistent levels of protection from state to state. As our Report points out, existing federal laws leave loopholes that do not protect students who are being bullied solely because of their religion or sexual orientation. Therefore, I believe Congress should enact and the President should sign into law both the Safe Schools Improvement Act and the Student Non-Discrimination Act. In addition, Congress should amend Title VI to prohibit discrimination on the basis of religion and the President should sign such a bill into law. These laws will close loopholes and give federal agencies the tools they need to fully and equally protect students when and where state laws or school districts can't or won't.

A Comprehensive, Consistent Approach Is Needed

However, we cannot merely legislate and litigate these issues away. We must also educate and train. Only through a holistic approach can we ever hope to overcome the destructive consequences of peer-to-peer violence, harassment and bullying.

That's why I support the thoughtful recommendations of organizations such as the American Bar Association ("ABA"), the National Education Association ("NEA"), the Anti-Defamation League, and others, which call for the regular training of administrators, teachers and students in how to identify and respond to instances of bullying.

I applaud the NEA for providing free anti-bullying training through its National Bullying and Sexual Harassment Prevention and Intervention Program and for incorporating anti-bullying strategies into its school transformation campaign.

Furthermore, as the ABA points out in its Report in support of its anti-bullying Resolution of February 14, 2011:

“Effective anti-bullying programs are known to include the following: ‘target known risk factors in youth violence; involve youth, parents, teachers and community members; monitor the implementation of the program components; use culturally-relevant, gender-specific and developmentally appropriate strategies; establish high standards and expectations for staff and participants; and provide comprehensive and ongoing interventions.’”²

I also agree with the ADL’s recommendation regarding the interrelationship of the enforcement of anti-bullying efforts and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.³

This type of comprehensive approach, coupled with strong federal anti-bullying protections will help to holistically begin to address this problem.

Culturally and Linguistically Appropriate Protections for Limited English Proficient Persons

It is difficult enough to discern whether your child is the victim of bullying, harassment or violence at school, let alone know what your rights are and how to navigate the system to enforce them and protect your child. Now imagine trying to do all of this with limited English language proficiency and/or cultural barriers. In addition, students with language barriers may also find it more challenging to report incidents of bullying, harassment or violence, or suffer a chilling effect in reporting these situations to a school system that is not linguistically or culturally accessible. For example, as Ms. Helen Gym of Asian Americans United testified at our briefing regarding the violence perpetrated against Asian students in Philadelphia: “Staff members... failed to investigate reported complaints, or worse, refused to

² American Bar Association Resolution and Report, Feb. 14, 2011, at 6 (quoting from Jeffrey M. Jenson & Matthew O. Howard, *Causes and Prevention of Youth Violence*, 77 DENV. U. L. REV. 629 (2000)), available at http://www.americanbar.org/groups/child_law/projects_initiatives/bullying.html.

³ “The Justice Department and the FBI should work collaboratively with civil rights and community-based groups and law enforcement organizations to ensure comprehensive and effective implementation of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA), with particular attention to the new requirement that the FBI collect hate crime statistics committed by and against juveniles.” Anti-Defamation League Written Statement, at 15.

file incident reports unless students spoke English to them, and who failed to call for translation assistance for concerned parents and families.”⁴ Ms. Gym further testified, “The district failed to translate documents or provide students and families with interpretation. Students reported that school security did not offer translation assistance to students who made complaints, and therefore, did not investigate them, or only heard the perspective of the English-speaking student.”⁵

Therefore, school districts should provide to Limited English Proficient student victims and their families information in their respective languages about how to report incidents of violence, harassment and bullying, and how to enforce their rights under existing district policies and applicable state and federal laws. School districts should also make reasonable efforts to have spoken-language translators available to students and families to assist in this dissemination of information and in the accurate reporting of complaints of bullying, violence or harassment. It is not just enough to have bilingual staff. The staff must be trained in interpretation and be knowledgeable about the anti-bullying policy of the school. As the ABA states in its report, “Without taking into consideration the cultural and linguistic differences among youth, it is unlikely that any [anti-bullying] program will be successful.”⁶

Neutrality Policies Are Anything But Neutral

“Neutrality” policies in schools require staff to take a neutral position when it comes to matters of sexual orientation in the school’s curriculum. However, in practice, these neutrality policies, also known as Sexual Orientation Curriculum Policies, are being erroneously applied in areas beyond curriculum, with devastating results, as we heard from Tammy Aaberg. Ms. Aaberg was the mother of Justin, a 15 year old who committed suicide last year after experiencing bullying and harassment due to his sexual orientation. When it was reported to Justin’s school, which had a neutrality policy, the school allegedly failed to take action because, as his mother testified, the neutrality policy “confuses teachers and staff and they feel like their hands are tied, as they don’t know what should or shouldn’t be considered neutral. I believe this is what happened with the

⁴ Briefing Transcript, at 164.

⁵ Id at 168.

⁶ ABA Resolution and Report, supra Note 1, at 6.

Counselor. Once she heard the word gay, she didn't ask Justin's friend any further questions and I never received a phone call.”⁷ The results were tragic for the Aaberg family. We should not allow this tragedy to continue to be repeated in schools across the country.

While Ms. Aaberg presented her story, the story of one family, of one child, that should not diminish the impact of her request for help for other children like Justin who are persecuted solely because of their sexual orientation. Or for that matter, for other students who are also bullied, harassed and have violence perpetrated against them because of their race, national origin, gender, disability or religion. Therefore, school districts should rescind these neutrality policies that lead to instances of bullying, harassment and violence going unaddressed.

I was very moved by Ms. Aaberg’s testimony about the loss of her son. I believe her words best summarize why we must take every step possible to ensure that existing laws are enforced fully, and new laws enacted to protect ALL of our children:

“These children are dead, my son is dead. Justin is gone from this earth and I will never be able to give him a hug, see his smile, hear his beautiful Cello playing or tell him I love him. Because some people believed he deserved fewer protections than others. All of these children and too many others across the country all died too young as a result of bullying and harassment.”⁸

It is time for us to make certain that our Constitution and laws are interpreted and enforced in a manner that provides the necessary protections against bullying, harassment and violence inflicted on students on the basis of their race, national origin, gender, disability religion or sexual orientation—for all of our children’s sake.

⁷ Briefing Transcript, at 243.

⁸ Id at 245-6.

STATEMENT OF VICE CHAIR ABIGAIL THERNSTROM

DATA

I am disturbed by the self-reported nature of the data presented in this report. Perceptions of discrimination are not reality. Of course the testimony of people who believe they have been victims must be taken seriously, but it is essential to verify those claims. They do not accurately register the frequency of incidents unless we are willing to say, if you feel you have been bullied, you have been bullied.

In addition, the data upon which we relied were, in many cases, collected by advocacy organizations with a clear agenda; again, the numbers need verification. Some of these organizations characterize conduct as “harassment” that doesn’t qualify as such under federal law. Readers should take definitional problems into account when looking at questions of how federal agencies enforce anti-harassment laws.

SCHOOL CULTURE

Before moving on to other concerns I have with the report, I should say, as a preliminary matter, that I do not believe that controlling unacceptable student behavior in schools is – as the cliché runs – rocket science. I have spent much time in both orderly and disorderly schools. In those that are well run and have a culture truly devoted to education, no student even thinks of harassing peers or teachers – the latter often being a serious problem. The inmates do not run the asylum where there are clear messages about who is in charge, and about acceptable and unacceptable behavior. In orderly, disciplined schools, there is no running in the halls, fights between students, disrespectful language used in talking to other students or to teachers.

The secret to creating such schools is very simple: The messages about expectations with respect to behavior and language are communicated by every teacher in every setting, and by administrators as well. No principal locks himself or herself behind a closed door,

letting bedlam occur out of sight and thus out of mind. Students face consequences when they are late to school, when food is thrown in the lunchroom, when they dress in a slovenly manner, when they use their fists to settle disagreement, and when their language violates rules of respect and self-respect. Slovenly language and slovenly dress are like James Q. Wilson's famous "broken windows" in a city. If not repaired, they send a signal that no one cares about disorder, and that signal is a slippery slope to a community in which fear is ever-present.

Why don't more schools – particularly those in the inner city – fit the description above? In too many schools, civility is not regarded as integral to education. It should be seen as equally, if not more important, than the three Rs. A student's employment prospects in life will depend on it. And yet often teachers and administrators with whom I have discussed the importance of a school culture tell me that they would be imposing middle class values on their students if they listened to me – although "middle class" jobs are precisely that they should be making their disadvantaged students eligible for.

A FEDERAL FIX?

School culture is something that only schools can set. Values cannot be imposed from above or outside. It is very difficult to see how the federal government can play a major role in stopping bullying in hundreds of thousands of schools across the land. As one of our witnesses, Dr. John Eastman testified,

There are lots of problems in society that are beyond the authority of the national government to address. The kinds of interactions between children on school playgrounds that have existed since we had schools would seem to be near the top of the list. And even if we could find constitutional authority for the federal government to intervene in this quintessentially local setting, do we really think that bureaucrats in Washington, D.C. should be crafting a national, one-size-fits-all policy on how to manage the interactions of children on the playground?¹

¹ Eastman, Dr. John, C., Prepared Testimony submitted to USCCR May 13, 2011, page 1. Available online at "<http://www.eusccr.com/7. John Eastman, Chapman University School of Law.pdf>"

FIRST AMENDMENT ISSUES

Witnesses at the briefing explored other important issues. For instance I have First Amendment concerns that would arise with federal intervention regulating student speech, even when that speech is perceived as harassment. Here is an issue on which perhaps there can be consensus. I hope we can all agree that “*a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights,*” as the OCR Guidelines of January 19, 2001 stated.²

In addressing the First Amendment question, panelist Eugene Volokh cited the Supreme Court’s *Davis v. Monroe County Board of Education* decision³ that “suggests that Title IX (and, by extension, Title VI) [did] require schools to ban certain forms of harassment.” It was a case, however, that involved “physical touching and unwanted vulgar sexual references,” he noted. Prof. Volokh was thus not sure “its holding would apply in a case based on politically or religiously themed speech.” Moreover, he noted, “liability could only be imposed “where the behavior [was] **so severe, pervasive, and objectively offensive that it denie[d] its victims the equal access to education . . .**” Volokh concluded:

schools should be encouraged to craft policies in terms such as these, rather than using terms such as “bullying,” “harassment,” or the creation of a “hostile or offensive environment” through “severe or pervasive” conduct.⁴

RELIGION

While the scope of our report included student-on-student harassment and bullying based on religion, Congress has not enacted legislation to prohibit religious discrimination in programs and activities which receive federal funds such as public schools and colleges. Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, and national

² U.S. Department of Education Office of Civil Rights, “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” January 2001, at page 22. Available online at: <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (last visited 8/15/2011).

³ 526 U.S. 629 (1999).

⁴ Eugene Volokh prepared statement to the Commission 5/12/2011, p. 8. Available online at “<http://www.eusccr.com/27. Eugene Volokh, UCLA School of Law.pdf>”

origin. Subsequent legislation also prohibits discrimination based on sex, disability, and age. But there is no law prohibiting religious discrimination by recipients of federal funds.

However, over the years OCR has issued policy guidance regarding discrimination based upon shared ancestry or ethnic characteristics which may overlap or coincide with a victim's religious practices or beliefs. The most recent such guidance was contained in OCR's Oct. 26, 2010 "Dear Colleague" letter:

While Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith.⁵

Since this protection is articulated in a guidance document it may not survive changes in administrations, does not have the same force as law, and only indirectly protects against religious discrimination. Moreover, the discrimination must be based on "perceived, shared ancestry or ethnic characteristics" of a religious group.⁶

Insofar as bullying and harassment based on enumerated protected characteristics is a problem requiring federal intervention in our local schools – and I'm not certain that is the case – Congress might consider enacting legislation specifically prohibiting religious harassment and discrimination in federally funded education programs.

⁵ Russlynn Ali, Dear Colleague letter at p. 5, dated Oct. 26, 2010. Available online at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (last visited 8/17/2011).

⁶ See, e.g., Ken Marcus, prepared statement to the Commission, 5/13/2011 at pp. 15, 16. Available online at "http://www.eusccr.com/15_Kenneth_L_Marcus_Institute_for_Jewish_&_Community_Research.pdf"

Statement of Commissioner Roberta Achtenberg

INTRODUCTION¹

The breadth and depth of the record in this inquiry demonstrate that students target each other for peer-to-peer bullying, harassment, and violence due to identity-based animus, all too frequently. The numerous, complex short and long-term negative consequences of such victimization underscore the urgency of careful monitoring, proactive intervention, and access to enforcement of rights by targeted students and their families.

Each demographic class of students examined -- those identified by race or national origin, sex, disability, sexual minority or gender non-conforming youth status, or religion -- suffers a serious and pervasive level of victimization. Needless to say, all children deserve to be protected from such targeting so that they may learn and grow in safety, regardless of what negative beliefs may persist about their status or identifying characteristics.

I concur with each of the Findings and Recommendations contained in the body of the U.S. Commission on Civil Rights' 2011 statutory enforcement report, "Peer-to-Peer Violence and Bullying: Examining the Federal Response."² This Statement puts forth the additional findings and recommendations that I believe the multi-faceted and credible record supports.

FINDINGS

Finding #1: Peer-to-peer violence, bullying, and harassment based upon animus toward students' race, national origin, sex, religion, disability, and/or sexual orientation or gender non-conformity occur at high rates. These actions constitute serious and pervasive problems which negatively affect schools, students and their families.

¹ The Commission's 2011 Statutory Report is the product of intensive and thorough work by our staff, and also by the many panelists and public commenters who generously contributed their time and expertise toward a voluminous record. In particular, thanks are due to our Office of General Counsel for navigating the many tasks and complexities involved in this project while on a very demanding production schedule.

² U.S. Commission on Civil Rights, "Peer-to-Peer Violence and Bullying: Examining the Federal Response," Washington, D.C., 2011, available at <http://www.eusccr.com/ppvb.htm>. (Hereinafter "USCCR Report").

The USCCR Report finds first that “[b]ullying and harassment, including bullying and harassment based on sex, race, national origin, disability, sexual orientation or religion, are harmful to American youth.” This is an important conclusion drawn from the Commission’s inquiry. Yet, it does not go as far as the record supports to underscore the severity of the underlying problems. In view of the depth and breadth of the Commission’s record, it is appropriate to characterize the scope of the problem in more serious terms, as well as to make more particularized findings and recommendations.

Finding #2: Up to one-quarter of racial and ethnic minority students are targeted for peer-to-peer bullying, harassment, and violence.

The numbers of complaints alleging race-based harassment made to the U.S. Department of Justice and the U.S. Department of Education demonstrate the continuing seriousness of the problem. Complaints alleging racial or national origin discrimination represent a significant percentage of overall complaint statistics in each of the years that the Commission examined, 2005 through 2011. In some years, more complaints alleging racial or national origin harassment were made than those asserting that other types of animus-based harassment had been perpetrated.³ As the USCCR Report notes,

[t]he California Healthy Kids Survey conducted in 2007-2009 found that when youth in California were bullied or harassed on school property, the most common specific reason cited was because of their race or national origin, with about 18 percent of students in grades 7, 9, and 11 reporting at least one bullying incident in the past year for this reason. The problem is not limited to one specific racial or ethnic group. When results from 9th and 11th grade students are broken down by race and ethnicity, African-American students reported being bullied or harassed due to their race or ethnicity at the highest rate — 23 percent. Twenty-two percent of Asian-American students, 22 percent of Native Hawaiian or Pacific Islander students, and 20 percent of Native American students reported being harassed due to their race, ethnicity, or national origin as well. [citations omitted.]⁴

Finding #3: Disabled students are at significantly higher risk of targeting for peer-to-peer bullying, harassment, and violence than are non-disabled students.

³ *Id.* at 32 – 36 and 40 – 42.

⁴ *Id.* at 12.

As the USCCR Report indicates, “[t]hough research regarding the connection between bullying and disability is fairly limited . . . , such research seems to indicate that students with disabilities are two to three times more likely than students without disabilities to be victims of bullying.”⁵ The paucity of studies in this area is of particular concern in light of the wide range of physical and mental health disabilities which affect students⁶ and the differing ways in which peer-to-peer student bullying, harassment, and violence pertain to each, and in view of the fact that “[t]he limited research on bullying in special education has indicated that special education students are more likely to be victimized.”⁷ Specifically with regard to students with learning disabilities, there has been:

very little research [citations omitted]. . . . [However, b]ased on the research to date and on the characteristics common to children with [learning disabilities] and children who are bullied, there is reason to believe that children with [learning disabilities] are at greater risk of peer victimization [citations omitted].⁸

This is of particular concern where “the co-occurrence of peer victimization and [learning disabilities] for children and youth may have separate and additive effects, substantially heightening these children’s chance of experiencing social and emotional problems [citation omitted]”⁹ Disabled students’ heightened risk of being targeted has been demonstrated with regard to students with Attention Deficit Hyperactivity Disorder (hereinafter “ADHD”). Specifically:

[m]iddle-school students who reported taking medications for ADHD were . . . more likely to report being bullied [than students not taking such medication]. . . . 34% of the students who reported taking ADHD medication, in comparison

⁵*Id.* at 14.

⁶ *See generally*: 1) Dawkins, J.L., “Bullying, Physical Disability, And the Pediatric Patient,” Developmental Medicine and Child Neurology, Vol. 37, No. 7, 1996, p. 603; 2) Haynie, D.L., Nansel, T., Eitel, P., Crump, A.D., Saylor, K., Yu, K., et al, “Bullies, Victims, and Bully/Victims: Distinct Groups of At-Risk Youth,” Journal of Early Adolescence, Vol. 21, 2001, p. 29; 3) Nabuzoka, D., “Teacher Ratings and Peer Nominations of Bullying and Other Behavior of Children With and Without Learning Difficulties,” Educational Psychology, Vol. 23, No. 3, 2003, p. 307; and 4) Nabuzoka, D., and Smith, P.K., “Sociometric Status and Social Behavior of Children With and Without Learning Difficulties,” Journal of Child Psychology and Psychiatry, Vol. 43, 1993, p. 1435.

⁷ Mishna, Faye, “Learning Disabilities and Bullying: Double Jeopardy,” Journal of Learning Disabilities, Jul/Aug. 2003, p. 336, 339.

⁸ *Id.* at 336.

⁹ *Id.*

to 22% among other students, reported that bullies victimized them at least 2 or 3 times a month.¹⁰

Also, the Commission has learned that:

[i]n a 2009 study of parents of children with Asperger Syndrome, 94 percent reported that their children had been bullied. [citation omitted.] Additionally, 65 percent reported that their children had been victimized by peers within the past year, while 50 percent reported that their children were scared by their peers.¹¹

Finding #4: Over three-quarters of all students experience sex-based bullying, harassment, or peer-to-peer student violence.

As the USCCR Report indicates, “statistics on sex-based bullying in K-12 schools are somewhat limited.”¹² Nonetheless, the USCCR Report presents good data from the Commission’s record. Specifically,

a 2001 study by the American Association of University Women (AAUW) found that 81 percent of students in grades 8 to 11 reported experiencing sexual harassment, including 83 percent of girls and 79 percent of boys. Twenty-seven percent of the students surveyed, including 30 percent of girls and 24 percent of boys, said that they were sexually harassed often. Seventy-six percent of students reported that they experienced nonphysical harassment often, occasionally, or rarely, while 58 percent reported experiencing physical harassment often, occasionally, or rarely. And 44 percent of girls and 20 percent of boys reported that they were afraid of being sexually harassed at school. [citations omitted.]

In addition, in the School Survey on Crime and Safety (SSOCS), sponsored by the U.S. Department of Education’s National Center for Education Statistics, schools reported 800 incidents of rape and 3800 incidents of sexual battery not involving rape in the 2007-2008 school year. The AAUW study found that 12 percent of boys and 9 percent of girls in grades 8 to 11 reported that they had been forced to do something sexual other than kissing. [citations omitted.]¹³

¹⁰ Unnervor, James D. and Cornell, Dewey G., “Bullying, Self-Control, and ADHD,” Journal of Interpersonal Violence, Vol. 4, No. 2, Feb. 2003, p. 129, 141.

¹¹ USCCR Report, *supra* note 2, at 14 – 15.

¹² *Id.* at 10.

¹³ *Id.* at 10 – 11.

Finding #5: Students of different religions, including Sikhs, Jews, Muslims, and Christians, report being targeted for bullying, harassment, or peer-to-peer student violence. For example, rates of Sikh student victimization range from roughly half to over three-quarters.

Issues of the targeting of students for peer-to-peer bullying, harassment, and violence based upon religious animus raises civil liberties issues that are a bit more complex than the victimization of students in other classes. As panelist Kenneth Marcus testified,

[i]ntuitively, one would expect children victimized by religious hate to enjoy the apex of protections afforded under our constitutional system. Structurally, they are victimized at the convergence of the First and Fourteenth Amendments, denied not only the Constitution's "first freedom" [citation omitted] but also the very interest in equal educational opportunity that has been constitutionally preeminent since *Brown v. Board of Education*. [citation omitted].¹⁴

Unfortunately, in this era of escalating religious intolerance, such legal subtleties are not being observed in the nation's classrooms. According to a study of youth survey data in California, 9.1% of students report being targeted for peer-to-peer harassment due to their religion.¹⁵ By way of illustration, the Report demonstrates that, in addition to Muslim, Christian, and Jewish students, Sikh students in the United States are targeted for animus-based peer-to-peer problems. Of particular note,

[a] 2010 survey by the Sikh Coalition, conducted in the San Francisco Bay Area in California, found that 47 percent of local Sikh youth were subjected to bullying. Of the boys who wear turbans (or patkas), 74 percent reported being subjected to bullying. The survey found bullying to be most prevalent in Alameda County, where 86 percent of Sikh boys reported being targeted. Likewise, a 2007 Sikh Coalition survey of Sikh youth in New York City

¹⁴“Religious Harassment in the Public Schools,” Testimony of Kenneth L. Marcus, Executive Vice President and Director of the Anti-Semitism Initiative, Institute for Jewish & Community Research, U.S. Commission on Civil Rights briefing, May 13, 2011, p. 2, available at <http://www.eusccr.com/15.%20Kenneth%20L.%20Marcus,%20Institute%20for%20Jewish%20&%20Community%20Research.pdf>.

¹⁵California Safe Schools Coalition and 4-H Center for Youth Development, “Consequences of Harassment Based on Actual or Perceived Sexual Orientation and Gender Non-Conformity and Steps for Making Schools Safer,” University of California, Davis, 2004, p. 7, available at <http://www.casafeschools.org/SafePlacetoLearnLow.pdf>.

found that 58.4 percent of local Sikh students had been subjected to bullying. The survey found that 62.2 percent of boys who wear turbans (or patkas) reported that they were bullied and 42 percent reported being physically hit or involuntarily touched. In the borough of Queens, as high as 77.5 percent of boys reported being bullied. [citations omitted.]¹⁶

Finding #6: Data shows that forty to fifty percent (40 to 50%) of sexual minority and gender non-conforming youth are targeted for peer-to-peer bullying, harassment, or violence.

Leading institutions and researchers, including the Institute of Medicine of the National Academies, have recognized that peer-to-peer bullying, harassment, and violence against sexual minority and gender non-conforming youth is so serious and pervasive as to constitute a public health problem of the highest order.

The recent report of aggregated data by the Institute of Medicine concluded that “[c]ompared with heterosexual youth, LGBT youth report experiencing higher levels of harassment, victimization, and violence, including verbal, physical, and sexual abuse.”¹⁷ The recent work

¹⁶USCCR Report, *supra* note 2, at 22.

¹⁷“School-based harassment, bullying, and peer victimization are the most common topics in the literature on LGB youth. This emphasis may be due to the role of schools in child and adolescent socialization and development and the increasing focus over the past 20 years on schools as a primary site of conflict, victimization, and activism for young people who are known or perceived to be LGBT.”

The Institute of Medicine of the National Academies, “The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding,” Washington, D.C., 2011, p. 158, available at <http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx>. (Hereinafter “IOM Report.”)

The IOM Report further states that:

[s]chool victimization based on known or perceived sexual orientation and gender identity has been documented consistently in studies of LGB and, more recently, transgender adolescents. A community-based study of LGB youth aged 21 or younger (n = 350) (D’Augelli et al., 2002) found that school-based victimization was widespread for LGB youth and that an association existed between this victimization and mental health and posttraumatic stress symptoms. The study results showed that earlier recognition of same-sex feelings, self-identification as LGB, and disclosure of sexual orientation were correlated with increased high school victimization. Similarly, youth who were open about their sexual orientation or exhibited gender-atypical behavior were targets for victimization. Likewise, a series of community school climate surveys conducted since 1999 has documented extensive verbal and physical harassment and discrimination among LGBT students in schools (Kosciw et al., 2007, 2008).

Id.

of Dr. Mark Friedman of the University of Pittsburgh¹⁸ is also a relevant aggregation of studies. Dr. Friedman’s meta-analysis “included only studies that compared sexual minority and sexual non-minority (heterosexual) youth.”¹⁹ Further, and critically, his work “included ... only school-based studies that used probability (sometimes referred to as random) samples of youth. That is, youth assessed in these studies represent the populations of youth attending high schools in the communities where the studies were conducted.”²⁰ Simply put, Dr. Friedman’s work is a meta-analysis of probability studies. Its relevant conclusions should, therefore, be assigned particular validity and credibility. Dr. Friedman concludes that his “research, using state of the art methodology, has confirmed that bullying victimization of sexual minority youth (i.e., youth who are sexually attracted to same-sex youth, self-labeled as gay, lesbian or bisexual) is a major public health problem.”²¹ Dr. Friedman found that much peer-to-peer bullying, harassment, and violence toward sexual minority and gender non-conforming youth tends to be expressed through physical violence. Specifically,

[o]ver the aggregate of all the studies that qualified to be included in the meta analysis, compared to heterosexual youth, ... [s]exual minority youth were 170% more likely to be assaulted at school”²² and that “40% of lesbians 44% of bisexual females, 43% of gay males and 50% of bisexual males were assaulted at school....”²³

Finding #7: Sexual minority and gender non-conforming youth do not have an intrinsically heightened vulnerability to negative outcomes from peer-to-peer bullying, harassment, and violence. Rather, ongoing societal stigmatization of homosexuality, as

¹⁸ Friedman, Mark, Ph.D., MSW, MPA, Marshal, Michael P., Ph.D., Guadamuz, Thomas E., Ph.D., MHS, Wei, Chongyi, DrPH, MA, Wong, Carolyn F., Ph.D., Saewyc, Elizabeth, Ph.D., RN, PHN, and Stall, Ron, Ph.D., “A Meta-Analysis to Examine Disparities in Childhood Sexual Abuse, Parental Physical Abuse, and Peer Victimization Among Sexual Minority and Sexual Nonminority Individuals,” submitted to the Commission’s record by Dr. Friedman on May 26, 2011 and in press with the American Journal of Public Health at the time of this writing. (Hereinafter “Friedman, et al.”)

¹⁹ Public Comment of Mark S. Friedman, Assoc. Professor, Univ. of Pittsburgh, at 1, May 26, 2011. (Hereinafter “Friedman Comment.”)

²⁰ In addition, the incorporated studies were disparate as to place and time.

“These results are based on 27 surveys administered in 15 geographic areas including cities, regions, or entire states such as Boulder, CO; Chicago, IL; Dane County, WI; District of Columbia; Massachusetts; Milwaukee, WI; Minnesota; Rhode Island; Seattle, WA; Vermont; Wisconsin., Of these 27 surveys, 17 were implemented after year 2000 and 10 during the 1990's.”

Id. at 2.

²¹*Id.* at 1.

²²*Id.* at 2.

²³*Id.*

opposed to any inherent weakness, makes these youth particularly susceptible to negative outcomes resulting from identity-based harassment.

Homosexuality has long been understood to be a normal variation of human sexuality.²⁴ A cornerstone of this knowledge is the fact that the American Psychiatric Association (APA) concluded almost forty years ago, in 1973, that “homosexuality in and of itself implies no impairment in judgment, stability, reliability, or vocational capabilities,”²⁵ and that “homosexuality is not considered a mental disorder in APA’s Diagnostic and Statistical Manual, Fourth Edition (DSM-IV-TR).”²⁶

The American Psychological Association expressed its support for the American Psychiatric Association’s change in viewpoint in 1975.²⁷ A wide array of professional mental health groups have subsequently endorsed the position that homosexuality is normal, as evidenced by their support for the American Psychiatric Association’s recommendation against “any psychiatric treatment, such as ‘reparative’ or ‘conversion’ therapy, that is based upon the

²⁴Testimony of Gregory M. Herek, Ph.D., p. 6, as cited in USCCR Report, *supra* note 2, at footnote 91, p. 19, available at

<http://www.eusccr.com/9.%20Gregory%20M.%20Herek.%20University%20of%20California.%20Davis.pdf>.

(Note: The American Psychological Association informed the Commission, in its letter of May 10, 2011, of its assessment that “Drs. [Gregory] Herek and [Ilan] Meyer are experts in the field of discrimination and bias against the LGBT population.”)

See also IOM Report, *supra* note 17, at 37, citing the mid-20th Century research of Dr. Alfred Kinsey and Dr. Evelyn Hooker.

²⁵ At the time of homosexuality’s 1973 removal from the Diagnostic and Statistical Manual, the American Psychiatric Association issued the following position statement: (<http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/197310.aspx>). The American Psychiatric Association stated that its “[r]esolution singles out discrimination against homosexuals ... because of the pervasive discriminatory acts directed against this group and the arbitrary and discriminatory laws directed at homosexual behavior. *Id.* *See also* Public Comment of the American Psychiatric Association, April 29, 2011.

²⁶ *Id.*

²⁷ Conger, J.J., “Proceedings of the American Psychological Association, Incorporated, for the year 1974: Minutes of the annual meeting of the Council of Representatives,” *American Psychologist*, Vol. 30, 1975, pp. 620-651, available at <http://www.apa.org/about/governance/council/policy/discrimination.aspx>.

assumption that homosexuality per se is a mental disorder or is based on the a priori assumption that the patient should change his or her homosexual orientation.”²⁸

Numerous studies, both meta-analyses and individual investigations, have demonstrated that sexual minority and gender non-conforming youth upon whom animus-based peer harassment is perpetrated suffer an array of serious, negative outcomes. Among other results, “experiences [of peer-to-peer student violence] are related to increased substance use, ... mental health problems, and sexual risk-taking behavior.”²⁹ The Institute of Medicine reports that sexual minority youth who are targeted by peers are also at risk for suffering academic outcomes, such as diminished school attendance and low grades.³⁰

²⁸ These professional groups include the American Academy of Pediatrics, American Association of School Administrators, American Counseling Association, American Federation of Teachers, American Psychological Association, American School Counselor Association, American School Health Association, Interfaith Alliance Foundation, National Association of School Psychologists, National Association of Secondary School Principals, National Association of Social Workers, National Education Association, and the School Social Work Association of America. See “Psychiatric Treatment and Sexual Orientation, Position Statement No. 199820,” American Psychiatric Association, 1993, available at: <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/199820.aspx>. Corollary to the lack of pathology inherent in a homosexual orientation is the reported overall positive mental health of sexual minority youth. As the USCCR Report quotes from the IOM Report,

[i]t is important to note that LGBT youth are typically well adjusted and mentally healthy. Research based on probability samples with LGB youth consistently indicates that the majority do not report mental health problems. Regarding transgender youth, although no data from national probability samples are available, studies with sizable convenience samples indicate that many, if not most, of those youth do not report mental health problems.

USCCR Report, *supra* note 2, at footnote 98, in pertinent part: “See IOM Study, *supra* note 83, at 125.”

²⁹IOM Report, *supra* note 17, at 158, citing Birkett et al., 2009.

³⁰*Id.* With regard to school attendance, Friedman’s meta-analysis found that sexual minority youth are “240% more likely to miss school due to fear that they would be unsafe at school or on [the] way to or from school,”³⁰ and that “16% of lesbian females, 23% of bisexual females, 14% of gay males and 23% of bisexual males missed school due to fear.”

Friedman Comment, *supra* note 19, at 2.

Further, gay, lesbian, and bisexual youth are approximately three to four times more likely than their heterosexual peers to have missed at least one day of school within the thirty days prior to the survey “because they felt they would be unsafe at school or on their way to or from school.”

Olsen, Emily O’Mally, McManus, Tim, Kinchen, Steve, Chyen, David, Harris, William A., Wechsler, Howell, “Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9-12 – Youth Risk Behavior Surveillance, Selected Sites, United States, 2001 – 2009,” *Morbidity and Mortality Weekly Report*, Vol. 60, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, June 6, 2011, p. 12, available at <http://www.cdc.gov/mmwr/pdf/ss/ss6007.pdf>. (Hereinafter “CDC Report.”)

Sexual minority youth appear to engage in an array of risky behaviors at higher rates than do their heterosexual peers. The June, 2011 analysis of multi-state, multi-year Youth Risk Behavior Surveillance System high school student data performed by the U.S. Department of Health and Human Services' Centers for Disease Control and Prevention found that, "[c]ompared with students who are not sexual minorities, a disproportionate number of sexual minority students engage in a wide range of health-risk behaviors."³¹ ³² Sexual minority youth, as the CDC Report indicates, also face heightened risk of substance use and abuse, including tobacco,³³ alcohol,³⁴ and illegal drugs.³⁵ In addition, as did the Institute of Medicine, the Centers for Disease Control and Prevention found that sexual minority youth appear to engage in risky sexual behavior at disproportionate rates.³⁶

The research fails to show a link between any *per se* weakness in a homosexual orientation and a particular vulnerability to negative outcomes from peer-to-peer student violence. Rather, as discussed in detail by Drs. Herek and Meyer, it appears that the extra pressure created by structural stigma is responsible for such disparate outcomes to the extent that they appear to exist.³⁷

³¹*Id.* at 49.

