

U.S. COMMISSION ON CIVIL RIGHTS

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EDITED

BRIEFING

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ENFORCEMENT OF SEXUAL HARASSMENT POLICY AT
 EDUCATIONAL INSTITUTIONS BY THE U.S.
 DEPARTMENT OF EDUCATION'S OFFICE ON CIVIL
 RIGHTS (OCR) AND THE CIVIL RIGHTS DIVISION
 OF THE DEPARTMENT OF JUSTICE (DOJ)

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FRIDAY, JULY 25, 2014

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

PRESENT:

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

MARLENE SALLO, Staff Director

* *Present via telephone*

** *Present via video teleconference*

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STAFF PRESENT:

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

COMMISSIONER ASSISTANTS PRESENT:

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

INTERNS PRESENT:

MELISSA BROWER
JEFFREY JOSEPH, OSD
ELENA LOPEZ, OSD

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P-R-O-C-E-E-D-I-N-G-S

9:02 a.m.

I. INTRODUCTORY REMARKS BY CHAIRMAN CASTRO

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

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

And we're very fortunate to have today

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1 esteemed panels that represent 11 distinguished
2 speakers who are going to provide us with a diverse
3 array of views on this topic. Speakers have been
4 divided between four panels. Panel I will consist
5 of Government officials discussing the Office for
6 Civil Rights and the Department of Justice's Policy
7 Guidance and Enforcement. Panel II will consist
8 of advocates and how they interpret the
9 Department's guidance and enforcement on the
10 Sexual Harassment Policy. Panel III is going to
11 discuss data that's available on the topic. And
12 Panel IV is going to conclude with advocacy
13 scholars and industry practitioners discussing
14 both the pros and cons of the Office for Civil
15 Rights and the Department of Justice's policies and
16 enforcement.

17 During the briefing each panelist is
18 going to have seven minutes to speak. After the
19 panelists have made their presentations, we
20 Commissioners will have the opportunity to ask them
21 questions during an allotted period of time. I
22 will recognize the Commissioners and schedule when

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1 they will ask questions and try to keep on track
2 as best we can to maximize the opportunity for
3 discussion to occur among the panelists and the
4 Commissioners.

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

18 Again, I also ask my fellow
19 Commissioners as we have in every briefing
20 beforehand to be considerate of one another and try
21 to ask one question. I know there will times be
22 a need for follow up, but we want to give everyone

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1 a chance to speak. And in a few minutes I think
2 we'll be joined by some new Commissioners and we'll
3 talk about that then, but we will have a very full
4 panel of Commissioners who'll want to question our
5 panelists today.

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

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

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

20 (Whereupon, the panelists were
21 sworn.)

22 **II. ISSUE PANEL I- OCR/DOJ GUIDANCE**

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1 CHAIRMAN CASTRO: Okay. Thank you.
2 Ms. Randall, you have seven minutes.

3 MS. RANDALL: Thank you.

4 CHAIRMAN CASTRO: Thank you.

5 MS. RANDALL: Thank you so much for
6 inviting the Department of Education's Office on
7 Civil Rights, the Department of Justice's Civil
8 Rights Division and the Office on Violence Against
9 Women to speak about our efforts to reduce the
10 prevalence of sexual harassment, including sexual
11 violence that can create hostile environments in
12 elementary and secondary schools and institutions
13 of higher education. It is critically important
14 that we ensure safe, non-discriminatory learning
15 environments for all students in a lawful manner.
16 We know that is a shared goal of all members of the
17 Commission as well. We will discuss the work of
18 our respective offices as well as our collective
19 work as part of the White House Task Force to
20 Protect Students from Sexual Assault.

21 The Office on Violence Against Women
22 administers the Violence Against Women Act and we

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

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

21 Alcohol is often used to render
22 victims helpless as well as less credible.

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1 Perpetrators frequently prey on women who are
2 already incapacitated from drinking and may
3 encourage them to drink more or may surreptitiously
4 provide their victims with drugs or alcohol. In
5 one study over 80 percent of college perpetrators
6 reported raping women who were incapacitated
7 because of drugs or alcohol.

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

21 Sexual assault causes serious
22 physical and psychological harm which frequently

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

15 Despite the scope and severity of
16 sexual assault as well as the opportunity that we
17 have to reduce a large number of assaults by
18 addressing repeat perpetrators, schools often fail
19 to respond effectively to sexual assault. Even
20 the best intentioned university's adjudication and
21 other processes frequently blame the victim rather
22 than discipline the perpetrator. Researchers

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1 have documented the profound negative effects that
2 victim blaming or unsupportive responses from
3 legal, medical or mental health professionals have
4 on assault victims.

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

16 The stories painted an alarming
17 picture of the response to sexual violence on
18 campus. As one commenter said, "It is not only the
19 rape that causes the trauma to the victim. Schools
20 can also compound the trauma by how they respond."
21 Another survivor reported, "I was not given any
22 sort of help on campus. The most I got was a new

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1 mattress for my bed." Another survivor who later
2 transferred reported, "My rapist was found
3 responsible for breaking four different conduct
4 policies including the rule that equates to rape
5 in Ohio law, but he was not expelled, not even
6 suspended. I spent the next year-and-a-half
7 terrified and paranoid on that campus."

8 The White House Task Force seeks to
9 address the most pressing issues for survivors to
10 better assist schools, local law enforcement and
11 communities with sexual assault prevention and
12 enforcement, and it builds on the great policy and
13 enforcement work that the Departments of Education
14 and Justice conduct on an ongoing basis. The
15 administration understands that addressing sexual
16 assault can be a large undertaking and that every
17 school is unique, so the Task Force released new
18 guidance and tools to help schools with these
19 efforts: A check list for sexual misconduct
20 policies, sample reporting and confidentiality
21 protocols, a model climate survey, fact sheets on
22 prevention and victim services. All these are

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1 available on notalone.gov. The website gives
2 students a clear explanation of their rights under
3 Title IX and Title IV, along with a simple
4 description of how to file a complaint with the
5 Departments of Education and Justice and what they
6 should expect throughout the process.

