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-

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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

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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

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[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]

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[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

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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 report[41] 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].

terms[43] 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

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[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 violence[54] 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

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[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]

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[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.

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[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 Negron, 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

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[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 (Volokh 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]

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[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

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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.

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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

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[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.

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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.

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[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]

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[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]

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[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

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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 is there 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 Cellar, 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 Alan 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]

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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]

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[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/glbt.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

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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?

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[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

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[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

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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

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[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]

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[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]

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[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.