Regarding its underlying data source, Youth Risk Behavior Surveillance System (hereinafter "YBRSS") reports from an array of states over nine years, the CDC reports that

YBRSS is the only public health surveillance system in the United States that monitors, among interested states and large urban school districts, the prevalence of health-risk behaviors and selected health outcomes among population-based samples of sexual minority youths defined by sexual identity and by the sex of sexual contacts.

Id. at 43.

³² The CDC also reported that African-American sexual minority youth engaged in approximately half of a large array of measured risky behaviors more often than their same-race, heterosexual peers, and that Latino/a and white sexual minority youth did so roughly two-thirds as often.

Id. at 42.

³³ *Id.* at 16.

³⁴ *Id.* at 21.

³⁵ *See, e.g., id.* at 23 - 28.

³⁶ *See, e.g., id.* at 30 - 32.

³⁷ "Structural stigma" is the collective process by which majority class members give permission to the society as a whole to victimize minority class members. This permission also facilitates perpetration of harassment by members of one minority upon members of other minorities. Structural stigma plays an important role in condoning students' identity-based targeting of others due to race or ethnicity, religion, sex, disability status, and sexual minority and/or gender non-conforming youth status. This appears to further enhance the negative impacts of harassment upon youth who are members of more than one minority class, such as those who are both racial/ethnic-origin minorities and sexual minority youth, as this Statement discusses. This concept of stigma is the underpinning of the way in which society condones, or at least fails to sufficiently intervene

Stigma impacts both the stigmatized and the stigmatizer. The Institute of Medicine reports that:

[c]ontemporary health disparities based on sexual orientation and gender identity are rooted in and reflect the historical stigmatization of [lesbian, gay, bisexual, and transgender] people. Most [lesbian, gay, bisexual, and transgender] people encounter stigma from an early age, and this experience shapes how they perceive and interact with all aspects of society.... Likewise, heterosexual people ... have been socialized in a society that stigmatizes sexual and gender minorities, and this context inevitably affects their knowledge and perceptions of lesbian, gay, bisexual, and transgender] people.³⁸

Unfortunately, the structural stigma which fuels much of the school-based harassment that sexual minority youth experience may compound their vulnerability to negative outcomes when it emanates from within the student's home. Structural stigma can be expressed as family rejection of the youth's minority identity. Family rejection theory appears to be validated by meta-analysis which shows that sexual minority youth are 1.2 times more likely than their heterosexual peers to be physically abused by their parents.^{39, 40} The heightened risk for parental abuse and other manifestations of family rejection appear to fuel the alarmingly high rate of homelessness among sexual minority youth.⁴¹

against, the identity-based harassment which plagues each of the demographic classes of students discussed in this project. (See Statements of Dr. Gregory Herek, *supra* note 24, and Dr. Ilan Meyer, available at <http://www.usccr.com/10.%20Ilan%20Meyer,%20Columbia%20Universirt.pdf>. See also USCCR Report, *supra* note 2, at footnote 90.)

³⁸ IOM Report, *supra* note 17, at 32.

³⁹ Friedman, et al., *supra* note 18, at 1.

⁴⁰ In a similar vein, research indicates that "sexual abuse by parents was more frequently cited as a reason for leaving home among gay and lesbian (21%) [homeless youth] than it was among heterosexual [homeless youth]."

See Corliss, Heather L., Ph.D., Goodenow, Carol S., Ph.D., Nichols, Lauren, B.A., and Austin, S. Bryn, Sc.D., "High Burden of Homelessness Among Sexual-Minority Adolescents: Findings from a Representative Massachusetts High School Sample," *Journal of Public Health*, Vol. 101, No. 9, Sept. 2011, p. 1683, 1686, published online July 21, 2011 with abstract available at <http://ajph.aphapublications.org/cgi/content/abstract/101/9/1683> and full copy on file with the author.

⁴¹ Analysis of data from two recent state-administered Massachusetts Youth Risk Behavior Surveys which drew from a large, probability-based sample pool determined that:

[a]pproximately 25% of lesbian and gay adolescents and 15% of bisexuals reported homelessness as compared with 3% of the exclusively heterosexual adolescents. ... [Further, n]early 20% of the homeless youths in this study identified themselves as lesbian, gay, or bisexual.

This study concluded that, overall, "rejection and victimization within the family related to minority sexual orientation likely contribute to a greater risk of homelessness among sexual minority youth.

Sexual minority youth are also apparently at particularly high risk of re-victimization by schools and the legal system. Such students also appear to be:

1.25 to 3 times more likely than their heterosexual peers to receive punishment from schools, police or courts. ... [T]his greater likelihood of punishment is not explained by greater engagement in troublesome behaviors and suggest that LGB youth may be targeted for punishment or that mitigating factors such as self-defense may be overlooked.⁴²

Recent statistics indicate that roughly thirteen percent of youth responding to an anonymous survey study in juvenile detention facilities in six cities were sexual minority and gender-nonconforming youth.⁴³

The most egregious impact of animus-based peer-to-peer harassment, obviously, is the possible fueling of victims' suicidal ideation and behavior.⁴⁴ The Centers for Disease Control and Prevention's recent analysis of behaviors related to suicidality indicates that gay, lesbian, and bisexual high school students are roughly two to three times more likely than their heterosexual peers to have "seriously considered attempting suicide",⁴⁵ or to have "made a suicide plan."⁴⁶ This analysis further found that gay, lesbian and bisexual are approximately three to four times more likely than their heterosexual peers to have actually attempted suicide,⁴⁷ and that sexual minority youth are in the range of three to four times more likely than heterosexual students to have "made a suicide attempt that resulted in an injury, poisoning, or an overdose that had to be treated by a doctor or nurse."⁴⁸ The reasons that sexual minority youth may experience suicidal ideation and/or acts in response to victimization are not entirely clear. Nonetheless, social stigma may well drive some number

Id.

⁴² IOM Report, *supra* note 17, at 159.

⁴³ Majd, Katayoon, Marksamer, Jody, and Reyes, Carolyn, "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts," Legal Services for Children, National Juvenile Defender Center, and National Center for Lesbian Rights, 2009, pp. 93 - 94, citing Angela Irvine, "The Inappropriate Use of Secure Detention for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Youth," funded by the Annie E. Casey Foundation Juvenile Detention Alternatives Initiative and presented at the Columbia University Gender on the Frontiers Symposium (April 10, 2009), on file with authors of "Hidden Injustice."

⁴⁴ *See, e.g.*, IOM Report, *supra* note 17, at 147 - 150.

⁴⁵ CDC Report, *supra* note 31, at 13.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

of these experiences.⁴⁹ According to the Institute of Medicine, “[f]amily rejection due to sexual orientation may also be associated with increased risk of suicidality.”⁵⁰ The need to intervene as fully as possible to diminish peer-to-peer bullying, harassment, and violence against sexual minority and gender non-conforming youth is not driven only by the need to improve targeted students’ short-term quality of life and academic success, but also by indications that the negative consequences of such acts can follow the target students into at least young adulthood.⁵¹

Finding #8: Peer-to-peer bullying, harassment, and violence targeted toward sexual minority youth who are also racial or ethnic-origin minorities are serious, pervasive, and involve unique complexities which merit further, careful study.

Sexual minority youth who are also members of racial or ethnic-origin minorities, according to research, face particular vulnerability to peer-to-peer bullying, harassment, and violence and to their negative outcomes. The Commission has been advised that, “[i]n addressing the

⁴⁹ Meta-analysis indicates that:

[s]pecific factors related to sexual-minority status, including homophobic victimization and stress [citation omitted] are associated with suicidal behavior. In a study of 528 self-identified LGB youth aged 15-19, D’Augelli and colleagues (2005) found that recognizing same-sex attraction, initiating same-sex sexual activity, or appearing gender nonconforming at earlier ages was associated with reported suicide attempts in LGB youth; *this association may be exacerbated by experiences of victimization and maltreatment* [emphasis added, citations omitted.]

IOM Report, *supra* note 17, at 148 - 149.

⁵⁰*Id.* at 149, citing D’Augelli et al. and Ryan et al.

⁵¹ Specifically,

LGBT young adults who reported high levels of LGBT school victimization during adolescence were 5.6 times more likely to report a suicide attempt that required medical care, [and] 2.6 times for likely to report clinical levels of depression ... , compared with peers who reported low levels of school victimization. [citation omitted.]

Public Comment of Caitlin Ryan, Ph.D., ACSW, Director, Family Acceptance Project, Marian Wright Edelman Institute, San Francisco State University, at 2, May 23, 2011.

The second relevant study demonstrated that sexual minority “young adults who did not socially conform to gender roles as adolescents reported higher levels of anti-LGBT victimization, with significantly higher levels of depression and decreased life satisfaction in young adulthood.” [citation omitted.]

Id.

experiences of sexual minority students of color, it is important to recognize the intersectionality of identities and to avoid using an additive approach, i.e., examining race and sexuality separately without addressing their intersection.”⁵² According to the Institute of

⁵² Public Comment of Adrienne Mundy-Shephard, Esq., at 8, May 6, 2011. The following quote best summarizes the issues presented when the questions involve sexual minority and gender non-conforming youth of color. Adrienne Mundy-Shephard, Esq. advises that:

when considering the bullying of sexual minority youth of color, we should be mindful of the common theme that emerges from qualitative studies of sexual minority people of color: the perception that their racial and sexual identities are in conflict (Chung & Katayama, 1998; Dube & Savin-Williams, 1999; Hahm & Adkins, 2009; Narváez et al., 2009). In their study of 23 black, Asian and Latino gay and bisexual male youth, Dube and Savin-Williams found that a number of the youth felt pressure to choose between their ethnic and sexual identities, and that their “dual identities may be distinct constructs that do not become integrated” (1999, p. 1396). Similarly, in Chung and Katayama’s study of gay and lesbian Asian-American adolescents, they found that those who strongly endorse their traditional Asian culture and beliefs are likely to face barriers in developing a positive sexual minority identity, while those who strongly identify with U.S. (*i.e.*, white) sexual minority culture may have problems dealing with their Asian identity because of racism encountered by members of the larger (predominantly white) gay community (1998). Building on the theme of identity conflict, Hahm and Adkins (2009) emphasize the importance of developing an integrated identity that allows API sexual minority youth to develop their minority identities in such a way that they are able to exist in both worlds, rather than feeling compelled to choose between either their racial or sexual minority identities. Finally, in Narváez et al.’s study of black and Latino sexual minority young people, a common theme concerned the incompatibility of sexual minority identity with minority status. For example, a Mexican lesbian described herself as feeling like “a traitor to [her] own race” while a black lesbian spoke of having it made clear to her that “being queer was in some sense a betrayal of [her] blackness.” (2009, p. 64).

Despite these real or imagined conflicts, the literature suggests that a positive self-image cannot be achieved without effectively dealing with one’s minority identities in tandem (Chung & Katayama, 1998; Dube & Savin-Williams, 1999; Hahm & Adkins, 2009). Sexual minority students of color are more vulnerable to negative academic and mental health outcomes precisely because of the difficulty in reconciling their dual identities, and their victimization on multiple fronts: by both outsiders, *i.e.*, straight whites, and by those who are theoretically part of their in-groups, *i.e.*, non-sexual minority members of their racial groups and white sexual minority people.

Given these intersections – and the tensions inherent in these intersections – it is crucial that researchers of sexual minority youth issues acknowledge the existence of sexual minority youth of color, and the ways in which their sexual minority status informs their status as people of color, rather than viewing youth through a single lens, *i.e.*, as either sexual minorities or as racial/ethnic minorities. For example, Klein (2006) writes that “adolescent members of racial or ethnic minority groups can usually turn to others in the group -- particularly family members and peers -- for reassurance and assistance in dealing with societal hostility and developing a positive self-image,” but that “gay and lesbian adolescents do not consider family to be a source of support and understanding” (p. 43). Within this frame, sexual minority youth of color do not exist: either a young person is a (straight) member of a racial/ethnic minority group and has the advantage of family and peer support to deal with issues of racism, or a young person is an sexual minority-identified (white) person who lacks the advantage of

Medicine, “[a]s highlighted by the concept of intersectionality, the experience of being a sexual minority is influenced by an individual’s other identities. Thus, the experience of being lesbian, gay, or bisexual appears to vary according to the racial or ethnic group with which one identifies.”⁵³

Given the limitations in obtaining probability samples of sexual minority youth and racial minority overall, as discussed in Finding #9 below, it is reasonable to assume that obtaining such samples of sexual minority youth who are also racial minorities would be particularly difficult. Therefore, given the absence in its record of probability studies or a meta-analysis regarding this specific population, it is reasonable to rely upon carefully-crafted non-probability studies conducted by highly-credentialed researchers and published in highly-respected journals. The studies of this nature which are in the Commission’s record demonstrate the heightened need to protect, as appropriate under the law, such youth.

One relevant study demonstrates that, as compared with white non-Latino/a peers and Latina sexual minority youth peers, young sexual minority Latinos face the highest rates of family rejection to disclosure of their sexual orientation. This high-rate rejection appears to be tied to sexual minority Latino youth, as compared to sexual minority white non-Latino/a peers and sexual minority Latina peers, having the highest rates of current depression, suicidal

such support to deal with homophobia. Such observations ignore the fact that sexual minority youth of color appear to be more reluctant to seek family support than their white peers (Daley et al., 2007). In attempting to demonstrate the lack of family support that sexual minority youth have, researchers may overlook the fact that the sexual minority youth of color are often least likely to benefit from family supports. As Daley et al. write about the experience of sexual minority youth of color, “the overwhelming white representation of lesbian and gay communities juxtaposed with the dominant heterosexual imagery of racialized communities helps to articulate the struggle for queer youth of color. They belong to both communities, yet their memberships in each remain contested” (2007, p. 22). When examining the impacts of bullying and harassment on sexual minority youth, we must therefore be cognizant that the interaction of racial/ ethnic and sexual minority identity may increase the likelihood of victimization while reducing the likelihood of support.

Id. at 8 - 9.

⁵³ IOM Report, *supra* note 17, at 30.

ideation, suicide attempts, heavy drinking, substance abuse-related problems, unprotected sexual activity, and diagnoses of sexually transmitted diseases.⁵⁴

Finding #9: The USCCR Report utilizes social science data which is rooted in conventional and legitimate research standards.

As self-report data collection techniques were first being developed, social scientists questioned their baseline reliability. Nonetheless, “[d]uring the 1960s, researchers began to recognize the true potential of the self-report methodology.”⁵⁵ Motivated by this understanding, researchers have since then discerned and implemented many ongoing improvements in the realm of self-reporting data collection. “[C]onsiderable attention has been paid to the development and improvement of the psychometric properties of the self-report method.”⁵⁶ Thereby, “[t]he self-report methodology [thereby] continues to advance, both in terms of its application to new substantive areas and the improvement of its design.”⁵⁷ This evolution has led to researchers’ increased confidence in the reliability and validity of data collected by self-report.⁵⁸

⁵⁴ Ryan, Caitlin, Ph.D., ACSW, Huebner, David, Ph.D., MPH, Diaz, Rafael M., Ph.D., and Sanchez, Jorge, BA, “Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults,” *Pediatrics*, Vol. 123, No. 1, Jan. 2009, p. 346.

⁵⁵ Thornberry, Terence P. and Krohn, Marvin D., “The Self-Reporting Method for Measuring Delinquency and Crime, Measurement and Analysis of Crime and Justice,” *Criminal Justice*, Vol. 4., 2000, p. 38.

⁵⁶ *Id.* at 41.

⁵⁷ *Id.* at 40.

⁵⁸ Of particular note is the increasing use of computerized surveys for collecting self-report data that has accompanied advances in technology and its accessibility. Most pertinently to this project and sexual minority and gender non-conforming youth,

[T]he use of computer-assisted data collection ... [has the] potential for collecting sensitive information in a manner that increases the confidentiality of responses. By not having the interviewer read the questions or be involved in the recording of answers, the respondent does not have to reveal potentially embarrassing behavior directly to another person. In addition, the responses cannot be overheard by other people (e.g., family members or teachers) who might be nearby.

Id. at 62, referencing Tourangeau, Roger, and Smith, Tom W., “Asking Sensitive Questions: The Impact of Data Collection, Mode, Question Format, and Question Content,” *Public Opinion Quarterly*, Vol. 60, 1996, p. 275.

Given the culturally-sensitive nature of a sexual minority or gender non-conforming youth identity and of non-heterosexual sexual behavior, it appears reasonable to extend this principle of the potentially enhanced reliability of computer-collected data to sexual minority and gender non-conforming youth.

Given the increased understanding that has led to ongoing refinements of self-report data collection methodologies, it is now the case that:

the self-report method appears to behave reasonably well when judged by standard criteria available to social scientists. By these criteria, the difficulties in self-report instruments currently in use would appear to be surmountable; the method of self-reports does not appear from these studies to be fundamentally flawed. Reliability measures are impressive and the majority of studies produce validity coefficients in the moderate to strong range.⁵⁹,

Whether the data is generated by self-report or otherwise, the methodology of the study creates different tiers of reliability of data.

Probability studies (those based upon as random a sample pool as possible) published in peer-reviewed journals with rigorous pre-publication standards are, overall, considered to be more reliable than studies based upon non-probability (non-random) sample pools published under the same circumstances. The Institute of Medicine explains that “peer-reviewed journals are the gold standard for the reporting of research results,”⁶⁰ and that “every effort [should be made] to consult works published in major research journals.”⁶¹ Within the realm of such studies, one should give “the greatest credence to such sources that report... research employing rigorous methods, were authored by well-established researchers, and were generally consistent with scholarly consensus on the current state of knowledge.”⁶²

Probability sampling among the some of the youth populations under examination by the Commission is particularly difficult to utilize. According to the Institute of Medicine,

[o]btaining a probability sample of a relatively small population, such as a racial, ethnic, religious, sexual, or gender minority, requires considerably more resources than are required for sampling the population as a whole. This is the case because a large number of potential participants must be screened

⁵⁹ *Id.* at 59, citing Hindelang, M.J., Hirschi, T., and Weis, J.G., Measuring Delinquency, Sage Publications, Beverly Hills, CA, 1981, p. 114. *See also* Chan, David, “Chapter 13: So Ask Me? Are Self-Report Data Really That Bad?,” Statistical and Methodological Myths and Urban Legends: Doctrine, Verity and Fable in the Organizational and Social Sciences, Lance, Charles E. and Vandenberg, Robert J., Eds., Taylor & Francis Group, LLC, Pubs., NY, NY, 2009, p. 309.

⁶⁰ IOM Report, *supra* note 17, at 18.

⁶¹ *Id.*

⁶² *Id.*

to obtain a sample of minority group members large enough for statistical analysis. Still more resources are required to collect samples that permit study of subpopulations within these groups, such as socioeconomic, age, and geographic groupings, and comparisons of respondents according to health-related characteristics. Lacking such resources, relatively few studies designed specifically to examine LGBT individuals have been able to utilize large probability samples.⁶³

Therefore, most specifically with regard to sexual minority and gender non-conforming youth, “[p]robability sampling has seen limited use in the study of LGBT health. ... [T]he relatively small size of LGBT populations, the lack of research funding, and the sensitivity of questions relating to sexual behavior and gender expression have been barriers to effective probability sampling.”^{64, 65} Despite the difficulties inherent in conducting probability studies about the sexual minority and gender non-conforming youth populations, however, relevant and reliable research is still possible to conduct and valid conclusions are still possible to draw.⁶⁶ Overcoming the inherent potential shortcomings in non-probability studies, aggregation of studies and meta-analysis are valid:

approach[es] to obtaining a national probability sample with a sufficient number of sexual- and gender-minority respondents involves combining data across studies. For ongoing studies that recruit new probability samples on a regular basis, it can be possible to combine sexual- and gender-minority respondents across years to produce a sample that is sufficiently large for

⁶³ *Id.* at 93.

⁶⁴ *Id.* at 99. Note: The IOM Report defines the term “LGBT” to mean “lesbian, gay, bisexual, and transgender,” in concert with the Commission’s Report and this Statement. See IOM Report, *supra* note 17, at *xviii*.

⁶⁵ The Institute of Medicine further explains that:

[s]cientific and methodological challenges exist in the design and implementation of most sample surveys and research studies. This is particularly true of studies of relatively small populations on topics construed by the respondent to be of a sensitive nature. Health research studies of LGBT populations are often viewed in this way. Methodological challenges, however, can be overcome when careful attention is paid to scientific rigor and respectful involvement individuals who represent the target population. Scientific rigor includes incorporating and monitoring culturally competent study designs, such as the use of appropriate measures to identify participants and implementation processes adapted to unique characteristics of the study population. Respectful involvement of the study population, in this case LGBT people, refers the involvement of individuals and community representatives in the research process, from decisions about the study purpose and methods, to ongoing consultation and data gathering, to dissemination of results (Minkler and Wallerstein, 2002).

Id. at 123 – 128, with data charts interposed.

⁶⁶ By logical extension, this principle should hold true with regard to the other demographic classes at issue here.

analysis, provided that the studies all include comparable measures of key variables.⁶⁷

The Institute of Medicine notes further that:

[c]ombining data from multiple samples can be helpful in researching groups (like sexual and gender minorities) that represent a small domain in part of a larger survey. Because the numbers of these small groups often are not sufficiently large for analysis, combining data from multiple samples allows researchers to generate more accurate estimates.⁶⁸

Finding #10: The Commission found that “[c]urrent federal civil rights laws do not provide the U.S. Department of Education with jurisdiction to protect students from peer-to-peer harassment that is solely on the basis of religion,” and that “current federal civil rights laws do not protect students from peer-to-peer harassment that is solely on the basis of sexual orientation.” In addition, current state-level anti-bullying laws neither protect all students nor provide them with equal and consistent levels of protection.

The Anti-Defamation League has argued that, although most states have some form of anti-bullying statute in place, these statutes are very different in content. Further, none appear to address all identified areas in which coverage would be appropriate to fully protect students across the country. Such dimensions of an ideal law would include the required creation of school district policy, provision of a model policy, addressing the unique questions presented by cyberbullying, listing enumerated categories of protected students, mandating the definition and implementation of reporting procedures, implementing of parental notification requirements, provision of staff training, and imposition of accountability regarding districts’ reporting to the states.⁶⁹

⁶⁷IOM Report, *supra* note 17, at 95 - 96.

⁶⁸*Id.* at 96.

⁶⁹See “Ultimate ADL Chart of State Anti-Bullying Statutes,” submitted to the U.S. Commission on Civil Rights as part of the “Statement of the Anti-Defamation League Submitted to the US Commission on Civil Rights,” May 13, 2011, available at <http://www.eusccr.com/22.%20ADL%20Attachment%20-%20Ultimate%20ADL%20Chart%20of%20State%20Anti-Bullying%20Statutes.xls>.

The Anti-Defamation League has drafted a comprehensive model statute in this domain entitled “Cyberbullying Prevention Law.” Culling the best provisions from existing state laws across the country, this law seeks to address, in concise fashion, the relevant concerns.⁷⁰

Finding #11: A school district “neutrality policy,” “sexual orientation curriculum policy,” or any directive which precludes staff from discussing issues related to homosexuality, inappropriately chills school staff members’ ability to communicate with students and their families about peer-to-peer bullying, harassment, and violence related to students’ real or perceived sexual minority or gender non-conforming status. By doing so, such a policy facilitates the unchecked perpetration and negative impact of such peer-to-peer behavior.

Commission witness Ms. Tammy Aaberg provided detailed and compelling testimony regarding the July, 2010 suicide of her fifteen year-old, openly gay son Justin Aaberg.⁷¹ According to Ms. Aaberg, Justin’s suicide was fueled by the verbal and physical anti-gay harassment to which peers subjected him at school.

Justin Aaberg attended school in Minnesota’s Anoka-Hennepin School District No. 11, which has in place a “Sexual Orientation Curriculum Policy,” which is known colloquially as the “neutrality policy.” This directive states that:

[t]eaching about sexual orientation is not a part of the District adopted curriculum; rather, such matters are best addressed within individual family homes, churches, or community organizations. Anoka-Hennepin staff, in the course of their professional duties, shall remain neutral on matters regarding sexual orientation.⁷²

⁷⁰See “Cyberbullying Prevention Law: The ADL Model Statute,” filed as hyperlinked attachment to “Statement of the Anti-Defamation League Submitted to the U.S. Commission on Civil Rights,” May 13, 2011, p. 11, available at http://www.adl.org/civil_rights/Model_Cyberbullying_law%203.pdf. (Note: Despite its title, the model statute seeks to facilitate remediation of bullying and harassment perpetuated by any means, electronic or otherwise.)

⁷¹ Briefing Transcript, “Peer-to-Peer Violence and Bullying: Examining the Federal Response,” U.S. Commission on Civil Rights, May 13, 2011, p. 243 ff.

⁷² “Sexual Orientation Curriculum Policy,” Anoka-Hennepin District No. 11, adopted Feb. 9, 2009, filed with Statement of Tammy Aaberg and available at <http://www.eusccr.com/19-1%20Tammy%20Aaberg,%20Parent.pdf>.

Reportedly, serious and pervasive problems of peer-to-peer bullying, harassment, and violence pervade District No. 11's high schools as a result of the discriminatory implementation of this policy. In Doe, et al. v. Anoka-Hennepin School District No. 11, federal court plaintiff students and former students allege suffering years' worth of unrelenting verbal and physical harassment from multiple student perpetrators due to the implementation of the Sexual Orientation Policy and a policy which preceded it.⁷³

In addition to the pending federal court action, Anoka-Hennepin's Sexual Orientation Curriculum Policy is facing federal executive branch scrutiny as well. The U.S. Department of Education and the U.S. Department of Justice are investigating allegations of discriminatory peer-to-peer harassment based upon gender non-conformity as related to the Sexual Orientation Curriculum Policy and Title IX.⁷⁴

The number and degree of reported acts of peer-to-peer bullying, harassment, and violence perpetrated against sexual minority and gender non-conforming youth, in tandem with the wide-ranging and serious consequences suffered by the targeted students, certainly raise questions about the implementation of Anoka-Hennepin District No. 11's Sexual Orientation Curriculum Policy. If, in fact, the policy and/or the manner in which it is implemented facilitate the creation of an illegally hostile environment for sexual minority and gender non-conforming youth, this situation exemplifies an unacceptable outcome to the failure of state and local authorities to control peer-to-peer harassment problems. If this is true, the situation underscores the need for students in Minnesota and across the country to have meaningful and consistent protections such as those proposed by the ADL Model Statute discussed above.

⁷³The plaintiff students report, among other manifestations of harassment, being called an array of derogatory names, touched in sexually suggestive manners, tripped, pushed into lockers and a trash can, choked, stabbed, and told to commit suicide. Plaintiff students further report numerous attempts to engage the assistance of school staff in remediating the harassment, only to be ignored or given meaningless suggestions. The lawsuit seeks relief from sex discrimination and gender-based harassment under the Fourteenth Amendment Due Process Clause, the Fourteenth Amendment Equal Protection Clause, and Title IX of the Education Amendments Act of 1972 (20 USC sec. 1681 et seq.). See Doe, et al. v. Anoka-Hennepin School District No. 11, No. 0:11-cv-01999-JNE-SER, (D. MN.), July 21, 2011, Complaint.

⁷⁴ Probst, Emily, and Harlow, Poppy, "Groups Challenge 'Anti-Gay Harassment' in Minnesota School District," CNN, July 21, 2011, available at http://articles.cnn.com/2011-07-21/us/minnesota.schools.gays_1_sexual-orientation-gay-rights-advocates-federal-investigation?_s=PM:US).

Finding #12: Potential federal tools for the further amelioration of peer-to-peer bullying, harassment, and violence have been introduced into the U.S. House of Representatives and the U.S. Senate. The Safe Schools Improvement Act, the Student Non-Discrimination Act, and a proposed amendment to Title VI of the Civil Rights Act of 1964 seek to close gaps in existing law and provide strong, viable protections for students at risk of victimization due to their sexual minority or gender non-conforming status or their religion.

As the Commission found, students targeted for peer-to-peer bullying, harassment, and violence only on the basis of their sexual minority or gender non-conforming status, or only to their religious affiliation, do not have the benefit of federal protections. The underlying problems are serious and pervasive. Further, the lack of consistency among state laws demonstrates the need for federal legal protections. The Commission's record and Report make clear that specific federal legislative protection for these students is warranted.

The Safe Schools Improvement Act (hereinafter "SSIA") is a cogent, targeted bill that seeks to ameliorate this gap for students targeted due to religion and sexual minority and gender non-conforming status that has recently been introduced into the U.S. House of Representatives and the U.S. Senate. The SSIA would amend the Safe and Drug-Free Schools and Communities Act. With bipartisan backing in both chambers, it seeks to address the targeting of students based upon, among other characteristics, race, national origin, sexual orientation, gender identity, sex, and religion. The SSIA would require federally-funded local educational agencies to adopt specific anti-bullying and anti-harassment prohibitions. It would further mandate that schools notify students, families, and school staff about prohibitions, incident reports, and complaint-registering information, and require that states collect and report to the U.S. Department of Education data regarding the nature and extent of the problems.⁷⁵

U.S. Representative Linda T. Sanchez (D-CA), lead U.S. House of Representatives sponsor of the SSIA, notes that "[t]he widespread nature of this [peer-to-peer student bullying and

⁷⁵H.R. 1648 (2011) and S. 3739 (2010).

harassment] problem justifies federal action, especially where different schools, districts, and states have failed to address it.”⁷⁶ The SSIA, if enacted, would,

help school personnel meaningfully address bullying and harassment and would ensure that States and [school] districts maintain and report data regarding incidents of bullying and harassment in order to inform the development of effective federal, state, and local policies that address these issues.⁷⁷

A second relevant pending bill, the Student Non-Discrimination Act (hereinafter “SNDA”), is tailored more specifically to address the needs of sexual minority and gender non-conforming youth and those who associate with them. This Act, which enjoys bipartisan support in the U.S. House of Representatives, seeks to ban the exclusion of sexual minority and gender non-conforming youth from any activity receiving federal dollars. The SNDA would grant a cause of action to those who assert violation of their rights under the Act, and would waive states’ Eleventh Amendment immunity from such suits.⁷⁸

U.S. Senator Al Franken (D-MN), lead sponsor of the SNDA in the Senate, believes that:

[e]qual protections are needed for [lesbian, gay, bisexual, and transgender] youth, and they are especially warranted in the realm of education, which, according to the U.S. Supreme Court in *Brown v. Board of Education*, is arguably the most important governmental function. For parents of [lesbian, gay, bisexual, and transgender] students, public schools are currently failing to meet their most fundamental obligation to them: to keep their children safe. To combat the urgent problem of anti-[lesbian, gay, bisexual, and transgender] bullying, the government and public must strive to provide a safe and secure environment for all students, an environment in which all students have an opportunity to reach their academic potential without being held back by fear.⁷⁹

The SNDA does not seek to invent a new rubric for the recognition and protection of the right of sexual minority and gender non-conforming youth. Rather, as Sen. Franken notes,

⁷⁶ Public Comment of Linda T. Sanchez, United States Representative, at 2, May 12, 2011.

⁷⁷ *Id.* at 1.

⁷⁸ H.R. 998 (2011) and S. 555 (2011).

⁷⁹ Public Comment of Al Franken, United States Senator, at 3, April 29, 2011.

the SNDA would provide meaningful remedies (potential loss of federal funding and a private right of action) for discrimination in public schools. Fifty years of civil rights history shows that similar laws that contain such remedies are often effective in preventing discrimination from occurring in the first place. Like other civil rights laws, SNDA would prompt schools to avoid liability by taking proactive steps to prevent the discrimination and bullying of students protected by the bill.⁸⁰

The lead co-sponsors of the SNDA in the U.S. House of Representatives, Rep. Jared Polis (D-CO) and Rep. Ileana Ros-Lehtinen, believe that in-school discrimination against sexual minority youth and those who associate with them is “a civil rights matter of great importance requiring an urgent, cooperative response from the federal government,”⁸¹ and that, given the scope, complexities, and importance of the issues, “school districts must be motivated to end discrimination and harassment against [sexual minority] students.”⁸²

Finally, H.R. 6216, as introduced into the 111th Congress, sought to amend Title VI of the Civil Rights Act of 1964⁸³ by adding the provision that “[n]o person in the United States shall, on the ground of religion, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, an educational program or activity receiving Federal financial assistance.”⁸⁴ This protection against religious discrimination, clearly, would be more appropriately expansive than the protections which the Safe Schools Improvement Act seeks to provide solely in the educational context.

RECOMMENDATIONS

Recommendation #1: Involved federal agencies, including the U.S. Department of Justice and the U.S. Department of Education, should provide funding for additional research into the seriousness, pervasiveness, and impact of peer-to-peer bullying, harassment, and violence, including cyberbullying, targeted toward students due to

⁸⁰ *Id.* at 4.

⁸¹ Public Comment of Jared Polis, United States Representative, and Ileana Ros-Lehtinen, United States Representative, at 1, May 4, 2011.

⁸² *Id.* at 3.

⁸³ 42 USC 2000d.

⁸⁴ H.R. 6216 (2010).

their race, national origin, sex, disability, religion, and/or sexual minority or gender non-conforming status in schools in the United States.⁸⁵

Recommendation #2: Additional scholarly research should examine with as much specificity as possible the issues of seriousness, pervasiveness, and impact of peer-to-peer bullying, harassment, and violence for students targeted due to their race, national origin, sex, disability, religion, and/or sexual minority or gender non-conforming status.

Recommendation #3: The U.S. Department of Education and other relevant agencies should assist school districts in providing information to students and their families about the modalities, including cyberbullying, through which students target each other for bullying, harassment, or violence due to race, national origin, sex, disability, religion, and/or sexual minority or gender non-conforming status.⁸⁶

Recommendation #4: As the Centers for Disease Control and Prevention of the U.S. Department of Health and Human Services recommend, “[e]ffective state and local public health and school health policies and practices should be developed to help reduce the prevalence of health-risk behaviors and improve health outcomes among sexual minority youths. In addition, more state and local surveys designed to monitor health-risk behaviors and selected health outcomes among population-based samples of students in grades 9-12 should include questions on sexual identity and sex of sexual contacts.”⁸⁷

Recommendation #5: Federal law enforcement agencies should collaborate with state and local law enforcement to ensure that the protections afforded under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act to victimized students are, in

⁸⁵See “Statement of the Anti-Defamation League Submitted to the US Commission on Civil Rights,” May 13, 2011, p. 13, available at <http://www.eusccr.com/20.%20Anti-Defamation%20League.pdf>.

⁸⁶See *id.* at 14.

⁸⁷ CDC Report, *supra* note 31, at 2.

fact, utilized fully and appropriately (including the requirement for collection of data regarding hate crimes both perpetrated by and against juveniles).⁸⁸

Recommendation #6: State governments should consider, as appropriate, either enacting anti-bullying statutes of the type put forth in the Anti-Defamation League's Model Statute "Cyberbullying Prevention Law" or amending their existing anti-bullying statutes to conform with the parameters of this Model Statute. Localities and school districts would be well-advised to contemplate the comprehensive facets of this Model Statute when considering their own laws, regulations, and policies.⁸⁹

Recommendation #7: School districts should ensure that they are in compliance with federal laws and U.S. Department of Education guidance documents regarding the protection of students targeted for discriminatory peer-to-peer violence.

Recommendation #8: School districts should ensure appropriate training to enable staff to recognize and act to minimize students' animus-based behaviors toward each other.

Recommendation #9: School districts should provide to student victims and their families information about how to report incidents of violence, harassment and bullying, and how to enforce their rights, in a manner which is not unduly complicated, and which is written at a level (and in a language) easily comprehensible to students and their families.

Recommendation #10: School districts should ensure that the families of students are informed, in a timely manner and one which is respectful of student safety,⁹⁰ when their children are subject to violence, harassment and bullying at school. Such parental notice may be especially important with regard to disabled students who are victimized,

⁸⁸ See "Cyberbullying Prevention Law: The ADL Model Statute," supra note 73, at 11.

⁸⁹ *Id.*

⁹⁰ In light of the structural stigma and family support concerns discussed in the USCCR Report and elsewhere in this Statement, there may well be special sensitivities and risks with schools' communication of peer-to-peer problems to the families of sexual minority and gender non-conforming youth.

as these students may be unable to report the abuse to their families if unaided by school officials. This notice should be in language and manner comprehensible to the family, especially in the case of Limited English Proficiency families.

Recommendation #11: School districts should rescind existing “neutrality policies,” “sexual orientation curriculum policies,” and any directives which preclude or chill staff from discussing issues regarding homosexuality with students and their families, thereby allowing peer-to-peer violence, bullying, and harassment against sexual minority and gender non-conforming youth to go unaddressed.

Recommendation #12: Congress should enact, and the President should sign into law, the Safe Schools Improvement Act for the benefit of students targeted for peer-to-peer bullying, harassment, and violence due to race, national origin, sex, disability, sexual orientation, gender identity, or religion.

Recommendation #13: Congress should enact, and the President should sign into law, the Student Non-Discrimination Act for the benefit of students targeted for peer-to-peer bullying, harassment, and violence due to their sexual minority or gender non-conforming status.

Recommendation #14: Congress should enact, and the President should sign into law, an amendment Title VI of the Civil Rights Act of 1964 to prohibit discrimination on the basis of religion.

CONCLUSION

There can be no doubt that peer-to-peer bullying, harassment, and violence against students due to their race, national origin, sex, disability, religion, and/or sexual minority or gender non-conforming status are serious and pervasive problems in the United States. Anti-minority stigma, which allows bias to linger in society, appears to complicate and compound the issues.

I commend the efforts of the U.S. Department of Justice and the U.S. Department of Education to enforce existing federal civil rights laws for the benefit of targeted students who fall under their protection. The federal government should extend these protections to students targeted due to their religion or sexual minority or gender non-conforming status by enacting bills such as the Safe Schools Improvement Act, the Student Non-Discrimination Act, and amendment to the Civil Rights Act of 1964.

Overall, the problems of peer-to-peer bullying, harassment, and violence exact far too high a cost. All of us, government officials, social scientists, educators, and families alike, must put forth our best efforts to continue to define, understand, and resolve the issues at hand. Honoring the memories of Justin Aaberg and the other youth whom we have lost requires no less.

Dissent and Rebuttal Statement of Commissioners Gaziano and Kirsanow, With Which Commissioner Heriot Concurs

Overview

Rather than undertake a critical analysis of what the U.S. Departments of Education (ED) and Justice (DOJ) are doing right, wrong, or could do better with respect to their enforcement of federal civil rights laws regarding peer-to-peer harassment, the report gets lost in the emotion over K-12 “bullying” generally. The report quotes a number of advocates and even some federal agency officials about the supposed bullying “pandemic” sweeping K-12 schools, but that type of rhetoric is to be expected from those who believe it is their job to promote the issue.

Unfortunately, there is no data whatsoever in the Commission’s report that relates to K-12 schools’ observance of or failure to follow the federal laws that deal with the subject, so there is no data whatsoever in the report that would support any change in law. There is also no serious analysis of the legal and policy issues raised by the agencies’ current enforcement efforts. The cursory discussion of whether ED’s recent guidance and DOJ’s current interpretation of the relevant anti-discrimination provisions are unlawful and/or misguided does not fairly capture the competing arguments nor come to any conclusions.¹ Even in the absence of any data on the federal enforcement effort, we think some of ED’s and DOJ’s enforcement positions are inconsistent with law and seriously mistaken as a matter of civil rights policy.

An Analysis-Free Report

Pursuant to the Commission’s organic statute, the purpose of its annual enforcement report is to study and critique the effectiveness of federal agency efforts to enforce one or more of the

¹ It is the general practice of the Commission, at least in recent years, not to set forth ultimate conclusions in the body of its reports, and to leave such conclusions to the formal “findings” and “recommendations” that are discussed and separately voted on by the eight commissioners. The Commission did not attempt to resolve the lawfulness or prudence of OCR’s departure from the legal standards set forth in Supreme Court decisions in any manner.

existing civil rights laws, but no serious attempt was made to critique the effectiveness of ED's or DOJ's efforts in the Commission report. The apparent purpose of this report is to condemn social behavior that includes teasing, eye-rolling, and exclusion among K-12 students. Yet, even if the report was an attempt to describe the negative social behavior of 6-18 year-old students that it often misleadingly labels "bullying," its uncritical reliance on flawed surveys, advocacy group claims, and a mish-mash of contradictory statistics does more to mislead than cast light on the matter. Congress expects the Commission to exercise a higher level of professionalism in the social sciences. We regret that the Commission failed to live up to this expectation.

Since its creation, a central purpose of the Commission has been to "gather facts instead of charges" and "sift out the truth from the fancies" in the hopes of providing findings and recommendations "which will be of assistance to reasonable men."² To do so requires the Commission to be a careful and neutral arbiter of the competing (and sometimes complex) facts, issues and policy considerations at work. It can only accomplish this goal by avoiding the hype that the broader topic of bullying evokes (even if the enforcement agencies have not been as careful). Responsible and critical analysis is necessary to avoid ill-conceived policy recommendations or enforcement actions that have negative, unintended consequences.

The general topic of student teasing, bullying, and social exclusion is not within this Commission's jurisdiction. Even so, the Commission's report provides no reliable indication of whether any such behavior is on the rise, has declined, or has stayed about the same over time. The advent of social technologies alone is not an indicator that bullying is on the rise. Even if it is, the only matter relevant to the Commission's study of federal civil rights laws is whether K-12 schools are responding as they should when they learn of severe and pervasive acts of bullying on the basis of protected classes that rises to the level of legally actionable harassment under the civil rights laws enforced by ED's Office for Civil Rights (OCR) and DOJ.

² 103 CONG. RECORD 13,897 (1957) (statement of Sen. Lyndon Johnson).

There also are significant statutory, First Amendment, and practical issues worthy of more careful and detailed discussion throughout the report rather than the cursory fashion in its last chapter. The issues involved in student-on-student harassment are not simple. Though it is emotionally appealing for some to join the chorus that a larger federal role would somehow bring the number of bullying incidents among 55 million K-12 students significantly down, the Commission must refrain from doing so absent more careful, detailed analysis.

Irrelevant, Unreliable, and Conflicting Data

Putting aside the heated rhetoric about a bullying “pandemic,” there is no data at all in the Commission’s report on the subset of school bullying that is covered by federal law, *i.e.*, that which rises to the level of legally-prohibited harassment of federally protected classes. Thus, there is no data on the central issue for a federal civil rights enforcement report, namely, whether K-12 schools are adequately addressing their responsibilities under federal law, or for that matter, bullying more generally. Instead, many pages of the report are devoted to reciting highly questionable and conflicting studies and surveys to suggest that teasing and bullying generally is “widespread.” It has been so for centuries, but the data in the report probably does more to mislead than illuminate policymakers regarding its nature, seriousness, or frequency.

To identify potentially relevant data, it is first necessary to understand what is and is not prohibited under federal law. Schools that accept various types of federal funding are themselves forbidden from discriminating on the basis of race, color, national origin, gender, and disability, but their liability for peer-to-peer conduct is understandably more limited. Although the relevant legal standards are not discussed in detail until chapter 7 of the Commission’s report, student conduct only creates liability for schools under federal law if: (1) they have actual notice of and are deliberately indifferent to (2) severe, pervasive, and objectively offensive conduct on the basis of race, color, national origin, gender, or disability

(3) that creates a hostile environment having the effect of depriving victims of the educational opportunities of the school.³

Putting aside for now the conflicting interpretations of the civil rights statutes at issue, it is undisputed that schools are not liable under federal law for trivial student-to-student insults, acts of exclusion, or speech protected by the First Amendment, even if motivated by the victim's race, color, national origin, gender or disability. Moreover, K-12 schools are not generally liable under federal civil rights law even for severe and pervasive taunts or bullying that focus on the victim's weight, attractiveness, or other non-federally protected categories. Any decent school would try to prevent all types of harmful bullying, but K-12 schools simply are not liable under federal law for all bad, or even objectively cruel and persistent, student conduct.

Surveys or studies that lump all incidents of student teasing, acts of exclusion, spreading rumors, and other protected speech with more serious and sustained conduct that is violent or might constitute physical threats are not helpful in assessing a school's responsibility under federal law for two reasons. First, most conduct in such global surveys is not covered by federal law. Second, it is even less clear whether the schools responded appropriately to any or all of the conduct at issue. If schools are responding reasonably, there is no federal issue.

Unfortunately, there is absolutely no data in the report on the following critical matters relevant to the enforcement of the federal civil rights laws:

- (a) the frequency or amount of student-to-student bullying based on federally protected criteria that is severe, pervasive, and objectively offensive enough to constitute prohibited harassment under federal law for any relevant time period (*i.e.*, that which denies the relevant students' educational opportunities);
- (b) the frequency or amount of such federally prohibited peer-to-peer harassment in subparagraph (a) that K-12 schools did know (or should have known) about and took, or were alleged to have taken, insufficient action to address;

³ ED and DOJ believe they can define the conduct that constitutes prohibited harassment under federal law much more broadly than has the Supreme Court. The differences in the substantive legal standards are discussed in the next section of this statement, but none of the data in the report are relevant to the administration's definition of prohibited federal harassment either. In short, the analysis in this section does not depend on adopting the Supreme Court's definition of federally prohibited harassment rather than the administration's.

- (c) the frequency or number of claims captured in subparagraph (b) that were meritorious for any relevant time period;
- (d) the frequency or number of instances of harassment in subparagraph (b) in which federal enforcement agencies played more than a tangential role in resolving.

The above data would be critical in assessing even a snapshot of the relevant student conduct at issue, whether K-12 schools are responding appropriately, and the federal enforcement agencies' current efforts or involvement in enforcing the federal laws. However, policymakers might want even more data before venturing to change federal law. For example, policymakers might want data on the following:

- (e) a breakdown of such data for subparagraphs (a) and (b) for each class of students protected under federal law (e.g., severe and pervasive bullying that constitutes prohibited harassment based on race, color, national origin, gender, disability, failure to conform to stereotypes regarding the same); and
- (f) data that show changes in subparagraphs (a), (b), (c) and (d) over relevant time periods (e.g., five- or ten-year intervals or any other relevant time periods).

The actual data from ED and DOJ in the Commission's report does little or nothing to shed light on relevant questions for a federal enforcement investigation. The type and number of complaints received by OCR (set forth in chapter 3 of the report) conveys no helpful information about schools' compliance with federal law as it relates to peer-to-peer conduct. The report concedes that the percentage of such complaints that involve peer-to-peer conduct is unknown. Even assuming the peer-to-peer complaints were identified, there is no information on what percentage of complaints were meritorious, or even marginally well supported. There is also no information on how many of the well-supported claims involved serious and pervasive conduct such that they might have constituted federally prohibited harassment. Finally, for the unknown subset that might be serious, meritorious complaints of peer-to-peer harassment, it is unclear whether the schools had taken or were already taking appropriate action.

The Commission's own review of OCR voluntary resolution agreements between 2005 and March 2011 is also virtually meaningless, for similar reasons. It is perhaps interesting but hardly significant to learn that 138 of the 292 agreements examined relate to peer-to-peer

conduct. But the Commission's examination of these voluntary agreements did not disclose anything else of particular value. For example:

- There is no analysis of the variation in the cases per year, which peak at 36 nationwide in 2009 and decline to 29 in 2010.
- There is no evaluation of how many complaints were either serious or meritorious. It is not very telling to voluntarily resolve a non-meritorious complaint.
- There is no information indicating how many of the roughly 23 schools per year that were the subject of such voluntary resolution agreements were already taking action on their own to resolve the dispute before OCR became involved.
- Assuming the schools at issue were not already taking action to resolve the dispute, there is no evaluation of whether the schools at issue responded immediately and voluntarily to claims brought to their attention or whether OCR played a more substantial role in resolving the dispute.
- There is no context to suggest how many thousands of schools are covered by federal law, the ratio of meritorious to non-meritorious complaints, or their relation to the actual incidence of serious bullying.
- Reliable estimates suggest there are approximately 55 million students enrolled in K-12 schools in any given year.⁴ Yet, California and Missouri were the only states with more than ten resolution agreements with OCR over the six year period. The vast majority of states and DC had schools with two or fewer such agreements over the six-year period: Alabama, Louisiana, Michigan, Minnesota, Mississippi, North Carolina, Oregon, South Dakota, Tennessee, and Utah (with 2 each); Alaska, DC, Florida, Idaho, Maine, Montana, New Hampshire, New Mexico, Rhode Island, Vermont, Washington, and West Virginia (with one each); and Arkansas, Delaware, Indiana, Iowa, Nebraska, Nevada, New Jersey, North Dakota, South Carolina, Virginia, Wisconsin, and Wyoming (with none).
- Thus, the above listed states and DC had, at most, one or two of their schools or school districts enter into a voluntary resolution agreement with OCR in the six-plus year period. Many of the complaints may have lacked merit and were resolved for that reason. The report does not say. Some schools might have already been investigating and resolving the incident. The report does not say. Some schools might have been happy to learn of the complaint and voluntarily taken appropriate action. The report does not say.

⁴ The National Center for Education Statistics estimated there were 55.4 million elementary and secondary students in the United States in fall 2010. U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS: 2010, Table 1, Projected number of participants in educational institutions, by level and control of institution: Fall 2010, available at http://nces.ed.gov/programs/digest/d10/tables/dt10_001.asp?referrer=report.

Although the Commission's review of voluntary resolution agreements tells us nothing about the seriousness or merit of the complaints or anything about the schools' voluntary responses thereto, it does undercut DOJ's and other activists' hyperbole about a "pandemic" of bullying. Even if all were serious and meritorious complaints, zero, one, or two incidents in a given state over six years is probably not what most people would consider a "pandemic."

The Commission's report does not disclose what effort, if any, was undertaken to obtain the relevant data described above, despite our frequent requests for it. Yet the report should at least have disclosed that in response to questions from several commissioners at the briefing on May 13, expert witnesses expressed their belief that no reliable data exists on the most contested issues, including peer-to-peer harassment on the basis of sexual orientation or failure to live up to a perceived gender stereotype, and accordingly, that no consistent frame of reference exists of this type of conduct over time.⁵ This is an inconvenient truth that should be honestly reported.

The final bit of relevant information that the Commission should have tried to obtain and analyze is what efforts K-12 schools are taking to comply with their obligations under federal law, or more generally, what they are doing to respond to all types of bullying. No serious discussion or analysis exists in the Commission report regarding these state and local efforts. Forty-nine states and the District of Columbia, and many more local jurisdictions, have formal anti-bullying laws and policies.⁶ Moreover, all states punish violence or threats of

⁵ See, e.g., Commission Briefing Transcript (May 13, 2011) [hereinafter Briefing Transcript] at 47 (Jocelyn Samuels answering Commissioner Kirsanow that DOJ does not keep data tracking complaints it receives); 103 (panel of Fatima Goss Graves, Roger Clegg, Gregory Herek, Ilan Meyer, and John Eastman had no response to Commissioner Kirsanow's question of whether ED, DOJ, or any other entity had data tracking the number of complaints relating to harassment of protected classes); 307 (Ken Trump answering a question from Commissioner Gaziano: "[T]here is no historical data on bullying, to my knowledge, especially at the federal level for an extended period of time."), available at <http://www.eusccr.com/Peer-Bullying%20May%2013%202011%20Transcript.pdf>.

⁶ Forty-seven states and the District of Columbia have anti-bullying statutes. Hawaii is the most recent state to pass an anti-bullying statute, which was signed into law on July 11, 2011. Two of the three states that do not have anti-bullying statutes, Michigan and Montana, have statewide regulations. See NAT'L SCHOOL BOARDS ASS'N, STATE ANTI-BULLYING STATUTES JULY 2011, available at <http://www.nsba.org/SchoolLaw/Issues/Safety/Table.pdf>; H.B. 688, 2011 Sess. (Haw.). We do not necessarily endorse all of these laws; we have not closely reviewed them. Commissioner Heriot notes in her accompanying dissent that some state anti-bullying laws and regulations may have unintended consequences. See also Winnie Hu, *Bullying Law Puts New Jersey Schools on Spot*, N.Y. TIMES, Aug. 30, 2011. We cite such state laws here primarily because the proponents of a new federal law bear the burden of demonstrating that it is not duplicative

violence that advocates claim they are most concerned about, and every school likely has policies against other types of bullying, even if they are not contained in “anti-bullying” laws.

On pages 74 and 76, the report recites two activists’ claims that the states’ anti-bullying laws are “not working,” but there is not even a casual examination of this assertion. Do the advocates think all teasing or bullying must stop for the laws to “work?” If so, what makes them think more federal laws would work? For example, every state prohibits theft with severe penalties, but thefts still occur. Does that mean state theft laws are “not working?” Would a general federal theft law prevent them?

The advocates’ dismissal of state and local efforts to combat bullying deserves more attention than a he-said/she-said, few-sentence coverage in the report. It goes to the heart of the federal government’s jurisdiction and the practical question of whether schools are doing a reasonable job enforcing the federal civil rights laws. Unfortunately, there is no quantitative or other objective evidence in the Commission’s report that state and federal laws are not adequate.

Instead of highlighting the failure of ED and DOJ to keep or provide relevant data, the report attempts to mask this serious shortcoming with a plethora of irrelevant, unreliable, and oddly conflicting survey data on mean student behaviors. The Commission has the responsibility to sort the “truth from the fancies” and place them in context. The Commission should not simply re-publish unreliable and misleading statistics gathered from whatever source. The Commission should have investigated competing factual claims and analyzed conflicting data. Instead, the report too often recites various statistics, many of which are unreliable, misleading, or inherently suspect. Accordingly, the report is more hortatory than analytical.

To add injury to this social science insult, the report declines to endorse any definition of bullying, see page 2, yet quotes three that may be mistakenly understood as Commission-

and will not undermine (by preempting and/or conflicting with) existing law. As we indicate later in the rebuttal portion of this statement, we also have independent reasons to believe that increased federal intervention would cause more harm than good in this area.

endorsed definitions.⁷ Even worse, it expressly refuses to evaluate the validity of any of the surveys or studies it cites (see the report at footnote 10). During our initial review of the draft report in May, we urged the Commission staff to evaluate all the surveys and studies cited in the report and delete all those that were irrelevant or unreliable or to at least note the deficiencies in those that are cited. Instead of doing so, the disclaimer appeared in the final draft report that the Commission did not “independently verify the data” and that some experts “critique the usefulness and accuracy of this data.” Indeed.

Here are just a few examples of the problems with the data cited in the report.

1. Many of the surveys suffer from serious self-selection bias, as well as other obvious biases, including that the students could volunteer to respond to poll questions on an advocacy group or other website.⁸ As one study cited in the report notes about sampling, “in contrast to probability samples, the sampling error associated with population estimates derived from nonprobability samples cannot be computed, and the extent to which the sample represents the population from which it was drawn cannot be known.”⁹

⁷ Not only did the Commission not define bullying or harassment in its report, a majority of the commissioners also refused to do so when debating the findings that would accompany the report. And the majority still purported to make a finding that “bullying and harassment . . . are harmful to American youth.” When the Commission was voting on the proposed finding, Commissioner Gaziano objected that “bullying” was a moving target and some scholars were even beginning to define “bullying” downward to include parents not inviting everyone in their kids’ class to their birthday parties at their homes. Commission Transcript at 19 (Aug. 12, 2011); see also Hans Bader, *Schools Use ‘Bullying’ as a Pretext to Violate Students’ Rights to Free Association and Freedom of Speech*, OPENMARKET.ORG, Aug. 10, 2011 (noting that bullying also is coming to mean wielding “popularity” to exclude others and offensive “eye rolling.”). Thus, Gaziano proposed to amend the finding to conform to the Commission’s purported review of federal law, limiting it to “serious, pervasive and objectively offensive” conduct constituting harassment under federal law. Commissioners Castro, Thernstrom, Yaki, and Achtenberg rejected the amendment and offered no clarification of their own, preferring to leave it vague. Indeed, Vice Chair Thernstrom admitted the finding “doesn’t say anything” and is “like a talking point of a politician” but then provided the decisive vote to prevent it from saying anything and keep it like a politician’s talking point. See Commission Transcript at 21-22 (Aug. 12, 2011).

⁸ All non-scientific polls should have been deleted, especially those from advocacy groups. For example, the GLSEN 2009 and Harris Interactive 2005 surveys are from different types of self-selecting respondents, the first of which is also influenced by the websites that solicit their views. Such self-selective surveys and suspect data serve no purpose but to mislead. Part of the AAUW study used the Harris Interactive online method, which is not a probability sample. The report at footnote 16 cites a press release from the American Academy of Child & Adolescent Psychiatry, but the press release does not indicate the kind of surveys it is publicizing. The Massachusetts Advocates for Children report did not use a probability sample and had a heavy selection bias. Parent respondents to an online survey were informed that data and examples provided would be used to support the passage of an act addressing bullying of children with autism. Report at 15 n. 69.

⁹ INST. OF MEDICINE OF THE NAT’L ACADS., BD. ON THE HEALTH OF SELECT POPULATIONS, COMMITTEE ON LESBIAN, GAY, BISEXUAL, & TRANSGENDER HEALTH ISSUES & RESEARCH GAPS & OPPORTUNITIES, THE

2. The report cites one study that not only used a self-selected sample gathered from community-based groups and internet sites for LGB youths, but the students surveyed were from the United States, *Canada and New Zealand*.¹⁰ Citing a study of foreign students illustrates the throw-anything-against-the-wall approach to data in the report.
3. Different surveys relied on inconsistent definitions of the bad student behavior at issue, and none attempted to isolate the conduct covered by federal civil rights laws. Some surveys included exclusion “from activities on purpose,” “spreading rumors,” “influencing relationships,” mild forms of teasing, and other conduct protected by the First Amendment.¹¹
4. Surveys administered in schools may not have the same selection biases, but are unreliable for other reasons. For one thing, self-reporting, particularly with broad and ambiguous categories, is notoriously problematic, as pointed out by an expert whose work is relied upon in the Commission report.¹² Moreover, many such school surveys are not voluntary; when adolescents and teens are forced to do something, they often rebel. In short, students who are repeatedly required to answer such surveys have a tendency to make things up, especially when the subject relates to sexual behavior.¹³

HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 105 (2011).

¹⁰ See Anthony R. D’Augelli et al., *Suicidality Patterns and Sexual Orientation-Related Factors Among Lesbian, Gay, and Bisexual Youths*, 31 SUICIDE AND LIFE-THREATENING BEHAVIOR 250, 252 (2001), cited in the report at 20 n.97.

¹¹ See Report at 3 & nn.3, 5 (citing National Center for Education Statistics and Bureau of Justice Statistics study; National Education Association study). The report on page 6 cites a study where students reported being “bullied, teased, or taunted” (emphasis added). Another study relates that students reported being subject to “hate-related words.” Report at 8. The AAUW study, subtitled “Bullying, Teasing, and Sexual Harassment,” defined sexual harassment to mean “unwanted sexual behavior that *interferes with your life*. Sexual harassment is not behaviors that you like or want (for example wanted kissing, touching, or *flirting*).” Report at 10 n.42 (emphasis added). Because federal jurisdiction covers only objectively serious and persistent harassment, based on suspect classifications, that the schools know about (or should know about if ED is correct) and that they are indifferent to, it is misleading to quote even reliable data on various categories of insults and slights that do not trigger federal jurisdiction.

¹² See Mark S. Friedman et al., *A Meta-Analysis to Examine Disparities in Childhood Sexual Abuse, Parental Physical Abuse, and Peer Victimization Among Sexual Minority and Sexual Nonminority Individuals*, AMER. J. PUB. HEALTH, Vol. 101, Issue 3 (2010) (“These data were collected through retrospective self-reports, which may be biased.”).

¹³ See generally Thea F. van de Mortel, *Faking It: Social Desirability Response Bias in Self-Report Research*, 25 AUSTL. J. ADVANCED NURSING 40 (2008) (discussing tendency of questionnaire and interview respondents to present favorable image of themselves, especially to socially sensitive questions). Self reporting may work

5. Due to a combination of such problems, the survey results were wildly contradictory, at least as set forth in the report. For example, 2% of the students in the SCS-NCVS survey supposedly reported being subject to hate-related words based on gender in a given year. Report at 8. The AAUW survey of students in grades 8-11 reported that 81% of students reported experiencing sexual harassment. Report at 11. Another survey of sexual harassment cited on page 8 claims the figure is 11%. No explanation is given for this wide divergence.
6. The AAUW survey also reported that boys were 33% more likely than girls (12% versus 9%) to claim that they had been forced to do something sexual other than kissing. That result seems, at best, counterintuitive. Report at 10. There are several possible explanations for the discrepancy, including poorly designed questions, selection bias, and boys who like to confound researchers with poor survey controls.

There are many other examples of irrelevant and unreliable data. After pages of citation to such data, it is not enough that there is a sentence admitting that some of the student behavior cited is not “necessarily” covered by federal civil rights laws. Report at 5. The Commission should have examined every factual claim and study, eliminated misleading or unreliable data, and retained only that which was reliable and has a close connection to our examination of ED/DOJ enforcement of the federal civil rights laws.¹⁴

Moreover, repeating and crediting others who claim that bullying is widespread or a “pandemic” without any quantitative support is misleading. How widespread? What constitutes a pandemic? What does Gregory Herek mean by “pervasive,” which has a legal

reliably well when asking respondents objectively verifiable questions such as how many cars they own or how many bathrooms they have in their homes. But in contrast to such “census-type” questions, self-reporting is much less certain to elicit a truthful response to socially sensitive questions without any likelihood of verification.

¹⁴ The Commission majority also rejected an additional finding that we offered to prominently warn readers that much of the data in the report came from advocacy organizations, was not independently verified by the Commission, and used definitions of harassment that vary from the definition of harassment under federal law. Thus, not only are the data in the report unreliable and somewhat contradictory, but a majority of commissioners did not even want to warn readers of the underlying problems that might make them so. *See* Commission Transcript at 61-63 (Aug. 12, 2011).

meaning? The Commission should have either credited or refuted such conclusions after carefully analyzing the reliable data or not used such loaded and contested terms.

Finally, even for the broader category of mean behavior, there is no reliable data that the relevant conduct is increasing, decreasing, or remaining about the same. It is necessary to have a baseline and consistent data over time to form any meaningful conclusions about whether there is a bullying “pandemic.” Trends relating to ill-defined behavior in non-scientific polls are not helpful. Even more important, we want to know if schools are more or less responsive to such incidents over time. The Commission report contains no information on that whatsoever.

OCR’s Attempt to Expand Its Authority Through Creative Interpretation

Title IX prohibits schools receiving federal funds from discriminating on the basis of sex. Because students are not agents of the schools and the schools cannot exert the same control over them that even employers can exercise over their employees, the Supreme Court has made it clear that schools are not responsible under Title IX and analogous civil rights laws for all student acts. In *Davis v. Monroe County Board of Education*, the Court held that private damages actions may be brought against schools under Title IX for failure to remedy student-on-student sexual harassment, but “only where [the schools] are *deliberately indifferent* to sexual harassment, of which they have *actual knowledge*, that is so severe, pervasive, and *objectively offensive* that it can be said to *deprive* the victims of access to educational opportunities or benefits provided by the school.”¹⁵ The Court’s limitations on school liability was a logical and reasonably necessary interpretation of Title IX because students are not themselves state actors whom Congress can directly regulate and schools exercise only limited control over them, during specific times and settings, and do not know everything students do and say.¹⁶

¹⁵ 526 U.S. 629, 650 (1999) (emphasis added).

¹⁶ *Id.* at 645-47.

ED's Dear Colleague Letter of October 2010 reads Title IX and other civil rights provisions in a manner that would greatly expand the scope of school liability compared to the legal standard in *Davis*. For example, ED changes the first prong of what constitutes prohibited harassment that schools are responsible for preventing from that which is "severe, pervasive, and objectively offensive" to that which is "severe, pervasive, or persistent."¹⁷ *Davis* uses the conjunctive "and" to require that all three conditions be met: that the conduct be serious, common, and offensive to an objective person. The Supreme Court specifically stated that one incident cannot give rise to liability.¹⁸ Under OCR's and DOJ's interpretation, including Jocelyn Samuels's testimony before the Commission, schools can be in violation of Title IX based on a single student act if the government believes it is sufficiently severe.¹⁹ OCR's formulation could also cover mild but "persistent" teasing by one student of another. OCR's interpretation might also capture dozens of different playground comments by dozens of different children if that rendered them "pervasive." Thus, the intentional switch from the Supreme Court's conjunctive phrasing to the disjunctive phrasing by OCR and DOJ broadens schools' potential liability enormously.²⁰

Further, OCR omits the term "objectively offensive" from its formulation of the legal standard, potentially removing a "reasonable person" protection. The Foundation for Individual Rights in Education (FIRE) warns in its public comment:

The loss of the crucial "reasonable person" standard means that a school's most sensitive students effectively determine what speech is prohibited. The "reasonable person" standard is a critical guard against punishing speech

¹⁷ Russlynn Ali, Asst. Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Harassment and Bullying at 2 (Oct. 26, 2010) [hereinafter Dear Colleague Letter], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

¹⁸ *Davis*, 526 U.S. at 652-53 (unlikely that Congress intended that a single instance could be sufficiently severe to create liability); see also Prepared Testimony of Kenneth L. Marcus Before the U.S. Commission on Civil Rights at 22 (May 13, 2011) ("OCR would face a steep challenge in defending its policy in federal court, given that the Supreme Court rejected the single-incident approach based not upon such issues as punitive damages or lawyers' fees but upon its assessment of congressional intent in drafting the relevant language.").

¹⁹ Dear Colleague Letter, *supra* note 17, at 2 ("Harassment does not have to . . . involve repeated incidents."); Report at 4-5 (citing Briefing Transcript, *supra* note 5, at 48 (Samuels Testimony)).

²⁰ Francisco Negron of the National School Boards Association testified that some lower courts are starting to use the OCR standard, granting deference to OCR's guidance. Briefing Transcript, *supra* note 5, at 249. Negron cited as an example *T.K. v. New York City Dep't of Educ.*, 2011 WL 1579510 (E.D.N.Y. April 26, 2011), where the court found the October 26, 2010 Dear Colleague Letter to be "useful" in deciding "when a school is required to act, and what type of response is required." *Id.* at *27. As we explain below, we think such deference is erroneous but it has understandable consequences, whether right or wrong.

based solely on subjective (and possibly unreasonable) listener reaction—something that courts have repeatedly held unconstitutional over the years.²¹

OCR's answer to this charge—that its policy is to “consider the conduct from both a subjective and objective perspective”—is not reassuring.²² It is unclear why OCR omitted the “objectively offensive” factor, but OCR has not issued any further clarification since FIRE and others have pointed out the problem.

In the second harassment prong, OCR replaces the Supreme Court's requirement that the harassment “*deprive* the victims of access to educational opportunities or benefits provided by the school” with the almost infinitely broad “*interfere with or limit* a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school.”²³ The *Davis* standard is closer to the work-place harassment definition, which requires a fundamental transformation of work conditions;²⁴ the new OCR definition includes almost any slight. What range of teasing does not “interfere with” a student's “ability to ... benefit from [some specified] service, activit[y], or opportunit[y]” the school offers?²⁵

OCR also changes the notice requirement from “actual knowledge” to “knows or reasonably should have known.”²⁶ The “actual knowledge” requirement recognizes that the anti-discrimination law is not directed at students but at schools, and schools without knowledge of the harassment cannot be responsible for it.²⁷ OCR essentially argues that since its enforcement actions are only prospective, it provides the necessary notice to the affected school districts and it would not threaten the loss of federal funding if the school agrees to

²¹ Public Comment of FIRE at 3 (May 26, 2011).

²² Report at 67 n.328 (citing Stephanie Monroe, Asst. Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Harassment Issues (Jan. 25, 2006)).

²³ Dear Colleague Letter, *supra* note 17, at 2.

²⁴ *See, e.g., Pennsylvania State Police v. Suders*, 542 U.S. 129, 146-47 (2004) (“For an atmosphere of sexual harassment or hostility to be actionable, . . . the offending behavior must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.”) (internal quotation marks omitted).

²⁵ *See* Public Comment of FIRE, *supra* note 21, at 3 (“This is problematic because ‘limit’ is a broad term that could encompass effects of widely varying severity, setting a far lower bar for conduct that constitutes harassment.”).

²⁶ Dear Colleague Letter, *supra* note 17, at 2.

²⁷ *Davis*, 546 U.S. at 644 (a school not engaging directly in harassment can only be liable if its “deliberate indifference subjects its students to harassment”) (quotation marks and brackets omitted).

take remedial action it deems appropriate. Although there is some logic to this distinction in theory, the guidance letter itself is not clear that prior unknown incidents cannot result in a loss of federal funding by themselves. Indeed, the “reasonably should have known” formulation implies otherwise. We also are concerned with the degree of leverage the “should have known” formula allows OCR in practice to insist on remedies it deems appropriate for such previously unknown incidents.

OCR and DOJ defend their many deviations from the legal standards articulated by the Supreme Court by distinguishing between a private suit for damages, as in *Davis*, and OCR’s administrative enforcement actions, in which no damages are sought. OCR argues that the “standards established” in *Gebser* and *Davis* “are limited to private actions for monetary damages.”²⁸ Quite true, but that doesn’t mean that “anything goes” in the administrative enforcement setting. Moreover, the only meaningful administrative power ED has is to deny school districts federal money. It seems counterintuitive to argue that the courts read a statute narrowly to protect a school district from paying a one-time money damage award that is remedial, but allow ED to read the same law as expansively as it wants, based on the same conduct, when the consequence could be the permanent loss of all federal money.

Professor John Eastman’s testimony before the Commission questioned the lawfulness of ED’s and DOJ’s interpretation in the Dear Colleague Letter. He explained that an administrative agency does have some discretion to implement a statute but that such discretion is not without limit: “An agency can impose regulations that are ancillary to the enforcement of a statute authorized by an enumerated power, such as rules requiring the reporting of certain data that is necessary to determine compliance with the underlying statute, but it cannot make up new prohibitions and substantive requirements that are not part of the relevant statute.” He further explained that “the deviations between [ED’s] ‘Dear Colleague’ letter last October and the *reasonable* interpretation of the relevant civil rights

²⁸ Letter from Russlynn Ali, Asst. Sec’y for Civil Rights, U.S. Dep’t of Educ., to Francisco M. Negron, Jr., General Counsel, Nat’l School Boards Ass’n of March 25, 2011, at 4.

statute[s] are large.”²⁹ In essence, an agency cannot vastly expand the reach of the statute in the guise of administering it.

Another of ED's purported distinctions is that the money damages in litigation are for retrospective wrongs. Since the administrative remedy is for a prospective failure to take the remedial action OCR deems appropriate, ED argues no school actually has to lose its federal money. All it has to do is change its conduct. Yet, that doesn't quite answer the underlying substantive question either. If a robber says, “Give me you money or your life,” that is a prospective choice. No one needs to lose his money, because he can give his life, and vice versa. But the robber doesn't have the substantive right to ask anyone to make that choice, prospective or not. Thus, if OCR has no statutory right to ask for certain actions/remedies based on the underlying conduct (perhaps because it was based on a single incident), it hardly matters that the threat to turn off the flow of money is prospective.

OCR does not indicate what the limits on its enforcement standards are if it is not bound by *Davis*. Pursuant to regulation, could ED condition funding on school districts agreeing to prevent harassment based on a child's weight or perception of what an ideal body mass index should be? The regulation would arguably be in furtherance of enforcing anti-discrimination laws, especially if OCR argued that many perceptions of ideal body mass were linked to gender stereotypes. Yet, we believe such a hypothetical regulation would be an unreasonable interpretation of Title IX, which doesn't cover “lookism” directly or indirectly. Such an unreasonable interpretation would not be entitled to deference by the courts under prong one of the *Chevron* doctrine.³⁰ Professor Eastman's conclusion that OCR's current interpretation of Title IX is unreasonable seems equally correct, and thus is unlikely to be granted deference or upheld by the Supreme Court.³¹

²⁹ Prepared Testimony of Dr. John C. Eastman Before the U.S. Commission on Civil Rights at 4 (May 13, 2011) (emphasis supplied), *available at* <http://www.eusccr.com/7.%20John%20Eastman.%20Chapman%20University%20School%20of%20Law.pdf>.

³⁰ *See, e.g.,* *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2721 (2009) (Office of the Comptroller of the Currency regulation interpreting the National Bank Act was unreasonable to extent it prohibited state attorney general from suing a national bank to enforce a state law, and thus, was not entitled to deference under *Chevron*).

³¹ Although we believe OCR's liability standard would not be upheld by the Supreme Court or most other appellate tribunals where the matter was fairly presented, few school districts can risk losing all federal funding pending the outcome of a court challenge that may never reach the High Court. Moreover, casual or erroneous

Gebser v. Lago Vista Independent School District is not to the contrary. Agencies have authority under comparable funding laws to investigate compliance and establish procedures consistent with due process for its revocation, but they have no authority from Congress to change the underlying substantive standard of what constitutes discrimination the state entity must follow.³²

When the National School Boards Association pointed out in a letter to OCR how far it had departed from the *Davis* standards, OCR could have answered that the standards are meant to be identical or that it would change them to mirror *Davis*. But it did not do so. Instead, OCR argued that its harassment standards are “consistent” with *Davis*, even if the “terms” and “words” are “in some ways different.” According to OCR, the Supreme Court’s and OCR’s “definitions are contextual descriptions intended to capture the same *concept*.”³³ It is risible to argue that standards that are “in some ways different” are still “consistent” as long as both are “contextual” standards. Under that postmodern reasoning, any standard that is “contextual” is “consistent” with any other “contextual” standard. What about the following harassment standard: “under all the facts and circumstances, might some kids feel bad”? And if the standards are consistent, then why does OCR take pains to argue that its administrative standards defining harassment can be different from the standards in private suits for damages?³⁴

Finally, OCR argues that the legal standards set forth in the Dear Colleague Letter of October 26, 2010 are nothing new, and are essentially the same standards set forth in guidance since

deference to OCR’s position is certainly possible, even probable, in some lower courts. *See* Negron testimony, *supra* note 20.

³² In dicta, *Gebser* says that ED could require school districts to have a grievance procedure and publish a notice of anti-discrimination on the basis of sex. The Court states: “Agencies generally have authority to promulgate and enforce requirements that effectuate the statute’s anti-discrimination mandate, . . . even if those requirements do not purport to represent a definition of discrimination under the statute.” *Gebser*, 524 U.S. 274, 292 (1989). But such enforcement requirements mentioned in *Gebser* do not change or alter the definition of discrimination in the statute; they merely supplement its enforcement, as is the case with reporting and record-keeping requirements. OCR’s Dear Colleague Letter attempts to fundamentally change the definition of discrimination.

³³ *See* Report at 64 (quoting Letter from Russlynn Ali to Francisco Negron, *supra* note 28, at 4) (emphasis supplied).

³⁴ *See* Report at 63.

1994.³⁵ This is not a defense if the guidance was never consistent with a reasonable interpretation of the statute. Moreover, Chapter 7 shows that OCR guidance has not been consistent over the years, hewing closer to *Davis* in 2001 (shortly after *Davis* was handed down), then departing further by 2010. The report acknowledges that “OCR’s use of different terms in different documents can be confusing.”³⁶ There is an easy way to resolve any confusion and maintain consistency, however, and that is simply for OCR to accept the *Davis* standard.

Serious First Amendment Concerns

For all of this report’s limitations, it does at least acknowledge that OCR’s Dear Colleague Letter poses thorny First Amendment questions that OCR does not satisfactorily answer. Both the report and a recommendation adopted by the Commission call for OCR to provide greater clarity to address the First Amendment concerns.³⁷ But the report notes these serious concerns only belatedly—this important discussion is relegated to the last 10 pages of the report—and in a way that gives far too much credit to OCR’s assurances that very little of the harassment it sees implicates protected speech.³⁸

The Dear Colleague Letter does not engage the free speech questions everyone else notices. Its only references to the First Amendment are buried in footnote 8 and in its last pages, where the reader is simply directed to a link to OCR’s 2003 Dear Colleague Letter on the subject. All the 2003 guidance document does is affirm quite generally that OCR does not

³⁵ *See id.* at 68.

³⁶ *Id.* at 69. The Commission noted inconsistencies in OCR’s legal standards and passed a recommendation that ED should “strive to use consistent language when it articulates legal standards,” but rejected an amendment to the recommendation that ED’s guidance should also be “based on appropriate legal authorities.” Commissioners Gaziano, Heriot, and Kirsanow voted for this important and neutrally-worded amendment. Commissioners Castro, Thernstrom, Yaki, and Achtenberg voted against it. See Commission Transcript at 58-59 (Aug. 12, 2011).

³⁷ We did not support the report’s recommendation number five in its current form because we have reason to believe OCR’s view of the First Amendment issues is erroneous, and its evaluation of the implications of its guidance document on protected speech is possibly even disingenuous, as this section of our statement documents. Thus, what the Commission acknowledges as serious First Amendment problems (or at least concerns) created by OCR’s letter are not likely to be cured by further “guidance” from that Office. Proper guidance surely is needed, but it may have to come from the courts or from other officials who are more sensitive to the First Amendment and less concerned about the reach of OCR’s power to regulate school conduct and student speech with broad, over-inclusive language.

³⁸ Briefing Transcript, *supra* note 5, at 13 (Ali Testimony).

intend for schools to restrict students' constitutionally protected speech. Neither it nor the current Dear Colleague Letter addresses how schools are to negotiate real-world conflicts.

As briefing testimony and public comments revealed, the threat ED's guidance poses to constitutionally protected speech is not hypothetical. The guidance will quite predictably lead school districts to overreact and trample students' freedom of expression by adopting various zero-tolerance approaches to curb "offensive" speech in an effort to avoid lawsuits and compliance investigations by OCR.³⁹ The guidance also creates an incentive for school districts to single out for special disfavor certain kinds of speech because of its unpopularity or political incorrectness.⁴⁰ These concerns are worthy of far greater exposition, far earlier in the report⁴¹ and with far less deference to ED's presumed good intentions.

As a preliminary matter, no one seriously disputes that schools have broad authority to restrict (or that they should restrict) unruly conduct, including some speech, in school when that conduct or speech either has created actual disruption of school activities or is likely to cause a "substantial disruption of or material interference with school activities."⁴² Schools should attempt to prevent and punish threats of violence and acts of vandalism. Particularly as it relates to classroom discussion, schools can also bar the use of vulgar, lewd or indecent

³⁹ Public Comment of Neal McCluskey, Assoc. Dir., Ctr. For Educ. Freedom, Cato Inst., at 1 *available at* <http://www.eusccr.com/28.%20Neal%20McCluskey.%20Cato%20Institute.pdf>. *See also id.* at 3-5 (for a more extensive discussion of the First Amendment issues in play, the catch-22 position schools are put in by ED's guidance and why zero-tolerance policies are inadvisable).

⁴⁰ The temptation to "engage in censorship of some students to benefit others" will be strong. Statement of Hiram Sasser, III, Dir. of Litigation, Liberty Inst., at 14 (May 13, 2011), *available at* <http://www.eusccr.com/11.%20Hiram%20S.%20Sasser,%20III,%20Liberty%20Institute.pdf> [hereinafter Sasser Statement]. "[B]ut the cause of freedom is never advanced by selective censorship of those messages with which the government disagrees." *Id.* at 15.

⁴¹ For example, we argued in our May 31, 2011 comments on the first draft of the report that the First Amendment concerns relating to the regulation of "cyber-bullying" be discussed in the chapter that addresses why some people want to regulate it. Instead, the alleged harm associated with cyber-bullying is discussed in chapter 2, but the First Amendment concerns associated with regulating it are confined to the last few pages of the report. Our discussion of the regulatory concerns is below.

⁴² *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969). Note that the school's "undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." Sasser Statement, *supra* note 40, at 4 (citing *Tinker*, 393 U.S. at 508). Likewise, the fact that someone is offended by the viewpoint expressed by the speech is also not sufficient to overcome the freedom of expression. *See* Statement of Eugene Volokh, Prof. of Law, Univ. of Cal., L.A., at 6 (May 13, 2011), *available at* <http://www.eusccr.com/27.%20Eugene%20Volokh.%20UCLA%20School%20of%20Law.pdf> [hereinafter Volokh Statement].

terms⁴³ as part of their pedagogical mission, as well as speech that advocates illicit drug use.⁴⁴ While they cannot penalize students based on the viewpoints they articulate, schools can insist that students take care to express themselves appropriately and constructively, without profanities or epithets, for example. As Professor Volokh noted, schools may even express criticism of or condemn rude and hurtful (albeit constitutionally protected) speech.⁴⁵

Schools *should* control substantially disruptive behaviors both to ensure that no student is denied educational benefits and to further the educational purpose of guiding students to become decent human beings who can interact in a civilized fashion with others—even those they disagree with or dislike.⁴⁶ These are settled propositions and nothing in this statement should be construed to suggest otherwise. The problem with the Dear Colleague Letter (and with ED’s and DOJ’s attempt to federalize the issues of bullying and harassment more broadly) is that its proscriptions extend far beyond the type of classroom settings referenced above, and it ignores that even offensive speech in the classroom may be protected by the First Amendment.⁴⁷

It is much less likely that schools can establish that non-threatening student speech uttered between classes, during lunch, or before or after school (even if unkind) is as likely to cause a disruption of the educational mission—and thus is subject to the same degree of regulation—as classroom discussion. The Supreme Court has rejected arguments that certain topics at certain settings are so sensitive that they may be subject to broad viewpoint regulation.⁴⁸ This is true regardless of the age of the speakers involved.⁴⁹ It has also rejected

⁴³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

⁴⁴ *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

⁴⁵ Volokh Statement, *supra* note 42, at 6.

⁴⁶ “Public schools must not merely teach abstract principles of good citizenship, they must also serve as controlled laboratories for students to responsibly practice their constitutional freedoms. ‘[S]chools must teach *by example* the shared values of a civilized social order.’” Brief of Amicus Curiae Claremont Inst. at 3-4, *Morgan v. Swanson*, 628 F.3d 705 (5th Cir. 2007) (No. 09-40373) (citing *Fraser*, 478 U.S. at 683)).

⁴⁷ *See Saxe v. State College Area Sch. Dists.*, 240 F.3d 200, 209-210 (3d Cir. 2001) (in which the court held that “harassing” or “discriminatory” speech, however evil or offensive, is not categorically denied First Amendment protection, thereby invalidating a school district’s anti-harassment policy as unconstitutionally overbroad for its impact on protected speech).

⁴⁸ *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (holding that the offensive speech of picketers near a military funeral could not be prohibited based upon the “viewpoint of the message conveyed”).

⁴⁹ “Minors enjoy the protection of the First Amendment.” *McConnell v. F.E.C.*, 540 U.S. 93, 231 (2003).

blanket bans by schools on all “offensive speech.”⁵⁰ It is even less likely that schools can make the case that student speech outside the school (on the Internet, for example) poses the same risk of disruption to the school’s activities, and thus, is subject to constitutional regulation.⁵¹

OCR’s guidance acknowledges none of these important distinctions. Indeed, it applies a standard of liability to schools that would allow ED compliance reviewers to make after-the-fact determinations that schools “should have known” (rather than had actual notice) that student exchanges in these non-classroom settings were somehow contributing to a hostile environment. ED has adopted a view that essentially requires schools to be hyper-vigilant arbiters of any instances of student interaction that might give rise to hurt feelings.

Throughout the course of the briefing, various proponents of ED’s aggressive approach sought to reassure us that the free speech problems identified by no less than five witnesses (and a fair number of additional public comments) were a “red herring.”⁵² They insisted that the only conduct they are really concerned with does not actually involve speech at all, except when it amounts to physical threats or creates a reasonable fear of physical harm.⁵³ Instead, they asserted that their (and by extension ED’s and DOJ’s) focus is on actual physical harm like assault, rape, or other violence⁵⁴ that are outside the scope of First Amendment protection.

To paraphrase a line from Professor Volokh’s oral testimony before the Commission, we wish that were true.⁵⁵ The Dear Colleague Letter also covers a broad array of non-threatening speech. The advocates’ assurances that it does not cover such protected speech ring hollow

⁵⁰ The Court has rejected such proposals because, “[a]fter all, much political and religious speech might be perceived as offensive to some.” *Morse*, 551 U.S. at 409. *See also* *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”).

⁵¹ *See generally* Volokh Statement, *supra* note 42, at 3; Briefing Transcript, *supra* note 5, at 264, 306 (Volokh Testimony) (for a discussion of the specific First Amendment problems related to school regulation of “cyberbullying”).

⁵² Report at 81 (citing Public Comment of Lambda Legal at 6-9)). *See also* Briefing Transcript, *supra* note 5, at 142 (Comments of Commissioner Yaki).

⁵³ *See* Report at 81-82 (citing Briefing Testimony of panelists Eliza Byard, Gregory Herek and Ilan Meyer).

⁵⁴ *Id.*

⁵⁵ Briefing Transcript, *supra* note 5, at 262 (Volokh Testimony).

for the reasons identified by Professor Volokh in his written and oral testimony, which is even summarized in the body of our report.⁵⁶ If the advocates were correct that liability for verbal harassment was essentially limited to physical threats, Assistant Secretary Ali should have said so when she responded to the NSBA letter from Mr. Negron, or in written or oral testimony provided to the Commission. We find it significant that she did not do so and that no one at OCR or DOJ has disavowed the broad language of the guidance letter that explicitly includes non-threatening speech.

Moreover, those few who attempt to defend the OCR's legal position seem fixated on two extreme positions on the First Amendment, neither of which we endorse. The first is the fictitious, First Amendment absolutist position that kids always have a right to say whatever they want in school,⁵⁷ which is a straw man. It has not been taken by any of us or anyone we are aware of who has participated in this debate. The second extreme position is the one actually taken by some school districts: that students have *no* First Amendment rights. For example, the two school principals sued in *Morgan v. Swanson* and their government-funded attorneys took the position in court (still pending) that the Constitution "does not prohibit viewpoint discrimination against religious speech in elementary schools" and that First Amendment free speech claims could not be brought by elementary school students.⁵⁸ They maintain these positions through years of litigation even though the Supreme Court has consistently held since *Barnette, in 1943*, that the First Amendment applies to public school

⁵⁶ For a discussion of Professor Volokh's arguments that ED's guidance really is in large measure about speech, see the report at 82-83. Summarized briefly, indicators that the guidance does implicate constitutionally-protected speech include: (1) the over-breadth of the Dear Colleague Letter's definition of "harassment" to include "verbal acts," i.e., speech including name-calling and graphic or written statements; (2) its lack of requirement that "harassment" be directed at a specific target or involve repeated incidents—the Dear Colleague Letter is not limited to personal insults that go to a particular person and could include general statements; (3) the fact that ED's less stringent "sufficiently severe, pervasive or persistent" standard means that schools can now be liable for mere isolated one-offs, giving them an incentive to restrict speech; (4) the policy's reach, which purports to hold schools responsible for speech created off-campus (such as cyber-bullying) and suggesting that students could be punishable for such speech throughout the entirety of their school lives (what Volokh calls "24/7 control of student speech"); (5) the fact that the guidance goes beyond personal insults to reach even gossip; and (6) the fact that the Dear Colleague Letter may reach even criticism of religion or homosexuality based on the theory that such speech, if severe, pervasive or persistent enough, creates an offensive or abusive environment.

⁵⁷ Report at 85 (quoting Public Comment of Stuart Biegel at 4) (noting that the Seventh Circuit has "rejected the notion that First Amendment absolutist arguments should be controlling in a K-12 education setting").

⁵⁸ 627 F.3d 170, 176 (5th Cir.) (internal quotation marks omitted), *reh'g en banc granted*, 628 F.3d 705 (5th Cir. 2010).

children,⁵⁹ and that public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁶⁰ OCR’s Dear Colleague Letter fails to address the real problem of school officials, like these in Texas, who misunderstand what the Constitution requires. Our concern is that the short shrift given to the First Amendment in the Dear Colleague Letter will actually lead to more illegal censorship like that in *Morgan*.

We find the Dear Colleague Letter’s imposition of responsibility on schools to police cyber-bullying to be quite revealing of OCR’s position on the potential scope of school liability for non-threatening student speech. “Cyber-bullying” has no set meaning beyond what its detractors declare it to mean. As best we can surmise, it seems nothing more than a derogatory label for electronic speech that someone else doesn’t like. This open-ended “cyber-bullying” largely occurs off-campus and after school hours, in such electronic media as private Facebook postings, emails, text messages, G-chats, and YouTube videos. Its potential to create school liability is a stark example of OCR’s policy overreach and lack of concern for First Amendment freedoms.

As the General Counsel for the National School Boards Association observed:

If schools are to be held accountable for all bullying behavior that may constitute harassment under federal civil rights laws, including that which takes place in cyberspace but makes its way onto campus overtly or by effect, schools will understandably feel the need to patrol electronic communications by students. But taking on this burden may be an act of futility, for how can a school patrol private internet sites with any measure of effectiveness? And yet the “should have known” standard would suggest that schools must police such venues to avoid liability under the OCR enforcement standard. The current confusion among courts as to what off-campus behavior can be

⁵⁹ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Former U.S. Solicitor General and D.C. Circuit Court of Appeals Judge Ken Starr was retained by the very same Barnett sisters who prevailed in their First Amendment case before the Supreme Court in 1943 to file a brief in the *Morgan* case to help convince these school officials that elementary school children are protected under the First Amendment’s guarantee of free speech and that they may not discriminate against religious viewpoints. Brief for *Amici Curiae* Gathie Barnett Edmonds and Marie Barnett Snodgrass, 627 F.3d 170 (5th Cir.) *reh’g en banc granted*, 628 F.3d 705 (5th Cir. 2010) (No. 09-40373). (The Supreme Court case caption does not match the names of the Barnett sisters because the courts misspelled their family surname during the litigation. *Id.* at 2 n.1.) See also the brief authored by former U.S. Solicitor General Paul Clement and Liberty Institute lawyers on behalf of the school children in *Morgan*, making similar legal points as well as describing the school officials’ outrageous actions in violating student speech rights. Supplemental En Banc Brief of Appellees, *id.*

⁶⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

regulated by schools, combined with the OCR enforcement position, results in an untenable expectation that schools police off-campus online behavior while ultimately facing liability for conduct over which they have no control.⁶¹

It is highly unlikely, though admittedly not impossible, that a bully would transmit an actionable physical threat via email, chat or text, because even teenagers are aware that creating a record of such a physical threat could result in their arrest or other serious punishment. Instead, our record reflects that the “cyber-bullying” concern is that electronic means would be used to perpetrate the following categories of conduct the anti-bullying activists want to stamp out: “spreading rumors,” “interfering with relationships,” and disparaging the target’s physical or personality traits in an attempt to make them feel badly about themselves. We do not condone such conduct, but the First Amendment does not only protect speech most people like.

The First Amendment problems with ED’s guidance are only exacerbated by its expansive theory of school liability and multiple examples of conduct that it asserts constitute actionable harassment under the civil rights laws. (See the previous section of this statement for more on OCR’s erroneous legal standard of liability.) “OCR is creating an expectation that school officials are to respond to each and every offensive incident as if it were a civil rights violation.”⁶² The practical effect of the Dear Colleague Letter is that Title IX will be used to foist a federally-imposed general civility code on schools and students across the country.

Consider ED’s application of its erroneous standard that any “severe, pervasive *or* persistent” conduct could create a hostile environment. Although single-incidents could not create an actionable hostile environment under the legal standard articulated by the Supreme Court, under ED’s current enforcement stance, it is possible for “one-offs” to create liability if they are sufficiently severe.⁶³ Thus, it is not difficult to imagine how administrators could think

⁶¹ Statement of Francisco M. Negron, Jr., General Counsel, National School Boards Association at 4-5 (May 13, 2011), available at <http://www.eusccr.com/24.%20Francisco%20Negron.%20National%20School%20Boards%20Association.pdf>.

⁶² *Id.* at 4.

⁶³ “But if every instance implicates a federal right, educators will have no choice but to take formal steps in even the most mundane cases to avoid agency liability and prepare for a legal defense.” *Id.* at 9.

that even pure expression, if deeply offensive, might contribute to a hostile environment and so try to regulate it.

Similarly revealing of the intended scope of ED's guidance is its imposition of liability on schools for not sufficiently addressing a "hostile environment" or "hostile school climate." ED's current guidance defines harassment to include speech such as graphic and written statements, and such statements need not be directed at a specific target. Thus, ED's definition of harassment is not restricted to insults directed at a particular individual. It also includes general statements, such as statements critical of homosexual conduct or particular religions.

Drs. Herek and Meyer testified about their theory that the mental health of gay students is negatively affected by the stigma and prejudice of society towards homosexuality, which will at times be expressed in the form of speech. General derogatory statements by students will be taken as evidence by OCR that a school has permitted an environment hostile to gay youth. Taken logically, that means that constitutionally protected speech expressing or contributing to "stigma" must be regulated by schools to avoid liability for the allegedly hostile environment.⁶⁴ It might be very difficult for a school district to satisfy OCR's standards without proscribing all speech that can be construed as hostile to gay youth. Similar examples have been borne out in litigation.⁶⁵ ED must be aware that the issuance of such guidance will put schools in a catch-22. Yet, it also knows that schools are more likely to accept the risk of potential private lawsuits over the suppression of student free speech for nominal damages than they will be to cross regulators who control the purse strings of their federal dollars.⁶⁶

⁶⁴ Briefing Transcript, *supra* note 5, at 263 (Volokh Testimony).

⁶⁵ *See, e.g., Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007) (mem.) (case involving whether school could properly prohibit a student from wearing a T-shirt expressing his views on homosexuality).

⁶⁶ As our colleague Commissioner Heriot notes in her dissenting statement, there is no federal agency charged with safeguarding students' First Amendment rights. There is at least one private group—the Foundation for Individual Rights in Education (FIRE)—that works on such issues, but they primarily confine their efforts to infringements on individual rights at colleges and universities. Given this asymmetry of incentives, many schools may be tempted to over-reach in the direction of avoiding litigation over bullying than in the direction of avoiding litigation over First Amendment concerns.

A number of witnesses at the Commission's May 13 briefing identified the difficult definitional and line-drawing problems the Dear Colleague Letter forces upon school districts.⁶⁷ Francisco Negron, General Counsel of the National School Boards Association, testified to the schools' very real concern over "the tension . . . between student freedom of expression and the regulation of hostile environment."⁶⁸ Unfortunately, schools have a track record of outrageous violations of students' freedom of speech. Hiram Sasser's testimony contains troubling examples of schools that are already taking a heavy-handed approach to non-disruptive speech involving students' belief in God and similar expressive conduct.⁶⁹ Such non-disruptive speech is routinely censored based on fear that it might cause offense to someone, somewhere.

The facts of *Morgan v. Swanson*⁷⁰ are just one example of the heavy-handed censorship many administrators already exercise to deny student speech. In that case, two principals were sued for clear religious viewpoint discrimination, and the students ultimately were vindicated, even though their claim for money damages has dragged on for many years, with the principals refusing to admit they did anything wrong after years of litigation. One principal prohibited kids from distributing "goodie bags" at a "winter break" party because the bags contained items with religious references, including pencils bearing the message, "Jesus is the reason for the season," and candy-cane pens with information regarding the Christian origin of the symbol. Another child was not permitted to give her friends tickets to a free Christian drama production at her church, even though she attempted to do so during non-curriculum time and with no material or substantial disruption to the school. The principal confiscated the tickets to the play, threatened to kick the child out of school and even threatened to have the child's parent arrested over the attempted distribution of such material, not because gift giving was inappropriate but because the play was religious in nature.

⁶⁷ See, e.g., Briefing Transcript, *supra* note 5, at 63 (Clegg Testimony).

⁶⁸ *Id.* at 250-51 (Negron Testimony).

⁶⁹ See Sasser Statement, *supra* note 40, at 7-11 (chronicling specific examples).

⁷⁰ 628 F.3d 705 (5th Cir. 2007).

These are not isolated examples. Schools have attempted to prevent a Muslim student from wearing her hijab in class, have banned all religious items and certain Valentine's Day and Christmas cards because they were religious, and have even tried to prevent a kindergartner from praying over her snack with two classmates.⁷¹ In *Harper*, a high school student was interrogated and chastised by school personnel and security personnel, including one wearing a sidearm, that he "had to leave his faith in the car" because he wore a T-shirt with a Bible verse expressing his views against homosexuality during the school's "day of silence."⁷² The Dear Colleague Letter, which lacks any accompanying guidance to schools regarding speech that they should not forbid, will only lead to more wrongful censorship and more litigation.

The Dear Colleague Letter's reference to system-wide training to combat a perceived hostile climate might also conflict with students' First Amendment rights. For example, it explains that it is insufficient for a school to recognize and respond to individual incidents on a case-by-case basis and only by punishing individual harassers. "Instead, school district [sic] must recognize and respond to a 'hostile environment' with a 'systemic response' 'reasonably calculated to end the harassment and prevent its recurrence.'"⁷³ The "systemic and comprehensive" actions the guidance contemplates include "training or other interventions not only for the perpetrators, but for the larger school community."⁷⁴ As Hiram Sasser noted in his testimony, to the extent that such training induces participants to affirm or agree with propositions that are contrary to their personal beliefs, such actions constitute compelled speech in violation of the First Amendment.⁷⁵

The report cites public comments by Erwin Chemerinsky and Stuart Biegel, who argue that those who have expressed concern about students' First Amendment rights should be comfortable with deferring to the judgment of school officials about how best to handle and classify offensive speech.⁷⁶ Yet, the enforcement agenda announced by ED and DOJ will

⁷¹ See cases collected in Sasser Statement at 7-11.

⁷² Sasser Statement, *supra* note 40, at 10 (citing to aspects of the factual background in *Harper*, 445 F.3d at 1171-73).

⁷³ Letter from Francisco Negrón, General Counsel, NSBA to Charlie Rose, General Counsel, U.S. Dept. of Ed. at 4 (Dec. 7, 2010), available at <http://www.nsba.org/SchoolLaw/Issues/NSBA-letter-to-Ed-12-07-10.pdf>.

⁷⁴ Dear Colleague Letter, *supra* note 17, at 3.

⁷⁵ Sasser Statement, *supra* note 40, at 16.

⁷⁶ Report at 84-85.

chill most rational educators from instituting anything other than what the federal government instructs.⁷⁷ The hypotheticals will not be construed as optional “best practices”; they will become requirements. For schools that already censor too much student speech, the guidance will only add to the denial of student rights.

For all ED’s protestations that its approach hews closely to established precedent and that it does not seek to supplant the judgment of school administrators, but to work closely and cooperatively with them, the policy’s over-breadth betrays ED’s true intent. Its efforts are likely to produce the precise effect on school districts that Justice Kennedy warned about in his dissent in *Davis*:

The only certainty flowing from the majority’s decision is that scarce resources will be diverted from educating our children and that many school districts, desperate to avoid Title IX peer harassment suits [or compliance investigations], will adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose upon them. The Nation’s schoolchildren will learn their first lessons about federalism in classrooms where the Federal Government is the ever-present regulator.⁷⁸

Unfortunately, we do not share some of our colleagues’ confidence that ED’s issuance of a new Dear Colleague Letter containing First Amendment guidance will be sufficient to cure the earlier Letter’s infirmities or to stem the practical threats to protected speech. In part, that is because we do not think that protected speech is merely an accidental casualty here.⁷⁹ Treating all student taunts as potential civil rights violations may score political points with various favored constituencies, but it creates a host of thorny legal tangles that school districts and their attorneys, administrators, and students have to wade through. “Civil rights laws [and by extension the agencies that enforce them] do and should regulate conduct, barring employers or school officials from engaging in discriminatory practices. . . . But laws

⁷⁷ Briefing Transcript, *supra* note 5, at 250 (Negron Testimony).

⁷⁸ *Davis*, 526 U.S. at 657-58 (Kennedy, J., dissenting).

⁷⁹ Nor do some of our witnesses. *See, e.g.*, Briefing Transcript, *supra* note 5, at 293-94 (Volkh Testimony) (“[O]ne thing that troubles me about a lot of this discussion including the Dear Colleague Letter is the sense that there’s sort of denial going on. That there really isn’t any speech issue in play. Sometimes the claim is ‘this is conduct, not speech,’ even though the conduct consists of verbal acts which is another way of saying speech. Sometimes the claim is ‘it’s harassment and not speech,’ even though if you label speech ‘sedition’ or ‘harassment’ or ‘intentional infliction of emotional distress,’ that doesn’t strip it of constitutional protection.”).

can't make people like each other; and laws can't force people to speak politely, civilly, or inoffensively, unless we aim for a world in which everyone is equal and no one is free."⁸⁰

Discrimination Based on Sexual Orientation Is Effectively Covered under Title IX

Title IX of the Education Amendments of 1972 prohibits public and private schools that receive federal money from discriminating “on the basis of sex.”⁸¹ In the employment context, the Supreme Court has held that discrimination-based sex stereotyping can violate Title VII of the Civil Rights Act of 1964, such as where an accounting firm would not promote a woman to partner because of her aggressiveness even though aggressiveness is a requirement for the job. This placed the woman in an “intolerable and impermissible catch 22” and thus constituted discrimination because of sex.⁸² The Supreme Court has also held that sexual harassment violating Title VII can occur where the harasser and victim are of the same sex.⁸³

ED acknowledges that “Title IX does not prohibit discrimination based *solely* on sexual orientation.”⁸⁴ This is a proper reading of the statute based on Congress’s original intent. As Roger Clegg put it, “‘sex’ does not mean ‘sexual orientation,’ and it certainly did not mean that in 1972.”⁸⁵ ED and DOJ further state that Title IX prohibits both offensive sex stereotyping, which includes harassment of boys or girls who don’t measure up to some notion of masculinity or femininity, respectively, and other forms of sexual harassment regardless of the students’ actual sexual orientation or perceived sexual orientation. Whether or not Title IX was intended to cover sex stereotyping, several lower courts have so held.⁸⁶

⁸⁰ Wendy Kaminer, *Anti-Bullying Laws & the Misguided Drive for Social Equality*, THE ATLANTIC (Dec. 2, 2010), available at <http://www.theatlantic.com/national/archive/2010/12/anti-bullying-laws-and-the-misguided-drive-for-social-equality/67322/> (also submitted by Ms. Kaminer for the record as a public comment).

⁸¹ 20 U.S.C. § 1681(a).

⁸² Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *superseded by statute on other grounds*.

⁸³ Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).

⁸⁴ Dear Colleague Letter, *supra* note 17, at 8 (emphasis supplied).

⁸⁵ Prepared Testimony of Roger Clegg, President and General Counsel, Center for Equal Opportunity, Before the U.S. Commission on Civil Rights at 7 (May 13, 2011), available at <http://www.eusccr.com/6.%20Roger%20Clegg.%20Center%20for%20Equal%20Opportunity.pdf>.

⁸⁶ *See, e.g.,* Pratt v. Indian River Cent. Sch. Dist., 2011 WL 1204804, *11 (N.D.N.Y. Mar. 29, 2011) (“[H]arassment based on nonconformity with sex stereotypes is a legally cognizable claim under Title IX.”); Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (“If not for her status as a

The analogy to *Hopkins* and *Oncale* is logical, and the courts are unlikely to narrow their interpretation of what has come to constitute sex stereotyping under Title IX.

Yet the report concludes that there is a gap in federal civil rights enforcement because harassment that is solely based on sexual orientation or gender identity is not prohibited, even though harassment based on sex stereotypes is prohibited. Report at 55. The report raises the specter that this “dichotomy may create a perverse incentive for alleged discriminators to evade Title IX liability by asserting that students’ harassment is based entirely on homophobic animus.” *Id.* But the report points to no evidence that schools are successfully avoiding liability by claiming that the harassment is based on sexual orientation.⁸⁷

ED told the Commission that it does not track complaints alleging discrimination or harassment based solely on sexual orientation, yet there is no evidence from ED or DOJ that there has ever been a complaint that presents a pure “sexual orientation” claim to track. Instead, ED claims it does not distinguish between sex harassment claims of heterosexual and LGBT students and whether they involve sex stereotyping. Report at 35. Thus, given the broad legal precedents, the likely student harassment scenarios, and the lack of contrary evidence, it seems quite doubtful there is a “gap” in federal enforcement authority as a practical matter, at least in the real world.

Unfortunately, four commissioners defeated attempts to clarify a finding that “federal civil rights laws do not protect students from peer-to-peer harassment that is solely on the basis of sexual orientation.” Such a finding can only mislead readers about the state of the law. Four commissioners rejected an amendment that would have added language at the end of the

female, a reasonable trier of fact could conclude that Andree would not have been called the offending slurs. As such, Andree, a female student, targeted by other female students and called a variety of pejorative epithets, including ones implying that she is a female homosexual, has established a genuine issue of fact as to whether this harassment amounts to gender-based discrimination, actionable under Title IX.”); *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000) (“[B]y pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes, plaintiff has stated a cognizable claim under Title IX.”).

⁸⁷ The report cites one case where the defendant school board argued that the statements in question were about sexual orientation and not gender, but, as the report notes, the court rejected this argument. Report at 55 & n.283 (citing *Riccio*, 467 F. Supp. 2d at 225).

finding informing readers that ED, DOJ, and the courts have nevertheless interpreted federal civil rights laws “as protecting students from peer-to-peer harassment that is based on conforming, or failing to conform, to stereotypical notions of masculinity and femininity.”⁸⁸ The three of us voted for adding the clarifying language, with Gaziano noting that there is no evidence in the report of a single instance in which a harassment claim failed because it was based “solely” on the student’s sexual orientation. The three commissioners supporting the clarification did not propose to strike the finding adopted by the majority, but simply urged that it be made reasonably complete.

As adopted, the Commission’s finding is highly misleading about ED’s enforcement efforts and the current state of the law, even if a few instances of non-enforcement based “solely” on sexual orientation can be found. The current finding strongly implies there is *no* federal protection for students who are harassed or subjected to violence based on their non-conformity to sexual stereotypes, when all such sex stereotyping claims are cognizable, and there is no reason to think that many sexual minority students can make out one claim but not the other. No sensible reason was provided by the commissioners who rejected the clarification, and no substitute amendment was offered by them that would make the finding less misleading. As it is written, however, the finding serves the political agenda of those who seek to argue that an intolerable “gap” exists in the federal civil rights protection that must be filled with new legislation.

Even so, the pending bills mentioned in the report and most strongly supported by the advocates to address this issue do not merely close this alleged enforcement “gap.” Instead, they impose many new requirements and cover much new ground that would have significant unintended consequences.⁸⁹ Such legislation should be evaluated on its own merits, or lack

⁸⁸ Commissioners Castro, Thernstrom, Yaki, and Achtenberg voted against adding the clarifying language. *See* Commission Transcript at 31 (Aug. 12, 2011).

⁸⁹ The Safe Schools Improvement Act, S. 506, defines harassment even more broadly than OCR—as “conduct . . . that *adversely affects* the ability of one or more students to participate or benefit from the school’s educational programs or activities . . .” The phrase “adversely affects” is broader than OCR’s phrase “interfere with or limit,” which in turn far exceeds the “deprive” standard in *Davis*. The Act would require states to collect and report on “the incidence, prevalence, age of onset, perception of health risk, and perception of social disapproval of bullying and harassment by youth in elementary schools and secondary schools.” It would also require local school boards to adopt anti-bullying policies and procedures, including formalized, written grievance procedures. The Student Non-Discrimination Act, H.R. 998, likewise goes beyond putting sexual

thereof. The supposed “gap” in Title IX coverage should not be used as an excuse to promote or disguise something much broader.

Rebuttal to Statements by Other Commissioners

As Commissioner Heriot explained in her accompanying dissent, three of us voted against the decision by the Commission’s majority to abruptly cancel our ongoing enforcement report project for FY 2011, which was to investigate the DOJ’s use of *cy pres* agreements. Given the Commission’s sensible past practice in which a new majority sets the course for future studies but continues ongoing projects (especially those more than half-way completed), the cancelation of the *cy pres* study was highly unusual and inappropriate, regardless of the preference the new majority had to study something more to its liking this fiscal year.⁹⁰

We also objected to the decision in March of this year to launch and attempt to complete a competent investigation of the student bullying topic generally and the federal agencies’ enforcement efforts relating thereto. We maintained that this particular topic could not be adequately investigated in a few months before the draft report had to be produced for review. We also objected to (and voted against) some of the timetables and procedures adopted to produce the draft report in such a short time frame. Our predictions that nothing meaningful could be completed on this topic in the time allotted have been proven correct, although our foresight was probably due more to our years on the Commission rather than anything else.

orientation and gender identity on the same footing as race, color, national origin, sex, or disability in the federal anti-discrimination laws. The Act also prohibits harassment based on “the actual or perceived sexual orientation or gender identity of a *person or persons with whom a student associates or has associated*,” while adopting OCR’s broad standard of what constitutes harassment. Such an expansion of prohibited harassment in federal law would certainly open the door to more litigation against school districts.

⁹⁰ We also join Commissioner Heriot’s regret that the new majority also canceled: (1) the ongoing investigation into DOJ’s handling of and ultimate dismissal of most of its New Black Panther Party lawsuit, and (2) the original research into whether certain colleges and universities were discriminating against women in admission. See Heriot Dissenting Statement at 185 n.14.

Putting aside those significant objections, however, we concur in Chairman Castro's description of the collegiality in which the briefing in May was organized, the constructive efforts (under the circumstances) of our career staff to deal with the short deadlines dictated by the shift in topic, and the fair-minded way in which Chairman Castro conducted the briefing. The failure of our career staff to conjure data that does not exist is understandable. Notwithstanding the serious substantive concerns with the report expressed in this statement, we especially appreciate the efforts Commissioners Achtenberg and Castro made to try to turn a sow's ear of an investigation into a silk purse report. That we believe their well-meaning efforts largely failed to produce what they hoped should not be interpreted as a lack of respect for them personally. Indeed, we regret the necessity of pointing out several of our continuing disagreements with them below.

Is Greater Federal Involvement in K-12 Bullying Helpful or Counterproductive?

A. Leaps of Logic in the Concurring Statements

The accompanying statements by Commissioners Achtenberg, Castro and Yaki contain certain common assertions that incorporate a non sequitur and a related leap of logic. The non sequitur is that because bullying of various types is harmful (ignoring for now that there is absolutely no evidence whether the level of bullying has changed since the dawn of time), there is a need for greater federal involvement to solve the problem. The related leap of logic is that because various anti-bullying efforts at the state and local level are not uniform, there is naturally a great need for uniform national standards.

The concurring statements make no, or almost no, attempt to connect the dots on these non sequiturs and logical fallacies, yet their favored policy recommendations of increasing the federal government's involvement and passing more national laws do not logically follow from either premise. For example, Chairman Castro writes that there is evidence that students are being bullied because of their membership in protected classes, and "[w]hen that happens, I believe the Federal government has an important role to play."⁹¹ This is an

⁹¹ Castro Statement at 91.

illogical leap for several reasons. Students are not themselves state actors. Many instances of peer-to-peer bullying may not be known to school officials. More importantly, if the schools take adequate and appropriate steps to address bullying they reasonably become aware of, there is no federal issue. The Fourteenth Amendment prohibits state actors from denying equal protection of the laws to their citizens; it does not empower the national government to right all wrongs in the first instance, no matter how real. At a minimum, there must be substantial evidence in the record that states are systematically ignoring the rights of students in certain protected classes before greater federal intervention would be warranted. There is no such evidence.

There are many more serious crimes that occur “nationwide” that most people, even intuitively, know should not be federalized with uniform, national prohibitions. Murder and sexual assaults are devastating crimes, but states vary in countless significant ways regarding how they define the different levels of homicide, the type of sexual assault offenses, the age of consent for statutory rape, the penalties for each, and the criminal procedures for proving those different offenses and various defenses (insanity, for example). It’s highly doubtful that federal preemption of homicide and sexual assault offenses would prevent more of them (for many of the same reasons we explain below relating to bullying), but it would be unconstitutional for the national government to try. For similar reasons, it probably would not help if Congress were able to supplement state laws with general, federal homicide and sexual assault statutes.

Unless one naively believes that all instances of teasing and mean behavior can be stopped among the 55 million American students, it is necessary to seriously analyze the efforts the schools are taking to address the issue. No attempt was made to do so in the Commission’s report or the concurring commissioner statements. It also would be necessary to carefully analyze any additional efforts that might arguably improve the situation before leaping to the conclusion that the federal government could naturally do a better job. Better than what? What is the baseline? Assuming, *arguendo*, that it is simply a matter of increased resources and effort that is needed, why can’t the local schools do more with those extra resources? Indeed, dealing with DOJ and OCR attorneys and the rest of the federal bureaucracy, for

example, will diminish the time principals, teachers, and administrators spend making their schools better.

Commissioners Castro, Achtenberg, and Yaki seem to assume that national, uniform standards are always better, without any explanation. They call for federal anti-bullying statutes because, as Commissioner Castro writes, “current state-level anti-bullying laws neither protect all students nationwide nor provide all students with equal and consistent levels of protection from state to state.”⁹² Yes, but so what? Most students only go to school in one state at a time. Why isn’t it enough that the state where any given student lives has laws that protect him or her? Moreover, the same legal characterization is true for murder, rape, and theft laws; there is no reason to fear that the lack of uniformity would cause a problem in prosecuting any particular case.

The District of Columbia and 47 states now have anti-bullying statutes, and two of the remaining three states have statewide anti-bullying regulations.⁹³ All states prohibit violence and threats of violence, regardless of the motive involved, which is what the anti-bullying activists and our fellow commissioners claim they are either exclusively or most concerned about. (That is also the most common understanding regarding their repeated references to “student safety.”) Moreover, the schools of every state and territory have the inherent ability and institutional history of addressing student bullying that pre-dates and supplements these specific anti-bullying laws and regulations. There is absolutely no evidence that particular states are deficient in enforcing such laws, regulations, and practices.

If the claim was that one or more of the states had deficient laws, regulations, or policies, that might support an argument for the particular state or states to reform their laws and practices. But neither the Commission’s report nor our fellow concurring commissioners’ statements analyzed the state enforcement record or made that argument. As the previous section of this joint dissent explains, we suspect the disconnect is at least partly because those who favor

⁹² Castro Statement at 92. *See also* Yaki Statement at 217 (stating, without the least explanation, that the protections he favors “must be uniform”); Achtenberg Statement at 121: “[T]he lack of consistency among state laws demonstrates the need for federal legal protections.” With due respect, it demonstrates nothing of the kind.

⁹³ *See supra* note 6.

new federal legislation do so not out of a love of uniformity per se—or a coherent argument that uniformity provides better protections for students who go to school in only one state at a time—but because they want to provide additional power and responsibility to the national government for other reasons. Perhaps they have sincerely come to believe that the national government is the best, most effective level of government there is. We don't share that view, but we think there are additional reasons to believe that increased federal intervention is likely to be counterproductive in this area that ED has admitted is “primarily a local responsibility.”

B. Reasons Why Greater Federal Intervention May Be Counterproductive.

We previously noted that there is no relevant data relating to violations of the federal civil rights laws concerning student-on-student harassment; no relevant data, evidence, or analysis of ED's or DOJ's effectiveness in enforcing the relevant federal laws; and no helpful information or analysis regarding the efforts K-12 schools are undertaking to enforce either the federal laws or otherwise respond to student bullying or harassment generally. Yet OCR is attempting to greatly expand its authority in this area with legally erroneous “guidance,” which Commissioners Achtenberg, Castro and Yaki seem to support. We now offer a brief reflection on whether such expansion of federal authority is likely to help or hurt.

In addressing the question, we do not mean to impugn federal officials' subjective motives for attempting to expand their power. It is human nature for federal officials, or anyone for that matter, to believe that expanding their power will do a world of good. Indeed, the vast majority of individuals enter government service with the best of intentions, but it is also human nature for such officials to increasingly come to believe that the common good coincides with their self interest. The public choice literature shows that whatever serves to increase bureaucratic authority is a powerful predictor of what bureaucrats will seek, but it is not surprising that they rationalize their behavior and sincerely come to believe that they know what is best.

A serious study of *relevant* data on student-on-student harassment and schools' responses thereto might be necessary to definitively answer the question of whether more federal involvement would help or hurt in preventing bullying, but the following reasons should counsel against the lazy assumption that greater federal involvement is always better. And with regard to what even Assistant Secretary of Education Russlynn Ali conceded is "primarily a local responsibility," our analysis suggests that more federal involvement is quite likely to be counterproductive.

- First, increased federal pressure will inevitably increase the number of "zero tolerance" responses to alleged harassment with ridiculous results. As Commissioner Heriot pointed out in her accompanying dissenting statement, kids in preschool and kindergarten are already suspended or arrested too often for trying to hug their teachers or kiss their classmates.⁹⁴ But things can get worse. Even the Antioch College conduct code ridiculed on Saturday Night Live would not go far enough for current activists' tastes. At least the Antioch College code permitted one student to ask another whether he could hold hands, hug, or kiss his romantic interest.⁹⁵ Some activists now purport to define bullying to include "unwelcome" flirting,⁹⁶ which is hardly an aggressive act, and in any event, is preliminary to asking for a date. Will K-12 schools have to pass comprehensive new

⁹⁴ See Commissioner Heriot's Statement at 189-90. See also, e.g., *Outcry Spurs School to Lift Boy's Suspension for Kissing*, ST. LOUIS POST-DISPATCH, Oct. 3, 1996 (6-year-old North Carolina boy suspended for kissing girl on cheek); JuJu Chang et al., *First Grader Labeled a Sexual Harasser*, ABC NEWS, April 4, 2008, available at <http://abcnews.go.com/GMA/AsSeenOnGMA/story?id=4585388>. During the 2005-06 school year in the state of Maryland, 28 kindergarteners were suspended for "sex offenses, including 15 for sexual harassment." Yvonne Bynoe, *No Hugs Allowed*, WASH. POST, Oct. 22, 2007.

⁹⁵ The Antioch College policy still states: "Consent is defined as the act of willingly *and verbally* agreeing to engage in specific sexual conduct. . . . Consent is required each and every time there is sexual activity." Eugene Volokh, *GETTYSBURG COLLEGE JOINS ANTIOCH COLLEGE, THE VOLOKH CONSPIRACY*, May 11, 2006 (quoting Antioch College policy) (emphasis added), available at <http://volokh.com/posts/1147374096.shtml>; see also FIRE, *Gettysburg College: Hug at Your Own Risk*, May 11, 2006 ("Under the [Gettysburg College] policy, 'consent' to sexual interaction is defined as 'the act of willingly and verbally agreeing (for example, by stating 'yes') to engage in specific sexual conduct. If either person at any point in a sexual encounter does not give continuing and active consent, all sexual contact must cease, even if consent was given earlier. . . . The policy's broad definition of sexual interaction includes not only sex acts but also 'brushing, touching, grabbing, pinching, patting, hugging, and kissing.'"). See also Sandy Hingston, *The New Rules of College Sex*, PHILADELPHIA MAG., Sept. 2011. Justice Kennedy's dissent in *Davis* cites a 1994 sexual harassment manual which suggests that a comment as mild as "You look nice" from one student to another could be sexual harassment, depending on the "tone of voice," how the student looks at the other student, and who else is around. 526 U.S. at 326.

⁹⁶ Report at 10 n. 42 (citing American Association of University Women, *Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School 20-21* (2001) (unwelcome "flirting" is sexual harassment)).

speech codes that prohibit “unwanted” date requests unless a student’s Facebook status expressly welcomes all new date invitations? What other restrictions on sexual innuendo will be required? As Professor Volokh noted: “Romantic problems occasionally cause suicide. We don’t go out there and start pervasively regulating romance because of that danger including a danger to teenagers.”⁹⁷ Volokh’s first point is undoubtedly correct, but a lot of activists would like to prove him wrong on his second point.

- Second, expanded federal authority to investigate incidents of K-12 school bullying will divert federal attention from the rare but serious cases in which a particular school or school district really is indifferent to protected-class-based violence. The troubling racial violence in a South Philadelphia high school explored by the Commission in its May 2011 briefing is a potent example.⁹⁸ It seems to us that DOJ should have been quicker to respond, especially since serious injury and potential loss of life was at play. Almost all schools do want to stop all forms of bullying, and it is not just because they fear liability for damages, although that is surely an additional incentive to follow the law. The massive resistance to desegregation in the 1950s-70s is not an apt analogy to instances of student-on-student harassment because there is no evidence that schools in general are indifferent to the serious incidents of harassment of any of their students. Nevertheless, the existing federal law, properly understood, provides an important backstop for race or similar class-based violence that a few schools might ignore. Helen Gym’s testimony about the un-checked violence in Philadelphia at our briefing is cited as proof that the federal government should intervene to stop violence. We agree, but her testimony actually supports our view that there is a critical role for federal officials when schools are deliberately indifferent or contribute to serious racial violence. Our fear is that this critical, but limited, role might get diluted or “defined down.” When DOJ and ED are busy policing offensive “eye rolling” or taking depositions about the tone of voice in

⁹⁷ Briefing Transcript at 307 (May 13, 2011).

⁹⁸ In December 2009 at a high school in South Philadelphia, African-American students attacked Asian American students, sending 13 of them to the hospital, despite repeated complaints to school officials and requests for protection from the Asian-American students, which went largely unheeded. Report at 13; *see also* Krissah Thompson, *Justice reaches pact with Philadelphia schools in '09 attacks on Asian American students*, WASH. POST, Dec. 15, 2010.

which a compliment was offered, they divert resources and undermine respect for the more serious incidents of violence and harassment.

- Third, greater federal regulatory involvement to prevent teasing and the like that doesn't rise to the level of what the Supreme Court defined as prohibited federal harassment will undercut the accountability local school officials and state legislators have to parents and students to prevent and address all types and degrees of bullying. The more the federal government acts as the savior, no matter how well meaning that may be, the more attention will be directed to Washington. It is hardly surprising that activists of all stripes focus their energy on federal action, but few consider whether that will backfire if the federal government is really unable to make a difference. Since few acts of bullying do rise to the level of a federal civil rights violation, this diffusion of responsibility will have a sadly counterproductive result. Local officials who should be responsible can partially evade their accountability by playing the blame game: "we are complying fully with the federal guidelines, and the feds haven't provided enough money to combat the problems that overwhelm our schools." This is hardly a trivial concern. Given the many thousands of local school officials involved, even a slight dilution in local accountability can have a larger impact than a corresponding increase in responsibility at the national level.
- Fourth, as Commissioner Heriot demonstrated in her accompanying dissent and we explained during the Commission's May 13 briefing, 800-pound gorillas from Washington, DC tend to get their way, but their ways are not always best. One-size-fits-all rules and wrongheaded ideas from Washington may have various counterproductive effects. One unfortunate example is the recent, federal "school discipline" agenda, that could require less discipline for certain types of students who deserve it to prevent a "disparate impact."⁹⁹ Moreover, 800-pound gorillas may not like local experimentation and local solutions.

⁹⁹ In March 2010, Secretary of Education Arne Duncan announced that ED would initiate a number of compliance reviews to examine, among other things, whether schools are disciplining certain protected categories of students too much and others too little. For example, OCR proposes to use "disparate impact" theory and statistical analysis to determine whether a given school is disciplining blacks more than their expected ratio, or perhaps, disciplining boys more than girls of the same age. A finding of discrimination might follow. The Commission questioned OCR at a briefing on the topic early this year. *See* Testimony of Ricardo

- Fifth, one of the zero tolerance responses worthy of special note is that the “anti-bullying” indoctrination called for by many of the activists may violate freedom of conscience and actually teach intolerance, instead of meaningful tolerance of differing opinions.¹⁰⁰ One frequent reply to this concern is that sensitivity training need not require students to affirm anything they don’t believe. That is true in theory, but testimony from Hiram Sasser at our briefing suggests that forced indoctrination and intolerance are already too common in such supposedly “tolerance” building programs. For example, in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), *judgment vacated for other reasons*, 549 U.S. 1262 (2007) (mem.), a high school student was prohibited from wearing a T-shirt expressing his opposition to homosexuality since it ran counter to the school-sponsored “day of silence.” Judge Kozinski in dissent explained that the particular “Day of Silence” program was “a political activity that was sponsored or at the very least tolerated by school authorities.” The majority even quotes school administrators saying they were especially concerned about the T-shirt because it was being worn the day after the Day of Silence. In short, the student’s speech was banned because it was contrary to the schools’ recent program of indoctrination on “tolerance.” OCR’s call for more of this training is likely to make matters worse.

Soto, Office for Civil Rights, U.S. Dep’t of Education Before the U.S. Commission on Civil Rights (Feb. 11, 2011). In contrast to OCR, several of the teachers and local authorities who also testified shared our view that the right amount of discipline was what the students individually deserved, regardless of their race or gender and whether or not their protected group had reached its discipline quotient for the week. Indeed, we expressed concern OCR’s policy could have serious negative consequences, harming minority students in classes with a number of disruptive classmates who are not disciplined enough because federal bureaucrats convince teachers they will pay a price if their disciplinary tally sheet doesn’t look right. Briefing Transcript on Disparate Impact in School Discipline at 113-15 (Feb. 11, 2011).

¹⁰⁰ Hiram Sasser of the Liberty Institute in both his written and oral testimony quoted the following passage from the Supreme Court’s opinion in *Tinker*:

Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Written Statement of Hiram Sasser at 16-17 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)).

Thus, on one side of the ledger is the absence of any evidence, or even a coherent argument, that greater federal involvement in preventing student-on-student bullying or harassment will help. Our thoughts above provide some important reasons to believe greater federal involvement will backfire, particularly as it undermines local accountability to address the real problems and leads to ridiculous results and increased denials of student freedoms.

Problems with the Data Cited in Concurring Commissioner Statements

According to the Commission's statute, our annual enforcement report is supposed to "monitor *Federal* civil rights enforcement efforts in the United States."¹⁰¹ Thus, this report should have focused almost exclusively on whether ED and DOJ are correctly interpreting the relevant federal anti-discrimination statutes, such as Title IX and Title VI, and whether they are taking appropriate actions against schools that are actually violating those statutes. The time spent in the report and concurring commissioner statements discussing the frequency of teasing, acts of exclusion, rumor mongering, and undefined bullying that does not violate federal law is largely off point, since those discussions tell us nothing about the federal government's enforcement of the relevant federal anti-discrimination laws, and whether schools are following federal law.

Another problem is that many of the studies cited in the report and relied upon by other commissioners combine survey terms such as "bullied, teased, or taunted"¹⁰² or "threatens or insults."¹⁰³ In each case, the less serious conduct is likely to be much more common, but the report treats them as if they are describing "violence" or, at the least, "bullying."¹⁰⁴ Even the use of the word "harassment" has a markedly different meaning depending on the context of the question and the type of respondent. A typical teenager might say "my parents harass me constantly to clean my room and get good grades" or "my teacher is always harassing me to do better in school." To a lawyer who litigates workplace sexual harassment cases,

¹⁰¹ 42 U.S.C. § 1975a(c)(1) (emphasis supplied).

¹⁰² Report at 6 (citing JOSEPHSON INSTITUTE, 2010 REPORT CARD ON THE ETHICS OF AMERICAN YOUTH 175 (2010)).

¹⁰³ Report at 7 (citing SIMONE ROBERS ET AL., NAT'L CTR. FOR EDUC. STATISTICS, INST. FOR EDUC. SCIENCES, U.S. DEP'T OF EDUC. & BUREAU OF JUSTICE STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2010, at 42 n.30).

¹⁰⁴ See, e.g., Report at 5-7.

harassment has a technical, legal meaning. When teens are asked about harassing conduct by fellow students, it is very important to review how that question is asked, and no matter how the question is posed, teens are not likely to give the word "harassment" its legal meaning. For example, the California Healthy Kids Survey, relied on in the Commission's report for data on "verbal harassment on school property," asked students if there were any "mean rumors" or "lies spread about" them, or if they were "made fun of because of [their] looks" or the "way" they "talk."¹⁰⁵ Thus, as Commissioner Thernstrom points out, we must be very careful to look at the type of questions asked in these surveys and not jump to conclusions when the survey summary uses terms like "bullying," "harassment," and the like.

Commissioner Achtenberg dismisses such concerns for precision and our federal jurisdiction with a somewhat sweeping, general claim: "There can be no doubt that peer-to-peer bullying, harassment, and violence against students due to their race, national origin, sex, disability, religion, and/or sexual minority or gender non-conforming status are **serious and pervasive problems** in the United States" (emphasis added).¹⁰⁶ We have a sense that bullying is a serious issue for some schools, as it has been for decades, but exactly how serious and whether it is "pervasive" in any meaningful sense is entirely unclear. For example, there is no reliable data in the report or commissioner statements whether it is more or less pervasive in rural, suburban, or urban schools. We can venture a guess, but it would be just that. Do some states do a much better job, such that bullying is not "pervasive" (which is itself a legally loaded term) in any of its districts? The report and concurring commissioner statements offer no clue on that important question.

The data cited in the report and in the concurring commissioner statements are so inconsistent and biased, based on self-reports and self-selecting non-probability samples, that we cannot often distinguish the possible reliable factoid from the worthless dross. That is why we urged the Commission to verify the studies it cited. As part-time commissioners, we did not have the time to do this ourselves, but the more we examine studies brought to our

¹⁰⁵ WESTED HEALTH & HUMAN DEVELOPMENT PROGRAM FOR THE CAL. DEP'T OF EDUC., CALIFORNIA HEALTHY KIDS SURVEY: STUDENT WELL-BEING IN CALIFORNIA, 2007-2009, GRADES 7, 9, 11: MAIN REPORT 37.

¹⁰⁶ Achtenberg Statement at 126. Commissioner Castro agrees, asserting without citation to any source that "tens of thousands or hundreds of thousands" of students are bullying victims. Castro Statement at 91.

attention, the higher the percentage of worthless and misleading studies we think exists. Unfortunately, some of our fellow commissioners seem to have been too trusting, and by relying on the studies cited in the report and by advocacy witnesses, they have unwittingly undermined their own positions.

Commissioner Thernstrom's statement contains many of the same data criticisms that we document, and Commissioner Heriot not only concurs in this statement, her own dissenting statement raises similar criticisms. Thus, four commissioners—Gaziano, Kirsanow, Heriot and Thernstrom—have expressed serious concerns about the reliability and relevance of the data cited in the report. Even Commissioner Yaki acknowledges that the report suffers from an “inability to thoroughly scour the literature” and a “rushed timeline.”¹⁰⁷ Commissioner Titus resigned from the Commission before the report or its findings were voted on, and her replacement, Commissioner Kladney, understandably abstained from voting on the report and almost all of its findings. Accordingly, only two of eight commissioners seem to express great confidence in the report's data, with double that number expressing grave doubts about its reliability and Commissioner Yaki staking out a middle ground. That level of distrust is telling in itself.

Despite Commissioners Achtenberg and Castro's efforts to sidestep the issue, there still is no data on whether bullying has increased or decreased over the past five, ten, twenty, or 10,000 years. Professor Eastman testified that bullying has gone on as long as there have been schools, and we bet it pre-dated the creation of schools by many millennia. Before policymakers increase federal intervention in this area, they should know whether bullying has increased or decreased over time. And if any increase is shown to be unrelated to the degree of federal intervention or negatively correlated, this would seriously undermine the case for more federal intervention.

Concurring commissioners' citation of the number of complaints received by OCR and DOJ adds nothing to nothing. OCR does not distinguish between peer-to-peer harassment and

¹⁰⁷ Yaki Statement at 214. Commissioner Yaki limited most of his initial statement to discussing LGBT or LGBT-identified children, writing that there was “[s]ubstantial evidence introduced” showing harm to them due to bullying, *id.* at 216, yet he does not mention or embrace any particular study or set of studies.

harassment by teachers or administrators. Thus, we do not know how many of the complaints relate to peer-to-peer harassment. We also have no idea how many complaints are meritorious. While OCR received 4,433 harassment complaints of all kinds from 2005 through 2011—out of approximately 55 million K-12 students—there were only 138 voluntary resolution agreements related to peer-to-peer harassment during this same six-year period. And a voluntary resolution agreement does not mean the school was deficient: a school may have adequately addressed the problem, and the agreement merely conforms to what the school has done.

We cannot address all our concerns with the other data relied upon in the concurring commissioner statements, but we will focus on a few areas of special concern. Commissioner Kirsanow offered the motion that added disability to the scope of the report, and we agree there is reason to suspect that disabled students may be more vulnerable to bullying and less likely to report it. Thus, the lack of reliable data with regard to bullying of disabled students is particularly disappointing to us. Commissioner Achtenberg acknowledges “there has been ‘very little research’” with regard to bullying of students with learning disabilities,¹⁰⁸ yet the studies she cites are still highly problematic.

The report’s claim that 94% of parents of children with Asperger Syndrome report that their children had been bullied, citing a 2009 article by Susan Carter, is highly misleading. The 94% figure actually comes from an article by Little (2002) which is merely cited in the 2009 Carter article. Most importantly, the Little study reported on frequencies of bullying by “siblings and/or peers.”¹⁰⁹ Such a study tells us nothing valuable about peer-to-peer bullying in schools because the figures may be mostly describing more frequent sibling behavior in the home. (Despite our loving relationships with our siblings today, while growing up, few weeks would pass without bullying among our siblings. We would expect reports of 99% bullying by siblings who are close in age.)

¹⁰⁸ Achtenberg Statement at 102.

¹⁰⁹ Susan Carter, *Bullying of Students with Asperger Syndrome*, 32 ISSUES IN COMPREHENSIVE PEDIATRIC NURSING 145, 146 (2009), cited in the report at 14-15 n.66; Achtenberg Statement at 103.

The further claim that 65% of parents of children with Asperger Syndrome reported that their children had been victimized by peers, with 50% reporting their children were scared by peers, though this time produced by the Carter study, are still highly misleading. The Carter study, like the Little research, included bullying committed by “a brother or sister.”¹¹⁰ Sibling behavior in the home is beyond the control of schools. Such incidents do not implicate federal jurisdiction. The Commission should have carefully analyzed the details in this and the other studies before citing them in the report.

The report’s explicit disclaimer that much of the data cited in it are questionable does not absolve the Commission or commissioners for citing unreliable or misleading studies. Even given the rushed nature of the report, it is still surprising how many errors and misleading uses of data are contained in a couple of sentences in the report describing the Carter study, which we reviewed because another commissioner mistakenly relied upon the report’s citation to it. Such errors call into doubt claims made throughout the report about the frequency and severity of peer-to-peer bullying.

Even on its own terms, the Carter study has a number of limitations. The author herself noted several serious issues: Only 34 parents participated in the study, a “relatively small” sample size. The parents were not randomly selected, but were instead recruited “online, in clinics, and at autism conferences,” and “may not be representative of the true population.” Moreover, “parents may have exaggerated their child’s experiences of victimization and shunning.” Finally, “the reliability and validity of the both [sic] measures used are still being determined.”¹¹¹ Indeed, the Carter study from 2009 found significantly less victimization of students suffering from Asperger Syndrome than the Little study from 2002.¹¹²

In the first portion of this joint dissent, we also noted the dramatically contradictory surveys cited in the report on sexual harassment. Commissioner Achtenberg relies heavily on only one of them, the 2001 AAUW study in which 81 percent of students in grades 8 to 11 supposedly reported experiencing sexual harassment. The California Healthy Kids Survey of

¹¹⁰ Carter, *supra* note 109, at 147.

¹¹¹ *Id.* at 146, 148, 152.

¹¹² *Id.* at 151.

the California Department of Education, also cited prominently in the report, is administered to hundreds of thousands of public school students in grades 7, 9, and 11 in that state. Eleven percent of the respondents in the 2007-2009 survey reported being subject to harassment based on gender.¹¹³ The report cites both numbers as equally valid, even though the difference is a factor of seven. And only two percent of students reported in another study being targeted by “hate-related words” on the basis of gender.¹¹⁴ Such wildly divergent percentages should call all of them into question, but we previously noted other reasons to doubt the AAUW study.

The report and one of the concurring commissioners also claim that 800 incidents of rape or attempted rape and 3800 incidents of sexual battery that were not rape were reported by schools in the 2007-08 school year, according to ED’s National Center for Education Statistics.¹¹⁵ Rape and sexual battery are serious crimes in all states and jurisdictions, and we hope all appropriate cases were the subject of a successful criminal investigation and prosecution, as warranted. Yet, as serious as those crimes are, some corrections and perspective are in order. The report wrongly says there were 800 incidents of rape reported by schools, when the underlying study it cites says there were actually 800 rapes *or attempted rapes* reported by schools.¹¹⁶ It would be helpful to know how broadly “attempted rape” is defined for this purpose. However it is defined, this mischaracterization of attempted rape as rape is yet another example of the rushed and erroneous way data is handled in the report. Second, given the number of preschool and kindergarteners who were cited for sexual harassment for hugging and attempted kissing in some school districts (see Commissioner Herriot’s dissenting statement), we also wonder what type of conduct schools reported under “sexual battery.” And finally, we need some baselines to put all such figures in perspective. There are about 55 million primary and secondary students. The rate of reported rape and *attempted rape* in the ED report was less than .05 per 1000 students and roughly 0.1 per 1000

¹¹³ Report at 9.

¹¹⁴ *Id.* at 8.

¹¹⁵ *Id.* at 11.

¹¹⁶ See SIMONE ROBERS ET AL., NAT’L CTR. FOR EDUC. STATISTICS, INST. FOR EDUC. SCIENCES, U.S. DEP’T OF EDUC. & BUREAU OF JUSTICE STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2010, at 104.

students for sexual battery that was not rape,¹¹⁷ which is, according to our review of DOJ's Bureau of Justice Statistics website, a tiny fraction of these crimes for teens overall.

With regard to another category of students, Commissioner Achtenberg proposes to find that forty to fifty percent of sexual minority and gender non-conforming youth are subject to peer-to-peer bullying, harassment, or violence, citing the public comment of Professor Mark Friedman. As an initial matter, forty percent is half the 81 percent of all students reporting sexual harassment in the AAUW study. Moreover, the comparison of figures in Friedman's underlying article is not as striking as his comment to the Commission in which he summarized the results. Both the Friedman public comment and our report left out the results for heterosexual males and females, which put the numbers in some context.¹¹⁸ Moreover, the usual caveats about studies based on retrospective self-reporting apply, as even Friedman admits they "may be biased."¹¹⁹

But whatever the actual level of teasing, harassment, bullying, or other "bad" conduct, neither the report nor concurring commissioner statements show that local school districts across the country are failing to deal with such issues appropriately. If schools are acting reasonably, there is no need for an expanded federal role. There remains a need for the federal government to act swiftly, as in the South Philadelphia high school case where school officials appear to have been grossly negligent in the face of racial violence. Thankfully, such cases seem to be quite rare.

Sexual Minority Stress Theory

The minority stress theory, as described by Professors Herek and Meyer, is as follows: Sexual minority youth have no inherent physical or mental health problems relative to other youth. Yet, they have worse health outcomes, particularly mental health outcomes, which are

¹¹⁷ *Id.*

¹¹⁸ Mark S. Friedman et al., *A Meta-Analysis to Examine Disparities in Childhood Sexual Abuse, Parental Physical Abuse, and Peer Victimization Among Sexual Minority and Sexual Nonminority Individuals*, AMER. J. PUB. HEALTH Vol. 101, Issue 3 (2010).

¹¹⁹ *Id.* at *18.

most likely caused by societal stigmatization of homosexuality.¹²⁰ This theory may have some validity, though it has been questioned by other scholars. Ritch Savin-Williams (Department Chair, College of Human Ecology, Cornell University) has noted the significant, positive change in attitude of the American public toward gay individuals since 1995, which has greatly reduced social stigmatization of homosexuality.¹²¹ Lisa M. Diamond (Department of Psychology, University of Utah) has questioned the importance of gay-related stress, pointing to “[e]vidence suggest[ing] that the average sexual-minority youth spends as much time ruminating about normative adolescent concerns such as love and romance as about gay-specific stressors such as hate crimes or familial rejection.”¹²²

Even if true, the minority stress theory is beside the point. Most of the examples cited by Commissioner Achtenberg, which certainly are troubling, are beyond the control of any school. She quotes from a report that “[c]ontemporary health disparities based on sexual orientation and gender identity are rooted in and reflect the **historical stigmatization** of [LGBT] people.”¹²³ Commissioner Achtenberg notes that families may reject a child due to his or her sexual identity and the structural stigma of homosexuality; there is a heightened risk of parental abuse; there is a higher rate of homelessness; gay youth face “heightened risk of substance abuse, including tobacco, alcohol, and illegal drugs;” police and courts might be biased against them (although could any disparities in punishment be due to their using alcohol and illegal drugs more?); and gay youth “appear to engage in risky sexual behavior at disproportionate rates.”¹²⁴ As cruel as parental rejection is, let alone parental abuse and the risky behaviors described above, this may easily swamp what goes on at school. The simple truth is that there is no study that reliably measures whether bullying at school on the basis of

¹²⁰ See Report at 19 & n.90.

¹²¹ See Ritch C. Savin Williams, *Then and Now: Recruitment, Definition, Diversity, and Positive Attributes of Same-Sex Populations*, 44 DEVELOPMENTAL PSYCHOLOGY 135, 135 (2008) (collecting studies on American attitudes toward gay people).

¹²² Lisa M. Diamond, *New Paradigms for Research on Heterosexual and Sexual-Minority Development*, 32 Journal of Clinical Child and Adolescent Psychology 490, 495 (2003) (“[A]lthough gay-related stress might be the most salient mechanism through which sexual-minority status influences adolescent development, it is not necessarily the most predominant or important.”).

¹²³ Achtenberg Statement at 110 (citing INST. OF MED. OF THE NAT’L ACADEMIES, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE 32 (2011) (emphasis added)).

¹²⁴ Achtenberg Statement at 109-12 (internal quotation marks omitted).

sexual orientation causes any particular, measurable degree of harm. It would be a very difficult effect to study, but perhaps in time there will be a way to measure it.¹²⁵

Moreover, students may disassociate themselves from others for all sorts of wrongheaded and mean reasons, but that does not by itself constitute “bullying” unless it is defined downward to include “acts of exclusion” that some activists are pushing for. It certainly does not implicate federal civil rights laws, and for a good reason. Neither the state nor the federal government is responsible for policing friendships. Government must not discriminate in its own right, but it is not liable for the historical stigmatization or bigotry held by individuals in society.¹²⁶

The Supreme Court in *Davis* held that for a school district to be responsible for peer-to-peer harassment, it must “retain substantial control over the context in which the harassment occurs” and “exercise significant control over the harasser.” Usually the misconduct must occur “during school hours and on school grounds.”¹²⁷ Thus, schools have a role to play, but under federal law, they are only responsible for addressing “severe, pervasive, and objectively offensive” conduct that they are aware of that denies an equal opportunity to certain students to learn or benefit from school programs. All people of good will should work to reduce irrational societal stigmatization. Yet to cast all bigotry as “bullying” is inaccurate and not productive to that end.

“Neutrality” Policies

Commissioners Achtenberg, Castro, and many public commenters (including one witness cited from our May briefing) are critical of what they refer to as school district “neutrality”

¹²⁵ Commissioner Heriot’s dissenting statement and rebuttal discusses various reasons why the “negative outcomes” gay youth appear to suffer may more likely result from causes besides peer bullying.

¹²⁶ *See, e.g., Missouri v. Jenks*, 515 U.S. 70, 121 (1995) (Rehnquist, C.J.) (“Psychological injury or benefit is irrelevant to the question of whether state actors have engaged in intentional discrimination . . .”). Likewise, it has no bearing on whether school officials have shown deliberate indifference to “severe, pervasive and objectively offensive” gender-based harassment of students in violation of Title IX. *See Davis*, 526 U.S. at 650 (emphasis supplied). Thus, the volumes of conflicting and potentially misleading social science research on a possible underlying psychological predisposition to bullying are wholly irrelevant to Title IX enforcement decisions.

¹²⁷ *Davis*, 526 U.S. at 646.

policies, though they only refer to one: the “Sexual Orientation Curriculum Policy” in Minnesota’s Anoka-Hennepin School District No. 11. They express concern that this policy discourages or prohibits teachers and administrators from talking about bullying based on sexual orientation, but the policy says nothing of the sort. The Anoka-Hennepin policy only governs what should be taught as part of the district’s official curriculum, and it specifically contemplates that staff may need to address issues relating to sexual orientation. It requires neutrality when they do so and further stresses that “it is important that staff do so in a respectful manner that is age-appropriate, factual, and pertinent to the relevant curriculum.” The policy is worth quoting in full:

It is the primary mission of the Anoka-Hennepin School District to effectively educate each of our students for success. District policies shall comply with state and federal law as well as reflect community standards. As set forth in the Equal Education Opportunity Policy, it is the School District’s policy to provide equal educational opportunity and to prohibit harassment of all students. The Board is committed to providing a safe and respectful learning environment and to provide an education that respects the beliefs of all students and families.

The School District employs a diverse and talented staff committed to serving students and families from diverse backgrounds. The School District acknowledges that one aspect of that diversity regards sexual orientation. Teaching about sexual orientation is not a part of the District adopted curriculum; rather, such matters are best addressed within individual family homes, churches, or community organizations. Anoka-Hennepin staff, in the course of their professional duties, shall remain neutral on matters regarding sexual orientation including but not limited to student led discussions. If and when staff address sexual orientation, it is important that staff do so in a respectful manner that is age-appropriate, factual, and pertinent to the relevant curriculum. Staff are encouraged to take into consideration individual student needs and refer students to the appropriate social worker or licensed school counselor.

Whatever one thinks of the actual policy, it is nothing like the caricature of it that appears in the press and elsewhere.¹²⁸ The policy acknowledges the need to “prohibit harassment of all

¹²⁸ The policy’s implementation is currently being challenged in court. To our knowledge, the Commission neither requested nor received testimony or other information from the school district on its policy. Only one side of the issue was thus presented at our briefing, from a parent who seems to have mischaracterized the district’s written policies. Had we known that the district’s policy was going to be raised at the briefing, we would have urged the Commission to invite a representative from the district to testify. But as discussed in this

students.” The district’s goal is a “safe and respectful learning environment” and to respect “the beliefs of all students and families.” The policy acknowledges that the diversity of students, families, and staff includes “sexual orientation.” And it is not a general neutrality policy but a “curriculum” policy: extended teaching about sexual orientation is not part of the curriculum, but the district goes to some pains to explain that this policy shall not be read to cut off discussion of sexual orientation when appropriate to the regular curriculum.

The district has other policies addressing bullying and LGBT issues.¹²⁹ Its “Harassment, Violence and Discrimination Policy” notes that sexual orientation is one of the protected classifications set forth in the district’s Equal Educational Opportunity Policy. The district “prohibits any form of discrimination including sex, race, religion, disability or any other protected classification [which includes sexual orientation].” It is a violation of the policy “for any student or District personnel through conduct or communication to harass; inflict, threaten to inflict or attempt to inflict violence; or discriminate against a pupil or other District personnel on the basis of sex, race, religion, disability or any other protected classifications set forth in . . . the District’s Equal Educational Opportunity Policy [which includes sexual orientation].”

The district also has a comprehensive anti-bullying policy protecting all students. The district has issued anti-bullying training and support programs for staff and students, which notes that “we have a number of board policies designed to prevent harassment or bullying for any reason, including sexual orientation or gender.” One of the materials provided is a power point presentation for staff, “Sexual orientation and Harassment: A Guide for Protocol and Response,” “on how to respond to anti-GLBT language and harassment and how to assist students who come out.” The district has a number of other GLBT-specific trainings and programs as well.

section, we have reviewed the court complaint and other material on both sides of this issue. The curriculum policy itself and the school district’s anti-bullying policies are all contained in publicly available documents.

¹²⁹ See ANOKA-HENNEPIN SCH. DIST., GLBT ISSUES, TRAINING AND AWARENESS, *available at* <http://www.anoka.k12.mn.us/education/components/scrapbook/default.php?sectiondetailid=297819>.

Certainly the general description of the policy by its critics seems quite mistaken. Commissioner Achtenberg also writes in her statement that the implementation of the curriculum policy was problematic, citing the plaintiffs' allegations in a lawsuit filed against the school district, among other things. That issue is still the subject of litigation,¹³⁰ so the court may determine if it was implemented in a manner inconsistent with law. Whatever the result, however, there is no support for the conclusion that all curriculum policies of this sort are problematic.

Religion

Although prohibitions on national origin discrimination may sometimes overlap with religious bigotry, discrimination based on religion is not itself banned by Title VI. We voted for a motion to amend finding number two, clarifying that ED "interprets federal civil rights laws to provide it with jurisdiction to protect students from peer-to-peer harassment that is based on the student's actual or perceived shared ancestry or ethnic identity rather than on the students' religious practices."¹³¹ Congress may want to go further than ED's interpretation and consider prohibiting all discrimination on the basis of religion in government-run schools, but it should consider the appropriate remedies for this prohibition and a number of exemptions for religious institutions if the law applies beyond government-run schools. The contours of such exemptions are difficult to draw,¹³² and the implications of additional liability in this area should be carefully weighed.

Commissioner Yaki's Statement

Commissioner Yaki argues that there is a compelling governmental interest in protecting LGBT students from bullying, which overrides students' free speech interests. His citation of Supreme Court authority for this proposition is extremely curious. We have previously explained why even the most well-settled government interests do not trump all student

¹³⁰ Doe v. Anoka-Hennepin Sch. Dist. No. 11, No. 11-01999 (D. Minn. filed July 21, 2011).

¹³¹ Commissioners Achtenberg, Castro, Thernstrom, and Yaki opposed and defeated the motion at the Commission's August 12, 2011 business meeting to clarify the finding to explain the full reach of ED's enforcement authority.

¹³² See Prepared Testimony of Kenneth L. Marcus at 15-16.

speech rights and justify whatever anti-discrimination or anti-harassment policy well-meaning bureaucrats dream up.¹³³

In any event, ED cannot, as Commissioner Yaki urges, withhold federal funding from schools on whatever basis it or he thinks proper while awaiting Congress to ratify that authority. Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Amendment's terms, not any agency of the federal government. Sexual orientation is effectively covered under Title IX because OCR and the courts interpret sex discrimination to include discrimination based on sex stereotypes. And Title VI protects groups that have an actual or perceived shared ancestry or ethnic characteristics who also share a religion. ED can no more expand the protection for religion or add new categories than it can prohibit "lookism." It can only enforce the statutes enacted by Congress, which must be interpreted in a manner faithful to their text.

¹³³ See also Commissioner Heriot's reply to Commissioner Yaki's First Amendment arguments in her accompanying dissenting statement at note 28.

DISSENTING STATEMENT OF COMMISSIONER GAIL HERIOT, WITH WHICH COMMISSIONERS PETER KIRSANOW AND TODD GAZIANO CONCUR

I. Background to the Report: A Twice-Told Tale Rather Than an Investigation

This report has been a disappointment—though its shortcomings can in no way be attributed to our staff. The responsibility must lie with the Commission itself. Switching topics at the last possible moment made it impossible for the report to be anything but an uncritical re-telling of the positions of the Department of Education and the Department of Justice—along with a very brief nod to a few of the objections to those positions.¹ Nothing that can be dignified with the term “investigation” has occurred here. No useful new evidence is uncovered. No serious analysis has been engaged in.²

In the Commission’s charter, Congress requires us to produce at least one report each year critiquing the manner in which a federal agency enforces civil rights laws.³ It is for that reason that the Commission is frequently referred to as a “civil rights watchdog.”⁴ Our job is to be fair and independent critics.

¹ The brief discussion of the objections to the policy is contained almost exclusively in the last chapter of the report.

² I agree with my colleagues Commissioners Todd Gaziano and Peter Kirsanow that none of the empirical studies on bullying cited in the report is relevant to the issues before the Commission. See Joint Dissent and Rebuttal of Commissioners Gaziano and Kirsanow. These studies do not show that the kind of bullying for which school districts can be held legally accountable for is widespread. Moreover, they do not show that school districts are failing to respond to the problem. Some of these polls are unscientific internet questionnaires that are far from random samples of students. See GLSEN Survey 2009. One would have to expect that victims of bullies are more interested in visiting the GLSEN web site and responding to such polls. All appear to use definitions of bullying or harassment that are overbroad and include activity that would be protected under the First Amendment or that would more properly be classed as tactlessness. In some cases, eye-rolling or engaging in gossip is classed as bullying. See Report at 3. It would have been useful to analyze each of these studies and discuss exactly what they do or do not establish. But there was no time for such meticulous work. The first draft of the report had to be finished one week after the Commission held its first and only hearing on the matter on May 13, 2011. See Transcript of Commission Meeting 10 (August 12, 2011).

³ 42 U.S.C. 1975(c)(1): “The Commission shall submit to the President and Congress at least one report annually that monitors Federal civil rights enforcement efforts in the United States.”

⁴ See Mary Frances Berry, Request for the U.S. Commission on Civil Rights, Hearing Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 103 Cong., 2d Sess. (February 9, 1994) (“We are a watchdog over the effectiveness of federal civil rights enforcement”); Mary Frances Berry Exits Civil Rights Commission; Gerald Reynolds Picked as New Chairman, *Jet* (December 27, 2004/January 3, 2005) (“Berry, who at times has been at odds with five presidents over civil rights issues since 1980, once reportedly said, ‘If we don’t have people irritated, we’re not doing our job We’re the watchdog that bites you on the leg, keeps tugging at you’”).

The annual enforcement report has traditionally been the most important project the Commission undertakes in any given year. It requires research and development that usually spans a year or more. This report was put together in less than a third of the usual time. Similarly, the length of time for individual commissioners to write their statements was reduced from 30 days to seven days from the date the report was adopted.⁵

There is a backstory here: After considering several projects for several months over the summer of 2010, the Commission decided on October 8, 2010 that this year's topic would be the Department of Justice Civil Rights Division's use of the doctrine of "*cy pres*" in settling civil rights lawsuits brought on behalf of a class.⁶ That decision was already a little bit later in the year than usual. It was in part prompted by an article entitled *Justice Department Steers Money to Favored Groups*, which appeared in the Washington Examiner on August 5, 2010.⁷ The Commission set out to determine whether the concerns discussed in that article were justified.⁸ The article's author, Byron York, outlined the policy at issue this way:

The Justice Department has found a new way to pursue civil rights lawsuits, using the power of the Civil Rights Division not just to win compensation for victims of alleged discrimination but also to direct large sums of money to activist groups that are not discrimination victims and not connected to a particular suit.

In theory at least, the fact that the Commission's eight members are part-time, usually have primary jobs outside the federal bureaucracy and have some expertise in civil rights, means that we can be free from the bias that sometimes hinders the efforts of federal officials assessing the performance of other federal officials. We need not (and should not) be beholden to anyone.

⁵ Time for rebuttals was also reduced from the usual 30 days to 21 days. While it is understandable that Chairman Castro would be concerned about getting the final report out by end of the fiscal year, the hurry was purely a result of the Commission's decision to switch topics halfway through the year.

⁶ The term "*cy pres*" comes from the French phrase "*cy pres comme possible*" or "as near as possible." It traditionally referred to a doctrine in trusts and estates law. When a testator attempts to create a charitable trust that will provide funds to a non-profit entity that no longer exists or for a purpose that can no longer be carried out, a court may order or allow those funds to be applied to a similar non-profit entity or for a similar purpose instead. Edith L. Fisch, *The Cy Pres Doctrine in the United States* 1 (1950). More recently, the term has been used to describe the practice described by Byron York in *Justice Department Steers Money to Favored Groups* under which non-profit organizations are awarded any unclaimed settlement funds or court-ordered damages in a class action or similar proceeding. Another term sometimes used in this context is "fluid class remedies."

⁷ Byron York, *Justice Department Steers Money to Favored Groups*, Washington Examiner (August 5, 2010).

⁸ The project was later expanded to include the Equal Employment Opportunity Commission (EEOC) and private civil rights class actions.

In the past, when the Civil Rights Division filed suit against, say, a bank or a landlord, alleging discrimination in lending or rentals, the cases were often settled by the defendant paying a fine to the U.S. Treasury and agreeing to put aside a sum of money to compensate the alleged discrimination victims. There was then a search for those victims—people who were actually denied a loan or an apartment—who stood to be compensated. After everyone who could be found was paid, there was often money left over. That money was returned to the defendant.

Now, Attorney Eric Holder and Civil Rights Division chief Thomas Perez have a new plan. Any unspent money will not go back to the defendant but will instead go to a “qualified organization” approved by the Justice Department. And if there is not enough unspent money—that will be determined by the Department—then the defendant might be required to come up with more money to give to the “qualified organization.”

The idea of directing unclaimed damage funds to non-profit groups whose interests are thought to be aligned with the unidentified victims’ is superficially appealing. Advocates of *cy pres* argue that it solves the problem of under-deterrence that occurs when the victims of the defendant’s wrongdoing fail to come forward and claim their share of the settlement made on their behalf.⁹ But as several respected legal scholars and practitioners have pointed out, it is also fraught with potential conflicts of interest.¹⁰ Northwestern University law professor Martin H. Redish and his co-authors have stated that the use of *cy pres* in the class action context “richly deserves” “scathing scholarly critique.”¹¹

⁹ Another way to deal with the problem is to over-compensate those victims who do claim funds. For example, if 20,000 victims are expected, but only 10,000 actually present themselves, each one with an injury valued at \$10, each could receive \$20.

¹⁰ Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010) (stating that the doctrine of *cy pres* in the context of class action litigation “richly deserves” “scathing scholarly critique”); John H. Beisner, Jessica Davidson Miller & Jordan H. Schwartz, *Cy Pres: A Not So Charitable Contribution to Class Action Practice*, U.S. Chamber Institute for Legal Reform 19 (October 2010) (“[T]he expansion of *cy pres* into the class action context has generated significant conflict of interest concerns with respect to plaintiffs’ attorneys, judges and defendants”); Theodore H. Frank, *Cy Pres Settlements*, Class Action Watch (March 2008) (stating that the use of *cy pres* in the class action context creates “clear conflicts of interest”). See also Adam Liptak, *Doling Out Other People’s Money*, The New York Times (November 26, 2007) (discussing, among other things, the efforts of New York University law professor Samuel Issacharoff to rein in this practice by issuing guidelines through the American Law Institute).

¹¹ Redish, Julian and Zyontz, 62 Fla L. Rev. at 665.

The conflicts of interest are by no means unique to civil rights cases brought by the federal government on behalf of a class of victims. They are equally significant in private class actions. But they are nevertheless important in the governmental context: When the Civil Rights Division selects a non-profit organization to benefit from the settlement of a legal dispute, how does it make that selection? Are there safeguards in place to prevent organizations that are simply the personal favorites of Civil Rights Division officials or staff members from being selected? Have any of the organizations that have been selected in the past employed family or friends of Civil Rights Division employees (or former Civil Rights Division employees themselves)? Are non-profit organizations lobbying the Civil Rights Division to be included as fund recipients (as they are already lobbying courts in connection with private class actions)?¹² Is it appropriate for Civil Rights Division attorneys to be dispensers of political patronage on such a large scale? Has the Civil Rights Division come under pressure to bring the kind of legal action that is most likely to benefit these non-profit organizations rather than the kind of legal action that would best vindicate the national interest? Does the Civil Rights Division exert less effort to locate actual victims of wrongdoing when a favored non-profit group has been selected to receive any uncollected damages? All of these questions deserve answers.

Pursuant to the Commission's decision, the Commission's staff had researched the issue, prepared a discovery plan and drafted initial sets of interrogatories, which were then served on the Department of Justice. Everything was underway. The Commission had received a partial response from the Department of Justice and was expecting the remaining documents soon. But the terms of Chairman Gerald Reynolds and Commission Ashley Taylor, Jr.—both Bush appointees—expired at the end of 2010, and in early 2011 they were replaced by Chairman Martin Castro and Commissioner Roberta Achtenberg.¹³ At its first opportunity, the newly-constituted Commission voted to abort the *cy pres* report, thus letting

¹² Adam Liptak, *Doling Out Other People's Money*, *The New York Times* (November 26, 2007) (“[The use of the *cy pres* doctrine in private class actions] gives rise to this unbelievable world that I was shocked to learn about, and I'm not easily shocked in litigation,” Professor [Samuel] Issacharoff [of New York University Law School] said. ‘Charities hire lawyers to go lobby the judge for the extra money.’”).

¹³ In addition, Commissioner Arlan Melendez was replaced by Dina Titus and the seat held by Commissioner Michael Yaki was briefly unoccupied. Both Melendez and Titus were appointed on the recommendation of Senate Democratic Leader Harry Reid. Michael Yaki was later re-appointed on the recommendation of House Democratic Leader Nancy Pelosi.

the Department of Justice off the hook in responding to the Commission's interrogatories. The bullying topic addressed in this report—a favorite topic of the current Administration--was hurriedly substituted, and the Commission staff had to start from scratch.¹⁴

This looks very bad. The Byron York article in the *Washington Examiner* at least implied that the Civil Rights Division under the leadership of Obama appointees may have engaged in questionable activities. Prominent legal scholars had agreed that the use of the *cy pres* doctrine in class actions creates a serious potential for conflicts of interest. The Commission's report was designed, among other things, to allow the Division to demonstrate that its procedures are sufficient to guard against these potential conflicts of interest and that no cronyism had taken place in recent past. One would think under the circumstances the Civil Rights Division would prefer that the report be completed, rather than leave the question of conflicts of interest on its part dangling. Nevertheless, the investigation was shut down by a change in personnel on the Commission shifting the balance of power to Obama appointees.¹⁵

¹⁴ See Statement of Chairman Martin R. Castro at 90 (quoting President Barack Obama at the White House Summit on Bullying Prevention on March 10, 2011).

The newly-constituted Commission also cancelled two other on-going investigations—one into discrimination against women in higher education and the other into race-neutral enforcement of civil rights laws at the Department of Justice, a project which began as an investigation of the Department of Justice's handling of a lawsuit against the New Black Panther Party for voter and poll worker intimidation. What all three projects had in common was each contained elements that were critical or potentially critical of the current Administration's policies. Put differently, in each case, the Commission was fulfilling its mission to be a civil rights watchdog. See supra at n. 4. For a discussion of the termination of the sex discrimination investigation, see Gail Heriot & Alison Somin, *Affirmative Action for Men?: Strange Silences and Strange Bed Fellows in the Public Debate Over Discrimination Against Women in College Admissions*, Engage (2011) (forthcoming).

¹⁵ The vote to terminate the investigation was 4 to 3. Voting in favor of termination were Chairman Castro (appointed by President Obama), Commissioner Roberta Achtenberg (appointed by President Obama), Commissioner Dina Titus (appointed upon recommendation of Senate Democratic Leader Reid) and Vice Chair Thernstrom (appointed by President Bush, but who has caucused with Democrats for the past two years and votes with them except when it is clear her vote will not affect the outcome. I know of only one very minor exception to this rule since the Commission was re-constituted at the beginning of 2011). Voting against termination were Commissioner Peter Kirsanow (appointed by President Bush), Commissioner Todd Gaziano (appointed on recommendation of House Republican Leader Boehner), and me (appointed on recommendation of Senate Republican Leader McConnell).

Believing that the Civil Rights Division might be eager to demonstrate that its staff members had never funneled funds to an organization with which they had some personal relationship, that it had not become lackadaisical about finding the real victims of civil rights violations, and that its procedures for selecting the recipients of funds were designed to avoid the potential for conflicts of interest, my special assistant, with my encouragement and cooperation, sent the Department of Justice a Freedom of Information Act request on June 10, 2010. DOJ acknowledged receipt of the request on June 21. No documents have been produced to date.

Meanwhile, given the late date at which the bullying topic was selected, there has been no opportunity for the Commission to root out useful new information about bullying or about the method by which the Department of Education enforces its bullying policy.¹⁶ I will therefore confine my remarks to a very general level.

II. The Federal Government is Ill-Suited to the Role of Controlling Schoolyard Bullies.

Remember when children used to say “Don’t make a federal case out of it”? In those days, even fourth graders understood that not every problem is best dealt with at the federal level. These days, however, everything seems to be a federal case—even schoolyard bullies.

The point is not that bullying is unimportant. Few things are as important as ensuring that all our nation’s children can attend safe schools that are conducive to learning. But, in the absence of extraordinary circumstances, the problem can only be dealt with effectively at the local level. Individual teachers and principals backed up by active parents, school boards, school district officials, and students themselves must be in charge. It is their battle to win or lose. They are the heroes in this story, not the Department of Education.

Dealing with bullies requires knowledge of particular personalities and situations. Only their teacher knows that when little Owen doesn’t want to go out to recess, it is likely because the bigger kids—Benjamin and Elijah—have been harassing him and that he is too embarrassed to say so. Only the teacher knows that when little Chloe claims she has been bullied by her playmates, she is probably telling a tall tale, as she has done many times

A similar request was sent to the EEOC on June 10, 2011. An acknowledgment was sent on June 17. On August 17, my special assistant received a letter stating that the EEOC estimated that costs of searching for responsive documents would be over \$5,000. She and I are waiting for a response to her request for a fee waiver.

¹⁶ Although Chapter 3 of the report purports to offer new information, what it sheds no useful light on the question of whether the Department of Education is doing its job properly or on any other significant question. What it does is provide charts and counts for the sake of charts and counts. As my colleagues Commissioners Todd Gaziano and Peter Kirsanow point out in their Joint Dissent, it is unclear how many of the complaints counted in this chapter actually involve student to student harassment (as opposed to alleged harassment of a student by a teacher or other school official). There is also no attempt to assess how many of the voluntary resolution agreements discussed in that chapter were actually meritorious. See Joint Dissent of Commissioners Gaziano and Kirsanow at 132-33.

before. Teachers must act quickly and decisively at times, but they must also be careful and nuanced in dealing with their charges. In addition to knowing about the subjects they teach and how to teach them, they must possess the skills of both a psychologist and a police officer.

One could argue that any help in this regard should be welcome. But help from the 800-pound gorilla can be worse than no help at all. And that is what anything as large and powerful as the federal government inevitably is. The fact that it may be well-meaning is nice to know, but it shouldn't make anyone want to trust it with a china tea set.

It is not that 800-pound gorillas are never useful. When it comes to fighting a war or building an interstate highway system, such a creature is perhaps the perfect ally.¹⁷ But helping school districts deal with discipline problems is a very different endeavor.

Local schools must do two things to satisfy the Department of Education: They must do the right thing in response to bullying motivated by race, sex, national origin or disability. Then they must be prepared to demonstrate with evidence that they have done the right thing. Sadly, in the real world, the latter task begins to overshadow the former. That is in the nature of bureaucracy. Teachers and principals must document the steps they have taken. Slowly, but unavoidably, the emphasis shifts from doing what the teacher and principal believe is the right thing to demonstrating that the school has done what the teacher and principal think some Department of Education official will think is the right thing. This is a shame. Their own judgment may have been imperfect—just like every other human being's on the planet Earth—but it is better informed than the Department of Education's and hence much more

¹⁷ Certainly, there are times when coordination at the national level is crucial. But no such coordination is necessary for dealing with bullies. And even if it were necessary, the federal government is not offering it. Rather, it offers fragmentation. Federal law confers jurisdiction to act on the Department of Education only when bullying is a manifestation of race, sex, national origin, or disability discrimination. There are ways in which bullying on these grounds may differ from bullying on other grounds. But it is unclear why anyone would want a school to have one method for responding to a bully who is harassing his victim because the victim is nearsighted or his parents are from Ukraine and another one for when the bully is motivated by the fact that his victim is homely, nerdish or socially awkward.

likely to be on target. Like every other person in a position of authority, teachers and principals may need some supervision. But it is better for that supervision to come from someone closer to the situation than from the Department of Education.

For a sense of how policies like the Department of Education's bullying policy have worked in the past, one need only look to its very similar sexual harassment policy and the zero tolerance rules that have evolved from it:¹⁸

¹⁸ While the Department of Education uses the word "bullying" in addition to "harassment" in describing its policy, the policy is essentially a harassment policy and draws on court decisions relating to sexual harassment for its justification. See Dear Colleague Letter of October 26, 2010 from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education.

A few words on how sexual harassment law in connection with Title VII has driven harassment law generally are in order: In 1964, when both Title VI (prohibiting race, color and national origin discrimination in federally-assisted programs) and Title VII (prohibiting race, color, sex, religion and national origin discrimination in public and private employment) were passed as part of the Civil Rights Act of 1964, the latter was considered much more significant. An entirely new federal agency—the EEOC—was created to administer the law, and it was clear from the beginning that a private cause of action would lie. Deputy Attorney General Nicholas deBelleville Katzenbach estimated in two letters to Emmanuel Celler, Chairman of the Committee on the Judiciary of the House of Representatives, both dated February 6, 1964, that Title VI would require only three employees and a budget of \$62,510. Title IV (school desegregation) on the other hand was estimated to require 150 employees and a budget of \$10,752,560, while Title VII was expected to require 155 employees and a budget of \$3,875,000. Title IX, part of the Educational Amendments Act of 1972, prohibiting sex discrimination by educational institutions receiving federal financial assistance, was passed eight years later.

In 1964, the kind of race and sex discrimination in employment that people most readily thought of was not subtle. Newspapers in the South routinely categorized their "Help Wanted" ads as "Help Wanted—White" and "Help Wanted – Colored," and "Help Wanted—Male" and "Help Wanted—Female" ads were common almost everywhere. Nevertheless, Title VII's text does not prohibit only gross discrimination; it prohibits discrimination. When confronted with the question of whether Title VII prohibits an employer from maintaining a working environment that is so hostile to a particular race (or to one sex) that few members of that group would be willing to expose themselves to it, the Supreme Court and other courts rightly ruled that it may. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)(sex); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)(race).

This did not result in an immediate explosion of cases. At the time, Title VII plaintiffs could sue for back pay or for an injunction requiring that the offending conduct stop. But they could not sue for emotional distress damages. As a result, an employee who had been harassed would be unlikely to sue unless things were so bad that she had quit or the employer refused to rectify something that mattered to her enough to get an injunction. Small grievances—both valid and invalid—were more likely to be left to the ordinary give and take of the workplace. All this changed in 1991 when Title VII was amended to allow money damages (instead of just back pay) and punitive damages. Changes in remedies frequently lead to profound changes in the way the substantive law is interpreted and applied. It was in 1991 that journalists (and even comedians) began to make fun of some of the comparatively trivial cases that employers had to contend with. See, e.g., Nat Hentoff, *Sexually Harassed by Francisco Goya*, Wash. Post. (Dec. 27, 1991)(copy of Goya's Naked Maja removed from classroom where it had hung for years after professor said it harassed her).

Meanwhile, as sexual harassment prevention was becoming part of the zeitgeist, cases brought under Title IX, which covers educational institutions receiving federal funds, began to be filed too. See *Franklin v. Gwinnett*

- Two middle school students—Cory M. and Ryan C., both 13, were arrested and charged with a *crime* at Patton Middle School in McMinnville, Oregon for slapping girls’ posteriors in an exuberant greeting in February of 2007.¹⁹
- Seven-year-old Randy C. saw another child hitting a fellow first-grader’s buttocks, so he did it too at Potomac View Elementary School in Woodbridge, Maryland in February of 2009. The principal called the police on him.²⁰

County Public Schools, 503 U.S. 60 (1992)(holding that a case for money damages may be brought under Title IX for teacher’s sexual harassment of student). Like the Title VII cases, once monetary damages became available, some of the Title IX lawsuits were trivial. See, e.g., *Nevermore for Poe Film, Lawsuit Says*, San Francisco Examiner (Aug. 30, 1994)(teenager sues for sexual harassment under Title IX after English teacher showed movie based on Edgar Allan Poe’s classic short story “The Pit and the Pendulum”).

The Department of Education was very much part of the zeitgeist that availability of money damages had helped create. On March 13, 1997, it upped the ante by issuing *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties*. That guidance made it clear that a school that did not come down hard on what the Department of Education considered sexual harassment might find itself the subject of a federal investigation. In the years that followed, the zero tolerance rules enforced against tiny tots began to appear. See also *Sexual Harassment Panda, South Park Episode No. 37* (July 7, 1999)(comic treatment of an elementary school’s sexual harassment policy).

In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), the Supreme Court gave much-needed clarification to the law by holding that damages may not be recovered for a case of teacher-on-student sexual harassment unless a school district official with authority to take corrective action had actual notice of the harassment and was deliberately indifferent. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)(imposing similar requirements in Title VII case).

In 2000, in the case of *Davis v. Monroe County Board of Education*, 526 U.S. 629 (2000), the Supreme Court further clarified by holding that in addition to the limitations in *Gebser*, damages for student-on-student sexual harassment are available from the school district only when the harassment was so severe, pervasive and objectively offensive that it could be said to deprive the victim of access to the educational opportunities or benefits provided by the school.”

In response to *Gebser* and *Davis*, the Department of Education was obliged to issue a new guidance in January of 2001, entitled *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*.

I agree with my colleagues, Commissioners Gaziano and Kirsanow, that the current Dear Colleague Letter goes far beyond *Gebser* and *Davis* by making a school district responsible for (1) harassment/bullying not just that some responsible party knew about but that some responsible party should have known about; (2) student-on-student harassment/bullying that is not just “severe, pervasive and objectively offensive” but “severe, pervasive or persistent;” and (3) student-on-student harassment/bullying that “interferes with or limits a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school” instead of the Supreme Court’s standard of harassment/bullying that “deprives the victims of access to educational opportunities or benefits provided by a school.” (Emphasis supplied). See Joint Dissent of Commissioners Gaziano and Kirsanow at 139-45. Indeed, it appears to me that the letter goes beyond any fair reading of Title VI or Title IX.

¹⁹ Scott Michels, *Boys Face Sex Trial for Slapping Girls’ Posteriors*, ABC News (July 24, 2007).

²⁰ Juju Chang, Alisha Davis, Cole Kazdin and Olivia Sterns, *First-Grader Labeled a Sexual Harasser: Has Zero-Tolerance for Sexual Harassment in Schools Gone Too Far?*, ABC News (Feb. 19, 2009).

- A five-year-old Hagerstown, Maryland boy was written up for sexual harassment for pinching girls' rear ends in the hallway at Lincolnshire Elementary School. Indeed, 28 kindergarteners were suspended for sex offenses, including 15 cases of sexual harassment in the 2005-2006 school year.²¹
- In December of 2006, a 4-year-old Waco, Texas boy was suspended for hugging a teacher's aide and rubbing his face in her chest.²²
- At Downey Elementary School in Brockton, Massachusetts, a 6-year-old was suspended for three days after he put two fingers inside a fellow first-grader's waist band. He told his mother that the girl had touched him first.²³
- A 6-year-old in Greer, South Carolina was accused of sexually harassing his kindergarten teacher, because he told one of his classmates that he liked looking at her behind.²⁴
- According to the Maryland Department of Education, 166 elementary school students were suspended in the 2007-2008 school year for sexual harassment, including three pre-schoolers, 16 kindergarteners and 22 first graders. In Virginia, 255 elementary students were suspended for offensive sexual touching in that same year.²⁵

One could argue that these school districts have simply misinterpreted what the Department of Education requires. But that is no answer. It is in the nature of distant bureaucracies that their edicts will be misinterpreted. One can argue that schools shouldn't make such mistakes, but that is no more useful than King Canute's command that the tides recede. The fact is that people make fewer mistakes when they rely upon their own common

²¹ Yvonne Bynoe, *Is that 4-Year-Old Really a Sex Offender?*, *The Washington Post* (Oct. 21, 2007). According to the article, school spokeswoman Carol Mowen said, "It's important to understand a child may not realize that what he or she is doing may be considered sexual harassment, but if it fits under the definition, then it is, under the state's guidelines." These state guidelines were promulgated in an effort to comply with federal civil rights law.

²² *Id.*

²³ Gitika Ahuja, *First-Grader Suspended for Sexual Harassment: Boy's Mother Says He's Too Young to Even Understand the Accusation*, *ABC News* (February 9, 2006). The article reports: "In a statement, Brockton Superintendent of Schools Basan Nembirkow said the district takes 'all allegations of sexual harassment very seriously. An investigation is always conducted when reports of sexual harassment arise. Principals are trained to handle these difficult situations and they are assisted, as needed, by the district's sexual harassment officer in handling each situation.'"

²⁴ *6-Year-Old Boy Accused of Sexual Harassment*, *WSPA-7-On-Your-Side* (April 4, 2008).

²⁵ Juju Chang, Alisha Davis, Cole Kazdin and Olivia Sterns, *First-Grader Labeled a Sexual Harasser: Has Zero-Tolerance for Sexual Harassment in Schools Gone Too Far?*, *ABC News* (Feb. 19, 2009).

sense than when they try to please some distant bureaucracy. Indeed, that is part of why it is not a good idea to make everything a federal issue.

The problem is structural. If a school district attracts the attention of the Department of Education and is forced to submit to an investigation, it is going to cost it enormous resources. Lawyers will have to be consulted, and considerable staff time will have to be devoted to dealing with an investigation. The object of the game therefore is to avoid such attention. It is natural for a school district to implement a policy that leans over backwards to avoid trouble.

A policy that leans over backwards to avoid one kind of risk will inevitably pay insufficient heed to a countervailing consideration. In the case of sexual harassment policies, young children who cannot even spell “sexual harassment” have been needlessly traumatized. Their educations have been interrupted by uncalled-for suspensions. And these well-publicized cases involving kindergartners and first graders are unlikely to show the full extent of the problem. There are likely lots of cases that are not quite as perfect for media ridicule as the tiny tot cases, but in which an injustice was nevertheless done.²⁶ In the end, the greatest casualty of the Department of Education’s war may turn out to be the easy-going relations between the sexes that have been characteristic of American culture for a long time. When young people have to be careful about what they say or do around the opposite sex, the result is likely to be that they say and do less.

In the case of the bullying policy, the neglected countervailing consideration may turn out to be the First Amendment. As then-judge Samuel Alito stated in *Saxe v. State College Area School District*:²⁷

There is no categorical “harassment exception” to the First Amendment’s free speech clause.

...

²⁶ I have asked the Commission to look into this issue, but have so far been unsuccessful in persuading a majority of the commissioners to do so.

²⁷ 240 F.3d 200, 204, 206 (3d Cir. 2001).

There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs.

To be sure, First Amendment protections operate a little differently in school settings than they do in the marketplace. But they operate nonetheless—especially in this case, given, as Professor Eugene Volokh pointed out in his written testimony, that the Department of Education's Dear Colleague Letter appears to cover certain off-campus speech as well as on-campus speech.²⁸ There is, however, no federal agency that actively protects students' First Amendment rights.²⁹ As a result, the incentive is for schools to give these rights a lower priority.

Anyone who has followed higher education over the last couple of decades knows that college campuses have been home to serious controversies over First Amendment rights.³⁰ It is one of life's crueler ironies that colleges and universities—the very institutions that should hold freedom of expression most dear—have instead led the charge against those rights.³¹ In his testimony, Professor Volokh recounted many illustrative incidents; many

²⁸ *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. School Dist.*, 398 U.S. 503 (1969); *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3d Cir. 2001). Commissioner Yaki's Statement is devoted almost exclusively to the proposition that the Constitution sometimes permits and indeed sometimes requires that children be treated differently from adults. No one denies this—although the cases he cites for that proposition do not always stand for it. See, e.g. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)(upholding Massachusetts' compulsory vaccination law against an adult plaintiff). By the same token, however, no serious student of the law can deny that while the Supreme Court has recognized limits on the application of the First Amendment to school children, it has also recognized that school children have First Amendment rights at school and outside of school in the same cases. See *Tinker*, 393 U.S. at 506 (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”). Commissioner Yaki's Statement does not deal with this at all. Nor does it deal with the question of whether the Department of Education has or should exercise the authority to regulate public or private schools in the manner it purports to do in its Dear Colleague Letter.

²⁹ The only organization I know of that specializes in protecting the First Amendment and academic freedom rights of faculty and students on college and university campuses is the Foundation for Individual Rights in Education (FIRE). Although some of the cases that FIRE litigate may lead to judicial decisions that affect K-12 public schools, FIRE works primarily on safeguarding the individual rights of university students rather than on defending those of younger students. Sadly, its staff is also tiny. But see William Shakespeare, *Henry V*, act iv, scene iii (c. 1598).

³⁰ See, e.g. Jon B. Gould, *Speak No Evil: The Triumph of Hate Speech Regulation* (2005).

³¹ See, e.g., Mari Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberle Williams Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech and First Amendment* (1993) (advocating hate speech

more could be told. The Department of Education's Dear Colleague letter is likely to push K through 12 education a little further down the path that higher education has recently followed.³²

Bureaucratic solutions are not the answer to every problem. The power of the federal government is a tool like any tool and should be used only in the right situation. For example, more than forty years ago the Department of Health, Education and Welfare (predecessor to the current Department of Education) performed an invaluable service in conjunction with the Department of Justice in coercing recalcitrant schools districts into desegregating. It had been a decade since *Brown v. Board of Education*, and many schools were just as segregated as they had been before that decision. Armed with Titles IV and VI of the Civil Rights Act of 1964, they indeed came down on these school districts like the proverbial 800-pound gorilla. Such a solution was necessary and altogether appropriate under the circumstances.³³

codes); Richard Delgado and Jean Stephancic, *Must We Defend Nazis?: Hate Speech, Pornography and the New First Amendment* (1999) (same).

Higher education is not the only place where serious First Amendment controversies have erupted in the last decade. Professor David E. Bernstein has written about the use of federal employment discrimination law to limit free expression in the workplace. See David E. Bernstein, *You Can't Say That!: The Growing Threat to Civil Liberties from Anti-Discrimination Laws* (2003) (discussing sexual harassment law's effect upon the workplace).

³² State anti-bullying initiatives may also have this effect. See Jonathan Saltzman, *Antibully Law May Face Free Speech Challenges*, *The Boston Globe* (May 4, 2010). That article stated:

[S]ome aspects of the law are so general that civil rights lawyers are concerned about how schools will apply it. The law, for example, defines one form of bullying as "repeated use" of a written, verbal, or physical act that "causes physical or emotional harm to the victim."

By that standard, said Gavi Wolfe, legislative counsel for the American Civil Liberties Union of Massachusetts, a student who calls another student "loser" twice on the school bus and hurts the youngster's feelings could qualify as a bully. A bus driver who heard the remarks would have to report them to school officials, who would then have to contact the parents of both children and take appropriate disciplinary action.

Harvey A. Silverglate, a well-known Boston civil rights lawyer, said, "School authorities are going to overreact, and we're going to have a firestorm of administrative actions against kids for saying this that are merely slightly unpleasant but do not qualify as bullying or harassment or any such thing."

³³ It has its costs, of course. Once such a bureaucracy is put in place, it is very difficult to dispense with it, even if the need for it diminishes. Such are the consequences of history.

This is not 1964. There is no credible evidence that any school district in the nation is pro-bully. Mistakes happen; teachers and principals have not always done the right thing.³⁴ But these mistakes are not less likely to happen with vigorous federal oversight. Indeed, I believe they are more likely to happen. Under the circumstances, a lighter touch that the Department of Education’s Dear Colleague Letter offers is called for.

III. Nothing in the Statements of the Commission Members Who Voted for the Report Justifies Making a Federal Issue Out of Schoolyard Bullying.

Chairman Castro rightly states in his Statement that “each of us, regardless of our Party affiliation or our political ideology, wants to have communities and schools that are safe for our children, regardless of their race, national origin, sex, religion, disability status or sexual orientation. Where we may differ is how to accomplish that goal.”³⁵ But he draws very different conclusions from that statement than I do. To me, the fact that we all agree we want safe schools for our children means that the aggressive federal oversight represented by the Department of Education’s Dear Colleague Letter is unnecessary and will likely be counterproductive. Different school districts, indeed different teachers and principals, should take different approaches to the problem, and they should learn from each other’s successes and failures. Meanwhile, creating media events like our May 13, 2011 briefing for the sake of media events is a job that can and should be left to the politicians.³⁶

³⁴ The case in South Philadelphia described at our briefing by Helen Gym of Asian Americans United may well be an example.

³⁵ Statement of Chairman Martin R. Castro at 90. It is useful to note that forty seven years ago, Chairman Castro could not have made a similar statement about the education issue of the day. It was not true that everyone wanted to ensure that African American students had the right to attend the same schools as their peers, regardless of race. That is why federal intervention was useful: The Fourteenth Amendment was being flouted. There is nothing remotely analogous to the massive resistance to *Brown v. Board of Education* today. There have many disagreements about education policy, but there are no adults outside homes for the criminally insane who don’t want all the nation’s children to have a safe place to learn.

³⁶ Everyone’s heart goes out to Ms. Aaberg, the mother of Justin Aaberg, the 15-year-old student from the Anoka High School in Anoka, Minnesota, who took his own life on July 9, 2010 during the summer vacation between his freshman and sophomore years. But when bereaved relatives testify before a commission about their grief, care must be taken to prevent the proceedings from degenerating into political theater. In our case one of our Commission members used Ms. Aaberg’s testimony as a club to attempt to discourage one of our other witnesses—Francisco M. Negron, Jr., general counsel to the National School Boards Association—from testifying candidly. Mr. Negron was kind enough to inform us of the kinds of problems school boards face in trying to satisfy the federal mandate on bullying. Commissioner Yaki responded this way:

I'm going to be as civil as I possibly can. But it just seemed to me very difficult for me to listen to your testimony talking about the fear of lawsuits and plaintiffs' lawyers when you're talking about sitting next to someone who lost their son

And to talk about plaintiffs' lawyers and whatever is essentially saying, 'Well you know there's a price we have to pay and there's some cost benefit analysis that we have to do when it comes to how much a child's life is.' At least that's the way it came to me. I know that's not what you meant, but certainly the way it came out.

So my question to you is, you talk about the fact that there should be no federal mandates, because there should be local leadership. How do you explain [that] to Ms. Aaberg?

Tr. at 275-76.

This was not fair. Mr. Negron was given a difficult task—giving testimony directly after a mother had offered her story of the loss of her young son—and he fulfilled that task with tact and grace. Mr. Negron and the National School Boards Association are at least as concerned about the safety and welfare of children as Commission Yaki and the other members of the Commission. But among other things, Mr. Negron has a duty to try to ensure that school resources are not spent on unproductive bureaucratic red tape rather than on actual teaching and learning. Moreover, as Commissioner Yaki must surely know, the job of preventing suicide is not as easy as it was made to seem at our staged media event—complete with poster-sized photographs of smiling suicide victims on easels. Increased federal oversight is unlikely to do the trick. The next suicide in the Anoka-Hennepin School District may not be the victim of an anti-gay bully. Next time it may be a child who was wrongly accused of being a bully instead. Perhaps it will be a child who never did anything at all, but whom the true bullies accuse of wrongdoing just for the fun of it. Or perhaps it will be a child reared in a religious tradition that disapproves of homosexuality, but who has done nothing but decline to endorse it. History never repeats itself exactly. The next time might not be a suicide at all; instead it may be a fatal accident because some school district somewhere had its budget strained by the kind of litigation that Commissioner Yaki seems unconcerned about and hence was not able to keep its school buses properly maintained. It is a complicated world. And it will not be made better or less complicated by a federal bureaucracy attempting to accomplish through federal mandate that which cannot be accomplished that way.

Justin Aaberg's tragic suicide is very much part of that complicated world. Members of the Commission seem to assume that it was a direct result of school bullying. But immediately after his death, which occurred in July, between school sessions, WCCO, the CBS affiliate in Minnesota, reported that his friends told Ms. Aaberg that he "had recently broken up with his boyfriend."

<http://minnesota.cbslocal.com/health/glb.t.teen.suicide.2.1910636.html>. To be sure, they also reported to her that he had sometimes been bullied. But there is nothing in the article to link the suicide to either the break up or the bullying, and given that the suicide took place in the middle of the summer, it seems doubtful that the link between it and any bullying at school was direct and immediate. At best, it may have had an indirect link.

In her testimony, Ms. Aaberg related the two incidents that she knew of. First, more than a year prior to his death, two other students grabbed at his genitals in the hallway and taunted him saying, "You like that, don't you?" This incident had left young Justin crying, and his friends reported the incident to the school counselor. There is nothing in the Commission's record that makes it clear what, if anything, the counselor did about it. Ms. Aaberg was inclined to be critical of the counselor for failing to inform her of what happened. But what if she had? Would that have made things better for Justin? Or worse? Many children prefer that their personal humiliations not be brought to the attention of their parents, and given that Justin did not tell his parents himself, he may well have fallen into that category on this occasion at least. Sometimes in the exercise of good judgment, school counselors must overrule the wishes of their charges on such matters. But sometimes good judgment requires that the child's wishes be respected. In what respect does oversight from the Department of Education increase the likelihood that the right decision will be made?

What disturbs me is the lack of real discussion in the Statements. Nowhere is an effort made to explain why the federal jurisdiction over these issues is making things better. The point is taken for granted. The Statements contain no recognition of the fact that entrusting an issue—especially an important issue—to the federal bureaucracy has costs.

I wish I could fully explain the modern tendency toward an ever-larger and more powerful centralized government. Part of it is obvious, of course: It is a one-way ratchet. Once a bureaucracy is created, it requires extraordinary political will to shrink it, and hence it hardly ever happens. As the bureaucracy grows, so too does the class of persons who service it from the outside—lobbyists, lawyers, and professional political activists. Such persons, like government employees themselves, are likely to see government action as the solution to every problem—especially when an important by-product of every new federal initiative is to provide white-collar jobs to people like them.³⁷

The other incident Ms. Aaberg reported was indeed communicated to her by her son. She testified that two months prior to his death he confided that a “kid” had once told him that because he was gay he was going to hell. Ms. Aaberg did not testify whether she knew where or when this conversation involving her son and the other young person occurred, the tone of voice with which the student spoke, whether the teachers, counselors or principal knew about it or had reason to know about it. She simply gave her opinion that the First Amendment should not cover such speech. Tr. at 296.

Despite knowing of this incident, Ms. Aaberg testified before the Commission that up until his suicide “he always looked so happy and I honestly thought he had the perfect life.” He had many friends, and according to her testimony, he evidently did not wish to bother them with his problems any more than he wanted to bother his family. Statement of Tammy Aaberg at 1. No one realized that he was about to take his own life. All of this is perfectly understandable and my sympathy goes out to Ms. Aaberg and her son’s family and friends. But it may well be that he looked happy to his teachers and counselor too. They may also have mistakenly thought he had the perfect life.

Life teaches us that human beings are not always what they appear to be on the surface. But no one has ever suggested that the problems of navigating the human soul can be made easier with more aggressive federal oversight.

³⁷ It is worth noting that a significant by-product of the Department of Education’s Dear Colleague Letter of October 26, 2010 is to increase the demand for anti-bullying seminars and education programs—and not just by a little bit. In the Letter, Assistant Secretary Russlynn Ali makes it clear that “school administrators should look beyond simply disciplining the perpetrators [i.e. bullies].” “While disciplining the perpetrators is likely a necessary step, it often is insufficient.” Instead, she repeatedly urges “training faculty on constructive responses to racial conflict,” “[p]roviding faculty with training to recognize and address anti-Semitic incidents,” and “creat[ing] an age-appropriate program to educate its students about the history and dangers of anti-Semitism.” In response to one hypothetical featuring sexual name-calling and rumor mongering, Assistant Secretary Ali states “The school should have trained its employees on the type of misconduct that constitutes sexual harassment.” She again makes it clear the “responding to individual incidents of misconduct on an ad hoc basis only” is insufficient.” In connection with a hypothetical involving the bullying of a disabled student, she states

It is easy to overlook the structural conflicts of interest that separate lobbyists, lawyers and professional activists from the people they purport (and indeed usually in good faith are attempting) to represent. But a wise policymaker will never lose sight of those conflicts: A lawyer or lobbyist benefits from complex and ever-changing law; his clients usually benefit from clear and stable law. A professional political activist needs political victories in the form of legislation passed or favorable administrative action; without such victories he cannot raise money. It is less important that these victories ultimately actually benefit anyone, much less those who thought they would be benefited. The professional political activist surely has no interest in examining past victories to find out whether they provided the promised benefits.

The primary political organizations that have supported the Department of Education's bullying policies have been civil rights organizations specializing in the concerns of sexual minorities. Sometimes their efforts have been part of broader efforts at the local level to combat bullying, and sometimes they have been part of efforts in the national media to assure sexual minority students who feel isolated that there are lots of Americans who wish them well. I believe these very different aspects of the anti-bullying

that the proper response should "at least" have included (among other things) "special training for staff on recognizing and effectively responding to harassment of students with disabilities."

By the end of the 10-page letter, only a fool would have failed to note that the best way to avoid liability—perhaps the only way—is to engage lots of trainers.

Training is obviously not always a bad thing. But when schools undertake such training in response to what they perceive to be a government mandate, they are overwhelmingly likely to just go through the motions.

Approximately twenty years ago, see n.18, *supra*, employers seeking to avoid Title VII sexual harassment lawsuits for monetary damages began to hire outside consultants to train their employees on proper workplace decorum. In doing so, some hoped their employees would learn to avoid conduct that could be construed as sexual harassment. More important, however, they hoped these training courses would provide them with some immunity against punitive damages. Consequently, it didn't matter whether an employer thought its employees needed sexual harassment training or not; they were going to get it.

In California, where I live, the businesses providing these training courses became powerful enough to secure a state law requiring all supervisory employees at all workplaces, both public and private, to take such a course every other year. See Cal. Gov. Code § 12950.1 (2011).

It seems overwhelmingly likely that the advocacy groups and private businesses that provide bullying training have received a special stimulus from the Department of Education's Dear Colleague Letter. A representative of one of them, the Gay, Lesbian and Straight Education Network ("GLSEN"), testified at our briefing in favor of the Department of Education's policy.

movement may run together in the minds of its supporters. But they need to be considered and evaluated separately. I question whether increased power in the hands of the Department of Education will, in the long run, be in the interest of sexual minority students in particular. If the stereotypes of sexual minority members as particularly likely to be artistic and creative are even partly true, it is not clear that a national policy of deadening bureaucracy in the schools is in their interest.³⁸

IV. Some of the Literature Cited in Commissioners' Statements and in the Report Needs at Minimum to be Put in Perspective.

Given the very short period of time allocated to put together this Report (and the Commissioners' statements), it has been impossible to do anything approaching an adequate analysis of the many social science articles, advocacy pieces masquerading as social science

³⁸ See, e.g., Richard Florida, *The Rise of the Creative Class: Why Cities Without Gays and Rock Bands are Losing the Economic Development Race*, *Washington Monthly* (May 2002).

One expert, Cornell University professor of human development Ritch Savin-Williams, has expressed concern that current scholarship on gay, lesbian and bisexual youth tends to be "doom-and-gloom" and that scholarship "[a]ccentuating the assets, resiliency, and complexity of same-sex oriented youth as creative, artistic, versatile, assertive, stylish, witty, sensitive, and athletic does not exist." Ritch C. Savin-Williams, *Then and Now: Recruitment, Definition, Diversity, and Positive Attributes of Same-Sex Populations*, *44 Developmental Psychology* 135, 137 (2008). Alas, the political system tends to reward those who can claim to be disadvantaged, particularly if they can claim to have been victimized.

Savin-Williams also points out what he calls a "perplexing contradiction" in the social science literature on sexual minorities:

Although gay youth are purported to be severely disturbed, once adulthood is reached, they somehow become good partners and parents. How can it be that young lesbians, who reportedly have high levels of nearly every risk behavior imaginable, grow up to be such good partners and parents? One pessimistic perspective is that disturbed lesbian youth are eliminated through their pathology, with suicide being the most obvious. Alternatively, as they age, broader and more representative subgroups of same-sex attracted women come out, establish relationships, and identify some aspect of their same-sex sexuality on research surveys. Another explanation is political in nature. Highlighting 'bad' gay youth and 'good' gay adults garners resources: community support services and school-based gay/straight alliances for youth and legal rights in legal same-sex parenting and marriage court cases for adults.

Id. at 137. See also Ritch C. Savin-Williams, *The New Gay Teenager* (2005)(arguing that the image of sexual minority teenagers as depressed and suicidal may be exaggerated).

and straight advocacy pieces cited in the Report and in the draft Statements.³⁹ Nor has there been time to canvass the literature to determine what was left out of the Report. Nevertheless, I have tried to read through a sampling of the articles cited in Commissioner Achtenberg's statement.⁴⁰ What follows are notes on some of the issues I spotted.

Bullying of Disabled Students: I have no trouble believing that some kinds of disabled students are bullied more often than other students—at least in environments where non-disabled students are left unsupervised in the presence of these disabled students. That is the nature of bullying; it is the abuse of the weak by the strong. But we should not pretend that we have useful data on in-school bullying of disabled students.

For example, Commissioner Achtenberg quotes from the Report this way:

“[i]n a 2009 study of parents of children with Asperger Syndrome, 94 percent reported that their children had been bullied. [citation omitted.] Additionally, 65 percent reported that their children had been victimized by peers within the past year, while 50 percent reported that their children were scared by their peers.”⁴¹

Actually it was a 2002 study—*Middle Class Mothers' Perceptions of Peer and Sibling Victimization among Children with Asperger's Syndrome and Nonverbal Learning Disorders*—that found the 94% rate.⁴² The 2009 study referenced in the Report—*Bullying of Students with Asperger Syndrome*—merely cites the 2002 study for that point.⁴³ The 94% figure is for mothers who responded more than zero to any of the following questions:

How often in the last year your child was hit by peers or siblings at home or schools or out in the community?

³⁹ It is the practice of the Commission for Commissioners to share their Statements and to then allow 30 days for Commissioners to add rebuttal material to their Statements or to draft a separate Rebuttal Statement. My citations are to the draft Statements, which did not contain rebuttal material at the time I had access to them.

⁴⁰ This is a random sampling of the articles, and not an effort to find the most troubling case in each category. There has been insufficient time for anything else.

⁴¹ Commissioner Roberta Achtenberg at 103 (quoting Report at 14-15)(citation were omitted in the Achtenberg version).

⁴² Liza Little, *Middle Class Mothers' Perceptions of Peer and Sibling Victimization among Children with Asperger's Syndrome and Nonverbal Learning Disorders*, 25 *Issues of Comprehensive Pediatr. Nurs.* 43 (2002)

⁴³ Susan Carter, *Bullying of Students with Asperger Syndrome*, 32 *Issues Comprehensive Pediatric Nursing* 145, 146, 150 table 2 (2009).

What is the number of times your child has been physically attacked by a gang or group of kids?

What is the number of times your child has been kicked or hurt in his/her private parts (nonsexual genital assaults)?

How many times did any kids, including sisters and brothers, pick on your child by chasing him or her, trying to scare him or her, grabbing your child's hair or clothes, or making your child go somewhere or do something he or she did not want to (bullying)?

How often did your child "get scared, sick or feel really bad because of being called names, saying mean things, or told that they didn't want him or her around anymore (emotional bullying)?⁴⁴

A few things are worthy of note about the 2002 study. First, the 411 families who participated in the study were not randomly selected. Rather, they were volunteers who responded to an internet invitation to the parents of a child with Asperger's Syndrome or another nonverbal learning disorder to complete an anonymous questionnaire that would be mailed to their home. Given that they appeared to be looking around the internet for information about their child's disorder, volunteers are probably more likely to report problems than non-volunteers.

Much more important, the study did not even purport to be limited to bullying at school. It included abuse by *siblings* or peers *in any situation*. I am forced to conclude from this that at least 6% of the Asperger's Syndrome children studied were only children. Otherwise the figure would almost certainly have been 100% at least with the families that I am familiar with, not just with disabled children, but with all children. Schools cannot control what siblings do at home and have little control over what peers do to peers at shopping malls and street corners. Consequently, this study has little application to the issues before the Commission.

The 2009 study cited by Commissioner Achtenberg asked essentially the same questions to the parents of only 34 children who had been diagnosed with Asperger's

⁴⁴ Little at 47-48.

Syndrome. Like the earlier study, it used a nonrandom sample. The parents had been “recruited online, in clinics and at autism conferences.”⁴⁵

The results showed high rates of incidents, though not nearly as high as in the 2002 study it is modeled after. The 2009 study found that 64% of parents report some sort of bullying or harassment and 50% said his or her child had been scared by peers or siblings. Again, this includes bullying or harassment anywhere, not just in school. In addition, 11.8% reported that the child at issue had not been invited to any other child’s birthday that year, 5.9% said that he or she was routinely chosen last or near last for sports teams and 2.9% said he or she sat alone at lunch everyday.⁴⁶

A few additional points may be also useful here:

- Asperger’s Syndrome children are sometimes characterized by aggression themselves, so insofar as they are more likely to be in the company of other Asperger’s Syndrome children, this may tend to elevate levels of violence. It is also possible that some of the incidents reported by parents were actions taken by non-Asperger’s children who, rightly or wrongly, perceived themselves to be acting in self-defense.
- Asperger’s Syndrome children are sometimes characterized by unwarranted or inappropriate fears, so the notion that 50% of these children were said to experience fear of their peers may be less informative than it appears on the surface.
- One of the most well-known characteristics of Asperger’s Syndrome children is an inability to judge nonverbal social cues—including facial expressions to voice inflections. As a result, insofar as parents are relying on their child’s report of an incident that occurred outside their field of vision, they may receive an inaccurate account of what happened.⁴⁷

The bottom line is that we have not begun to quantify how much more likely a child with Asperger’s Syndrome is to be bullied in school by other students—although it is easy to believe that they are. But even if we could quantify it, it would be insufficient to justify

⁴⁵ Carter at 148.

⁴⁶ Carter at 150 (only 18 respondents, those with children ages 4-14 were asked the questions on social shunning).

⁴⁷ Fred R. Volkmar & Ami Klin, *Diagnostic Issues in Asperger Syndrome*, in *Asperger Syndrome* 25, 31, 35 (Ami Klin, Fred R. Volkmar & Sara S. Sparrow eds., 2000).

federal efforts to influence local bullying policy. Nothing in either of these studies shows that local authorities are not addressing the matter in the best way they know how or that more federal supervision would be a useful improvement.⁴⁸

Bullying on the Basis of the Victim's Religion: Commissioner Achtenberg also draws our attention to two surveys by the Sikh Coalition—one in the San Francisco Bay Area in 2010 and one in New York City in 2007—on the subject of religious based discrimination. Of these, I have been able to locate and examine one—the New York City survey.

The fact that a survey had been conducted by an advocacy organization should ordinarily cause a critical reader to scrutinize it a bit more carefully than usual.⁴⁹ In this case, however, the survey does not require particularly careful scrutiny to reveal its problems.

The report has the tendentious title *Hatred in the Hallways: A Preliminary Report on Bias Against Sikh Students in New York City's Public Schools*.⁵⁰ It reports the results of a poll of 205 Sikh children in New York, primarily in the borough of Queens (where most New York Sikhs reside). Two things are crucial to understanding the results obtained in it:

Because the report states that 77.5% of Sikh boys and 58.4% of Sikh students generally report being teased or harassed on account of their Sikh religion, the word “**teased**” must be emphasized. The Free Dictionary defines “tease” this way:

1. To annoy or pester; vex.
2. To make fun of; mock playfully.

Despite the Sikh Coalition's assertion that its findings are “shocking by any standard,” it is never shocking to find that children tease each other. Children always tease

⁴⁸ It should be noted that these very useful studies were not written for the purpose of justifying a federal bullying policy. Rather they were intended to provide information to pediatric nurses and other health professionals that would take them a step beyond their own clinical observations. In the absence of this evidence, these professionals would have even less to go on.

⁴⁹ On the other hand, this can be carried too far. Sometimes advocacy organizations are in the best position to bring problems to public attention that might otherwise be neglected.

⁵⁰ The Sikh Coalition, *Hatred in the Hallways: A Preliminary Report on Bias Against Sikh Students in New York City's Public Schools* (June 2007).

each other. It would be shocking if they didn't. Indeed, all but the most humorless adults I know indulge in it now and then too. Sometimes children take it too far; indeed, sometimes adults take it too far. But there is nothing in the report to separate friendly but impish teasing from something worthy of discipline, much less worthy of federal intervention. There may well be a problem, but this report has not uncovered it.

It should also be noted that unlike the authors of some of the other studies cited in the Report, the Sikh Coalition evidently interviewed a number of quite young students.⁵¹ That puts the report's finding that "[t]wo out of five Sikh children who wear turbans or *patkas* [religious head coverings for younger boys] are physically harassed—beaten or touched on the head"—in a different light. Beaten *or* touched on the head does not mean beaten. Among the younger children, I would expect the number who have been "touched" to be extremely high. Younger children touch each other. They roll in the grass with each other, they blow spit balls at each other, and they put chewing gum in each other's hair. They are especially likely to want to touch a schoolmate if they see something that in their ignorance appears to be a funny hat. Children's ignorance, with proper treatment, goes away. Federal bureaucracies created to solve a problem that is best solved locally do not.⁵²

I am confident that the Sikh Coalition is correct that some Sikh children have been harassed on account of some other children's misperceptions that they are terrorists.⁵³ In that

⁵¹ This is clear because the summary of the results repeatedly refers to students who wear "*patkas*," which are head coverings worn by young boys before they are old enough to wear turbans. A Sikh Coalition video also features a photograph of a quite young boy being interviewed for the survey. See Sikh Coalition, Sikh Coalition NYC Civil Rights Survey (May 11, 2007), available at <http://www.youtube.com/watch?v=j61q1LTaN-8>.

⁵² It is worth pointing out that the high rates of teasing and/or harassing on account of religion for Sikh children seems to be confined to boys—likely for the obvious reason that they are ones who wear turbans or *patkas*. The study stated that "77.5% of Sikh boys we surveyed who go to school in the borough of Queens report being teased or harassed on account of their Sikh identity." In contrast, "58.4 percent of Sikh students report being teased or harassed at school on account of their Sikh identity. For reasons that are not discussed in its report, the Sikh Coalition interviewed approximately twice as many boys as girls (65.4% vs. 34.6%) in its study. Given the turban/*patka* issue, this, of course, artificially inflates the numbers of children who have been teased and/or harassed.

⁵³ If it is any consolation, I grew up during the Cold War, and I was accused by another child of being a spy for what was then commonly called "Red China." Just as Sikhs are not Muslim, I am not Asian. I do have dark, straight hair, or at least I did. And even if I were Asian, I am not a spy. The little girl who accused me of this later became a close friend. I am not trying to make light of all accusations suffered by Sikhs. Some are obviously more serious than others. For example, in the days directly after September 11, 2001, Frank Silva Roque, a man with serious mental problems, killed Balbir Singh Sodhi, a Sikh gas station owner in Arizona, believing him to be a Muslim terrorist. Roque was convicted and sentenced to death, but the Arizona Supreme

respect the survey may provide a useful reminder for teachers, guidance counsellors and principals: Children can be ignorant hellions. They need to be taught (1) Sikhs are not Muslims; and (2) Even if they were Muslims, that does not make them terrorists. A good course in world religions would work wonders on both counts, and it is likely to be quite a bit more effective than federal laws that require more training for teachers on how to prevent harassment.

Unfortunately, there is one more point that needs to be put out in the open with regard to *Hatred in the Hallways*. When the Sikh Coalition undertook the study (along with a similar study of adult Sikhs), it placed a promotional video on the internet explaining the motives and methods for conducting the survey. In that video, Mehtab Kaur, who is identified as a community advocate with the Sikh Coalition, states that the purpose of the survey was “to get statistics to approach government agencies and say, you know, X number of people in our community have experienced this, or you know, 45 out of 50 students surveyed say that have problems with discrimination and bullying at New York City schools. Let’s do something.”⁵⁴ But then she said something disturbing: “While administering the survey on Survey Day, I think most of us were surprised by the fact that, you know, some people said they hadn’t experienced any discrimination and but when pressed further, you know, we—uh—one of the questions in the survey asks, ‘Has anyone ever called you bin Laden or a terrorist?’ and people had become so used to being called, you know, such derogatory names that they didn’t really consider it harassment anymore.”⁵⁵

It is hard to avoid the conclusion that Ms. Kaur is not opposed to coaching survey subjects. She seems to believe that if the survey subject tells you that he or she hasn’t been

Court reduced his sentence to life imprisonment, citing as mitigating factors both his low IQ and mental illness. But just as not all accusations that a Sikh is a terrorist are insignificant child’s play, some really are insignificant child’s play. *Hatred in the Hallways* fails to make distinctions among accusations and hence is not particularly helpful.

⁵⁴ These statements were made before the project was completed. She also stated in the video, “Our goal is to have 1000 surveys completed by the end of the project, and our larger goal is to take these numbers and present them to government agencies who can help our community in different ways....”

⁵⁵ Sikh Coalition NYC Civil Rights Survey (May 11, 2007), available at <http://www.youtube.com/watch?v=j61q1LTaN-8>.

discriminated against or hasn't been bullied, the thing to do is press further. Under the circumstances, relying on such a survey seems inappropriate.⁵⁶

Bullying on the Basis of the Victim's Sex: Commissioner Achtenberg's Statement points out that "a 2001 study ... found that 81 percent of students in grades 8 to 11 reported experiencing sexual harassment, including 83 percent of girls and 79 percent of boys."⁵⁷

This too needs to be put into perspective. Only about 14% of students said that there is "a lot" of sexual harassment going on in their school. Almost as many—9%—said that there was not any.⁵⁸ Overwhelmingly, students answered "Some but not a lot" or "Only a little."

Students were given the following broad definition of harassment: "Sexual harassment is unwanted and unwelcome sexual behavior that interferes with your life. Sexual harassment is not behaviors that you like or want (for example wanted kissing, touching or flirting)." Examples given to students included "Made sexual comments, jokes, gestures, or looks," "Spread sexual rumors about you," "Flashed or 'mooned' you," and "Said you were gay or lesbian" and "Wrote sexual messages/graffiti about you on bathroom walls, in locker rooms, etc." The categories that drew the most affirmative responses were "made sexual comments, jokes, gestures, or looks (71%)," "Spread sexual rumors about them (61%)," and "Said they were gay or lesbian" (61%).

Students were also invited to define sexual harassment themselves. Among the responses they gave were the extraordinarily broad "Any unwanted attention," "When someone invades your personal body space or privacy," and "Someone making advances towards me and saying things that make me feel very uncomfortable." A few students

⁵⁶ I note that unlike in most scholarly articles (and I surely do not wish to imply here that scholarly studies are not also subject to political bias), in *Hatred in the Hallways*, the reader is not told how the questions to the survey subjects were worded.

⁵⁷ AAUW Educational Foundation, *Hostile Hallways: Bullying, Teasing and Sexual Harassment in School* (2001).

⁵⁸ *Id.* at 12, Figures 3 & 4.

seemed exasperated with the concept: “Feminist-politically correct language for saying things like ‘hello good-looking.’”

For a sense of how important the students themselves regarded this conduct, one may look at how they responded to the particular harassment they experienced. Only 20% of students said they had told a teacher or other school employee about an incident of sexual harassment.⁵⁹ The study produced the following list of responses to the question, “Why didn’t you tell anyone?” I quote the list in the study in full:

Boys

“I don’t know. Thought it was normal kid stuff.” (eighth-grader)

“Because I didn’t really care, it was not a big deal.” (ninth-grader)

“Because I’m a guy and I don’t care. I’m not so insecure that someone saying I’m gay is gonna bother me. I’m not, so who cares?” (ninth-grader)

“I could handle it myself.” (11th-grader)

Girls

“I don’t know. I just didn’t feel it necessary.” (ninth-grader)

“I liked it.” (10th-grader).

“... make a mountain out of a molehill. I handled the situation myself, or then eventually went away.” (10th-grader)

“I didn’t want to be a tattletale.” (11th-grader)

“It wasn’t anything that bothered me, and I knew that it would stop. And it did.” (11th-grader)⁶⁰

This study was clearly written to highlight sexual harassment as a serious issue. If the study’s authors had received more troubling answers to the question of why a student had

⁵⁹ Id. at 29.

⁶⁰ Id. at 27.

failed to draw a harassment incident to the attention of a teacher or other school official—such as “I was afraid to”—it is unthinkable that they would have failed to report it.

In the end, this study proves neither that further federal action is needed nor that past federal action has produced beneficial results.

Bullying on the Basis of the Victim’s Race: In her Statement, Commissioner Achtenberg quotes from the Report’s discussion of the California Healthy Kids Survey for her belief that “[u]p to one-quarter of racial and ethnic minority students are targeted for peer-to-peer bullying, harassment, and violence:

“[t]he California Healthy Kids Survey conducted in 2007-2009 found that when youth in California were bullied or harassed on school property, the most common specific reason cited was because of their race or national origin, with about 18 percent of students in grades 7, 9, and 11 reporting at least one bullying incident in the past year for this reason. . . . When results for 9th and 11th grade students are broken down by race and ethnicity, African-American students reported being bullied or harassed due to their race or ethnicity at the highest rate—23 percent. Twenty-two percent of Asian-American students, 22 percent of Native Hawaiian or Pacific Islanders students and 20 percent of Native American students reported being harassed due to their race, ethnicity, or national origin as well.”

I should add the rate for non-Hispanic white students was 13% and for Hispanic or Latino/Latina students it was 17%.

All these figures can be somewhat misleading. It is not always possible to know why one is being harassed or bullied.⁶¹ A certain number of times an individual will surmise from the circumstances that he is being targeted on account of his race given that the bully/harasser is of another race, and a certain number of times he will be wrong. If all encounters with bullies and harassers were random and none were racially motivated, members of racial minorities may nonetheless more frequently conclude that they have been

⁶¹ The question propounded to students was, “During the past 12 months, how many times on school property were you harassed or bullied for any of the following reasons?” Among the reasons listed was “Race, Ethnicity or National Origin.” Anyone who answered more than never would have been included in the tally.

racially targeted simply because a larger percentage of their encounters with bullies or harassers will be with members of another race.

A useful check on the conclusion that African Americans and Asians are more likely to be the target of racially motivated bullying than whites or Hispanics is the Health Behaviour of School-Aged Children survey. In “Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment,” Dr. Tonjah Nansel et al. analyzed the data collected in that massive survey and found that black students report that they have been bullied *less* often than white or Hispanic students.⁶² Their research showed that 29.9 percent of black students reported that they had been bullied during the current school term; in contrast 43.7 percent of white students reported bullying. The figure for Hispanics is 40.6 percent; no figures were given for other races.⁶³ To be sure, these figures are for bullying of any kind, not specifically for bullying based on race or ethnicity. Still, it would be odd to find that while black students are subjected to more bullying based on race or ethnicity, they were correspondingly bullied so much less on other bases that it nets out in favour of less bullying overall.

The HBSC also sheds useful light on the CHKS’s finding that “the most common specific reason cited” for bullying is “race or national origin.”⁶⁴ In fact, the CHKS only asked about what it calls “Hate-Crimes Reasons” for bullying—“race, ethnicity or national origin,” “religion,” “gender,” “sexual orientation,” and “physical/mental disability.” In contrast, the HBSC asked students whether they had been “belittled about religion or race,” “belittled about looks or speech,” “subjects of rumors,” or “subjects of sexual comments or gestures.”

Not surprisingly to anyone who has attended high school, “belittled about looks or speech” came in first, followed closely by “subjects of rumors.” “Belittled about religion or race” was not just last, it was dead last. All the other categories were more than twice as

⁶² Tonja R. Nansel, Mary Overpeck, Ramani S. Pilla, W. June Ruan, Bruce Simons-Morton & Peter Scheidt, *Bully Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 JAMA 2094 (April 25, 2001).

⁶³ The difference between white and Hispanic was not statistically significant. *Id.* at 2097, Table 2. Similarly, 8.8% of white students, 6.7% of black students and 8.1% of Hispanic students reported that they were bullied on a weekly basis. These differences, however, were not statistically significant.

⁶⁴ Statement of Commissioner Achtenberg at 101 (quoting Report at 12).

common.⁶⁵ This is not to suggest that bullying on the basis of race or ethnicity is not deserving of attention by teachers and principals. It simply needs to be seen in context. Also not surprisingly, the serious differences in bullying levels were not between races, but between genders and age groups. While females are more likely to be the subject of “sexual comments or gestures,” males are much more likely to be “hit, slapped or pushed.” Sixth graders are about three times more likely to report being bullied on a weekly basis than 10th graders. A full majority of 6th graders report having been bullied in one way or another; by 10th grade that number is very nearly cut in half.⁶⁶ This latter fact is actually good news. It shows that eventually the lessons of civility are learned by most students, though not as early as might be hoped for. It does indeed get better.⁶⁷

Bullying Based on the Victim’s Sexual Orientation: Everyone agrees that “[c]ompared with students who are not sexual minorities, a disproportionate number of sexual minority students engage in a wide range of health-risk behaviors.”⁶⁸ For example, according to the Center for Disease Control and Prevention, approximately 6.4% of self-identified heterosexual high school students report that they have attempted suicide, while 25.8% of self-identified gay or lesbian high school students have and 28.0% of self-identified bisexual high school students.⁶⁹

⁶⁵ Nansel at 2097. The rates among students who reported that they had ever been bullied were as follows: “Belittled about religion or race” (25.8%), “Belittled about looks or speech” (61.6%), “Hit, slapped, or pushed” (55.9%), “Subjects of rumors” (55.6%), “Subjects of sexual comments or gestures” (52.0%).

⁶⁶ Id. at 2097

⁶⁷ The “It Gets Better” Project was founded by Dan Savage and Terry Miller in response to suicides of gay teenagers. Its purpose is to urge them to hang in there; life as an adult will be better. This message strikes me as important for all pre-teens and teenagers, straight or gay, bullied or non-bullied. Few teenagers find growing up easy. Adults who tell adolescents that “These are the best years of your life” are frequently well meaning, but their words are not very comforting and (mercifully) usually inaccurate.

⁶⁸ Statement of Commissioner Achtenberg at 109, quoting Emily O’Mally Olsen, Tim McManus, Steve Kinchen, David Chyen, William A. Harris, Howell Wechsler, *Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9-12—Youth Risk Behavior Surveillance, Selected Sites, United States, 2001-2009*, Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report* (June 6, 2011)(Early Release).

⁶⁹ These figures are medians of the results of 13 state-wide and local surveys. The figures for reported attempted suicides broken down by actual sexual contacts (rather than reported sexual orientation) were 8.4% (opposite sex sexual contacts only), 19.7% (same sex sexual contacts only) and 29.8% (sexual contact with both sexes). Students were asked about their conduct for the 12 month period immediately preceding the point during which they filled out the questionnaire.

The tendency to engage in high-risk behaviors is not confined to suicide attempts. According to the Center for Disease Control and Prevention, about 7.6% of heterosexual students report smoking cigarettes daily, while 23.4% of gay or lesbian students and 24.8% of bisexual students do.⁷⁰ Similarly, 4.3% of heterosexual students report that they currently drink alcohol on school property, while much larger numbers of gay or lesbian students and bisexual students do—11.8% and 13.8% respectively.⁷¹ Drug use figures are similarly skewed.⁷²

This tendency includes activity that one would not necessarily associate with troubled youth. Only about 12.3% of heterosexual high school students report that they rarely or never wear a seatbelt when riding in a car with someone else. By contrast, the figures for gay or lesbian students and for bisexual students were 21.0% and 20.4% respectively. Nevertheless, the Center for Disease Control and Prevention data do not show that gay or lesbian and bisexual youth always score higher on unsafe behaviors than heterosexual youth. Among gay or lesbian students, 22.5% and among bisexual students 16.5% reported eating vegetables three or more times a day. The figure for heterosexual students was only 11.3%.⁷³

⁷⁰ Olsen et al, at 75, Table 26. Again, these figures are medians of 13 state and local studies. The figures are for any 30-day period, and do not necessarily imply that a student was currently smoking daily.

⁷¹ Id. at 89, Table 40.

⁷² Id. at 90-102, Tables 41-53. For example, 4.6% of heterosexual, 22.9% of gay or lesbian and 20.4% of bisexual students report using the drug ecstasy. Id. at 97, Table 48.

In view of this, it does not seem surprising to me that sexual minority students are more likely to “receive punishment from schools, police or courts.” See Statement of Commissioner Roberta Achtenberg at 111 (quoting Institute of Medicine of the National Academies, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 159 (2011)). Commissioner Achtenberg cites the Institute of Medicine report for the proposition that this disproportionate discipline was somehow unmerited. In fact, however, the reference she cites is merely a citation to another article. It is not an endorsement of that other article’s findings. See Kathryn E.W. Himmelstein and Hannah Brickner, *Criminal-Justice and School Sanctions Against Non-Heterosexual Youth: A National Longitudinal Study*, 127 *Pediatrics* 49 (January 2011). Two days after the internet version of the article was published, a letter dated December 8, 2010 from Donald J. Harris, Ph.D. sent to *Pediatrics* stated: “There is a sharp disconnect between the statistical findings presented in this report and the authors’ conclusion that ‘nonheterosexual youth suffer disproportionate educational and criminal-justice punishments that are not explained by greater engagement in illegal or transgressive behaviors.’ ... [T]he categorical language of the authors’ conclusion is based almost entirely on a pattern of findings that did not reach the stated criterion of statistical significance.” See *Replies to Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, *Pediatrics* web site. If this Report were not put together so hurriedly, perhaps we would have had time to figure out who is right.

⁷³ Id. at 115, Table 66. There is, however, research that finds that eating disorders are more common among gay, lesbian and bisexual students than they are among heterosexual students. S. Austin, N.J. Ziyadeh, H.L.

Commissioner Achtenberg argues that “the extra pressure created by structural stigma is responsible for such disparate outcomes to the extent that they appear to exist.”⁷⁴ She defines “structural stigma” to mean “the collective process by which majority class members give permission to the society as a whole to victimize minority class members.”⁷⁵

It is perfectly plausible that the increased victimization can lead to an increase in what social scientists like to call (with bureaucratic blandness) “negative outcomes.” But there is no way to draw the conclusion that increased victimization is the sole or even a primary cause of the increased tendency towards self-destructive conduct based on the available evidence. One simply has to take it on faith.⁷⁶

Corliss, M. Rosario, D. Wypi, J. Haines, C.A. Carmago, Jr. & A.E. Field, *Sexual Orientation Disparities in Purging and Binge Eating from Early to Late Adolescence*, 45 *J. Adolescent Health* 238 (2009).

⁷⁴ There may indeed be external structural issues that are contributing factors to the high rates of high-risk behavior on the part of gay, lesbian and bisexual youth. But they do not all relate to victimization. For example, since sexual minorities are minorities, the search for love may be a little harder. They are less likely to find a soul mate or even a reasonably compatible mate within a short distance from their home. As a result, they may be less likely to form satisfactory romantic relationships while still in school. A failed relationship may be a greater problem, since the common adage that there are “plenty of fish in the sea” may not apply. Another external structural issue relates to family structure. Through genetic inheritance, white parents tend to give birth to white children, while Asian parents tend to give birth to Asian children. Through cultural inheritance, Roman Catholic parents tend to have Roman Catholic children and Buddhist parents have Buddhist children. But most gay, lesbian or bisexual children are being reared by their own biological, heterosexual parents or parent. (Gay, lesbian and bisexual adults sometimes have biological or adopted children, but those children are usually heterosexual, thus creating the problem in reverse.) No doubt the pressures of parental disapproval can be a problem for sexual minority children. But even in the absence of disapproval, anything that makes a child different from his or her parents places some element of stress on the relationship. Sexual orientation is just one more such potential difference. Sympathetic parents, for example, may wish to provide advice on romantic relationships, but feel inadequate to the task, since their experience is dissimilar. Or their children may perceive them to be inadequate to the task, when in fact they are quite able to help, but their advice is not sought.

⁷⁵ She later states her point more modestly (and much more defensibly): “The reasons that sexual minority youth may experience suicidal ideation and/or acts in response to victimization are not entirely clear. Nevertheless, social stigma may well drive some number of these experiences.” Statement of Commissioner Roberta Achtenberg at 111-12.

⁷⁶ See Ritch C. Savin-Williams, *Then and Now: Recruitment, Definition, Diversity, and Positive Attributes of Same Sex Populations*, 44 *Developmental Psych.* 135 (2008) (internal citations omitted). In that article, Dr. Savin-Williams writes intriguingly about the issue: “[M]ost researchers assume that it is not same-sex sexuality per se that impacts development but the victimization, discrimination, and stigmatization that it engenders. If so, what is it about sexual prejudice that is developmentally more deleterious to the recipients than other forms of social ostracism to their recipients, such as that meted out to women, ethnic minorities, the poor, the unattractive, the overweight, or the disabled? Alternatively, one might argue (but few do) that because of their possibly altered hormonal and anatomical constitution, same-sex attracted individuals navigate a unique developmental instability or fluctuation across a range of personal attributes (sex object choice, cognitive skills, physical features, hobbies, career choices). The sex atypicality of same-sex populations suggests that some same-sex attracted individuals have a different brain structure, physiology, or hormonal status than others of their biological sex. Whether these potential biological differences make same-sex oriented individuals unique, and if so, to what degree are unknown, largely because the biologic data are so preliminary that few direct or indirect pathways have been established.”

For one thing, there are many groups with high rates of suicide whose behavior is unlikely to be the result of external victimization or social stigma. According to data from the World Health Organization, Lithuania, South Korea, Kazakhstan, Belarus, Japan and Russia were the top nations for suicide. The United States ranked 39th with a rate of suicide roughly one third of Lithuania's. Jamaica has one of the lowest suicide rates in the world. Yet somebody is victimizing somebody there; it has one of the highest murder rates.

In the United States, the Centers for Disease Control and Prevention report that American Indians/Alaska natives have the highest rates of suicide. They are followed closely by non-Hispanic whites. Other races and ethnicities—Asians/Pacific Islanders, Hispanics and non-Hispanic blacks—were a distant third, fourth or fifth.⁷⁷ Although obese persons receive far more than their share of bullying, social stigma and victimization and have high rates of depression, suicide rates among them are very low.⁷⁸

There have been efforts to prove that the high risk behavior of gay, lesbian and bisexual students is the result of victimization of one sort or another. But research that is said to prove it is usually measuring something quite different from what advocates suppose. And even when most people can agree on what is being measured, causation cannot be established. Consider, for example, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay and Bisexual Young Adults*, a 2009 study by Caitlin Ryan, David Huebner, Rafael M. Diaz and Jorge Sanchez.⁷⁹ In it, the authors argue that they have established “a clear link between specific parental and caregiver rejecting behavior and negative health problems in young lesbian, gay and bisexual adults.”⁸⁰ But are the authors

⁷⁷ Asian/Pacific Islander females had the third highest rate of suicide among females, followed by Hispanics and non-Hispanic blacks. Among males, non-Hispanic blacks had the third highest rate, with Hispanic males at a very close fourth and Asian/Pacific Islander males with the fifth-highest rate. Rates were age-adjusted. See Centers for Disease Control and Prevention, *National Suicide Statistics at a Glance* (2002-2006).

⁷⁸ Ottar Bejerkeset, Pai Romundstad, Jonathan Evans & David Gunnell, Association of Adult Body Mass Index and Height with Anxiety, Depression, and Suicide in the General Population, 167 *Am. J. Epidemiology* 193 (2008).

⁷⁹ Caitlin Ryan, David Huebner, Rafael M. Diaz, & Jorge Sanchez, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 *Pediatrics* 346 (Jan. 2009).

⁸⁰ *Id.* at 346. For example, 19.7% of those classed as having “low rejection scores” reported suicide attempts, while 35.1% of those with moderate rejection scores and 67.6% of those with high rejection scores did.

measuring actual rejection or just perceptions of rejection? In the study, 224 white and Latino gay, lesbian and bisexual young adults were asked to recall whether their parents or caregivers blamed them for any anti-gay mistreatment they might have suffered, how often their parents or caregivers made disparaging remarks about gays, lesbians or bisexuals and how often they were excluded from family activities, and similar questions.

The authors found that those with higher family rejection scores tended to have higher rates of suicidal ideation and of attempted suicide, higher rates of drug use and higher rates of unprotected sex.⁸¹ But are they really finding an association between family rejection and (for example) depression? Or are they finding that depressed people are more likely to remember, believe or report that they suffered rejection? Even if the reports of all 224 participants were 100% accurate, were the parents excluding them from family activities because of their sexual orientation? Or was it because of their illegal drug use, depression or suicide attempts?

Perhaps one day we will have better insight into what causes high-risk conduct among gay, lesbian and bisexual teenagers. But we need not wait for that day to ensure that their rights and the rights of all students are respected in the schools. In my opinion, the best way to do that is allow teachers, principals and local school districts to do their jobs. Nothing in this Report has persuaded me otherwise.

Similarly, 22.4% of those with low rejection scores, 44.6% of those with moderate rejection scores, and 63.5% of those with high rejection scores reported depression. Id at 350, Table 4.

⁸¹ The data on the relationship of family rejection with heavy drinking and with sexually transmissible disease diagnosis were not statistically significant. Id. at 350, Table 4.

STATEMENT OF COMMISSIONER MICHAEL YAKI

The U.S. Commission on Civil Rights, historically, has never shied away from tackling controversial issues in support of civil rights. Our historic reports on civil and voting rights in the South in the early 60s became the predicate for the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Through extensive interviews, hearings, and testimony both voluntary and compelled, little doubt was left that discrimination wildly at variance with Constitutional principles and protections needed to be remedied, sooner rather than later, and aggressively rather than tepidly as had been done in the past.

This Report had the potential to join the pantheon of exalted papers of the past. Unfortunately, due to a series of circumstances both beyond and within our control, it failed. The rushed timeline, the inability to thoroughly scour the literature and, most egregiously, the absence of a rigorously constructed and sound legal theory doomed this exercise from the start. And while I voted in favor of the report, it was only to validate the one, truly, ground-breaking aspect – that this Report was the Commission’s first real foray into the experiences of people who have been defined solely by their sexual orientation.¹

Nevertheless, the Commission’s failure to tackle head-on the continued discrimination against Americans who are gay, lesbian, bisexual or transgender in a meaningful way that utilizes extant Constitutional doctrine is the greatest omission of this Report. I believe that in the context of the issues brought before us, First Amendment doctrine has less application to the context of school bullying when it is balanced against a countervailing principle of protecting a suspect class – in this case, youth who identify or are identified as LGTB.

¹ In a report released last year – prior to the changes in membership on the Commission that approved this Report -- my Statement on the Multiethnic Placement Act report focused on the failure of the Commission to address same-sex adoption: “ However, the Commission majority, by its actions to date, has consistently refused to act in accordance with our mandate to ensure justice and equal treatment for all Americans. By that I am explicitly discussing the need for this Commission to recognize continued discrimination against Americans who are gay, lesbian, bisexual or transgender. This void in our mandate is evident by this report’s refusal/inability to explore or to encourage facilitation of adoption by one important sector of the American population: gay men and lesbians.”

In cases before the U.S. Supreme Court, the particular vulnerabilities of children have vaulted them into a special status worthy of a strong government interest. Whether the case of *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905), or more recently the treatment of juvenile offenders in *Roper v. Simmons*, 543 U.S. 551 (2005), the Courts have long held that children have a different place in the application of Constitutional doctrine.

In both *Prince* and *Jacobsen*, a parents' assertion of Free Exercise principles was found to not withstand a compelling government interest in laws designed to protect children. In *Roper*, Justice Kennedy's opinion for the Court explicitly embraced social science research on the adolescents as a reason for exempting youth from the application of the death penalty and providing them the application of the Eighth Amendment proscription against cruel and unusual punishment.

“Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” Johnson, *supra*, at 367; see also Eddings, *supra*, at 115–116 (“Even the normal 16-year-old customarily lacks the maturity of an adult”). It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Review* 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B–D, *infra*.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. Eddings, *supra*, at 115 (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage”). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003) (hereinafter Steinberg & Scott) (“[A]s legal minors, [juveniles]

lack the freedom that adults have to extricate themselves from a criminogenic setting”).

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, *Identity: Youth and Crisis* (1968).

Finally, and perhaps most fittingly, the most famous application of the unique nature of children in Constitutional doctrine was, not surprisingly, found in *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court rejected its early holding in *Plessy v. Ferguson*, 163 U.S. 537 (1896) in part, because the notion of “separate but equal” was found to have deleterious effects on black children. The Court stated:

“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system...”

In so finding, the *Brown* Court in footnote 11 cited a wealth of social science studies to buttress its claim.

Taken together, these cases argue strongly that government action to stop bullying in schools, particularly bullying against LGTB or LGTB-identified children, be given substantial deference with regard to competing First Amendment concerns. Substantial evidence was introduced showing the harm suffered by LGTB or LGTB-identified children as a result of bullying. Substantial evidence was introduced showing that LGTB and LGTB-identified children are targeted for bullying and harassment.

This evidence, coupled with the unfortunate plethora of historical documented discrimination against the LGTB community, should end any debate over whether the Federal government can enact laws protecting LGTB children pursuant to its mandate under Section 5 the 14th

Amendment.² While awaiting Congressional action, and rather than twist itself into knots with “Dear Colleague” letters and stretching for jurisdiction under Title IX, the Department of Education should offer emphatic guidance or stringent rulemaking that any K-12 institution receiving federal funds must provide strict protections against bullying based on race, gender, national origin, disability, religion and sexual orientation or perceived sexual orientation. These protections must be uniform, must be enforced, and have provisions for clear documentation and categorization.

² Indeed, given that state action is involved in educating (and protecting) K-12 children, and that this is limited to a distinct group, any law should pass muster under the “congruent and proportional” test of *City of Boerne v. Flores*, 521 U.S. 507 (1997).