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

21 Our campus program supports the
22 successful strategies in a university setting.

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1 The campus program distributes funds to
2 institutions of higher education and grantees are
3 required to strengthen their on-campus victim
4 services, advocacy, security, investigation and
5 disciplinary procedures, as well as implement
6 evidence-informed bystander prevention programs.

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

11 CHAIRMAN CASTRO: Thank you, Ms.
12 Randall.

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

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

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

19 CHAIRMAN CASTRO: Okay. Great.

20 Mr. Galanter, proceed please.

21 MR. GALANTER: Mr. Chairman, Members
22 of the Commission, thank you for the opportunity

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1 on behalf of the Department of Education to testify
2 today alongside my colleagues from the Department
3 of Justice. The Office for Civil Rights at the
4 Department of Education is responsible for
5 administrative enforcement of Title IX against
6 educational institutions that receive federal
7 financial assistance from the Department.

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

19 Before discussing our policies, let me
20 just add two more statistics to the ones that Ms.
21 Randall noted. First, the Department collects,
22 under the Jeanne Clery Disclosure of Campus

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1 Security and Crime Statistics Act, reports from
2 colleges of sexual offenses, among other things.
3 In 2012 there were over 4,800 sex offenses reported
4 to school officials on college campuses. And the
5 National Center for Education Statistics, which
6 collects similar numbers at the public school
7 level, reported that in 2009-10 there were 600
8 incidents of rape or attempted rape reported and
9 3,600 incidents of sexual battery other than rape
10 reported by public school officials.

11 And as we noted in our testimony,
12 another NCES report reveals that in a survey of
13 public school officials almost two-thirds of
14 public schools in the country reported that
15 student-on-student sexual harassment happened at
16 least occasionally in their school during the
17 2009-10 school year and more than three percent of
18 schools reported that it happened on a daily or
19 weekly basis.

20 As we all know, sexual harassment,
21 including sexual violence, can profoundly damage
22 a student's physical and emotional well-being in

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1 ways that deprive or limit their opportunity to an
2 education, and it is the effects on the educational
3 opportunities of this all-too-common
4 discriminatory harassment that implicates Title IX
5 and makes this a critical civil rights issue for
6 the Departments.

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

19 Under Title IX sexual harassment is
20 unwelcome conduct of a sexual nature and that can
21 include unwelcome sexual advances, requests for
22 sexual favors, other speech, non-verbal and

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1 physical conduct of a sexual nature, including acts
2 of sexual violence. In determining whether sexual
3 harassment has created a hostile environment to
4 which a school must respond, consistent with the
5 Supreme Court's decision in Davis, we consider the
6 conduct in question from both a subjective and an
7 objective perspective. Specifically, the
8 standards that our offices apply require that the
9 conduct be evaluated from the perspective of a
10 reasonable person in the alleged victim's position
11 considering all the circumstances.

12 The Departments recognize that
13 educational institutions have legal obligations in
14 addition to the legal obligation not to
15 discriminate on the basis of sex. In particular,
16 OCR has repeatedly acknowledged that students and
17 employees have certain due process rights under the
18 U.S. Constitution and may have additional rights
19 under state law. OCR has consistently stated in
20 its guidance on sexual harassment and sexual
21 violence that the rights established under Title
22 IX must be interpreted consistently with any

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1 federally-guaranteed due process rights.
2 Although hypotheticals can and do abound in this
3 area, we have not encountered a situation where
4 there has been an actual conflict between a
5 school's Title IX obligations involving sexual
6 harassment and a school's other legal obligations,
7 and we are not aware of any court that has found
8 such an actual conflict.

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

18 Now it's true that sexually harassing
19 conduct takes many forms including speech and
20 written documents and statements. It is not
21 enough to trigger a Title IX liability that a person
22 finds a form of expression personally offensive.

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1 Rather, to create a hostile environment that
2 requires the school to respond in ways that
3 eliminate and remedy the environment, the
4 harassing conduct must be sufficiently serious to
5 a reasonable person in that circumstance that it
6 limits or denies a student's ability to participate
7 or benefit from the school's program. In this
8 regard we would like to note, and we're pleased that
9 in 2012 this Commission's California Advisory
10 Committee recognized that the standard OCR uses for
11 determining what constitutes a hostile environment
12 is protective of speech and actually encouraged the
13 standard to be adopted by educational
14 institutions.

15 Over decades of work in this area, OCR
16 has investigated and resolved hundreds of sexual
17 harassment cases, issued policy guidance and
18 provided technical assistance. Our work begins
19 with the recognition that each school has a
20 responsibility for creating a non-discriminatory
21 learning environment and that each school is
22 different. There is no universal one-size-fits-all

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1 policy and the Department makes no effort to
2 mandate a single approach. Schools' policies will
3 vary in detail, specificity and components
4 reflecting different culture, state and local
5 legal requirements, their size, and their
6 administrative structure.

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

16 I would also note we've been
17 continuing to issue guidance on this area and
18 follow-up guidance as questions have arisen. We
19 first issued guidance in 1997, building on racial
20 harassment guidance in 2001, and additional
21 guidance in 2010. Most recently in 2014, April of
22 this year, we issued a question and answer document

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1 about Title IX that not only addressed sexual
2 violence, but touched on many of the issues we're
3 talking about today including First Amendment and
4 due process rights.

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

7 We now move on to Mr. Cadogan.

8 MR. CADOGAN: Morning.

9 CHAIRMAN CASTRO: Good morning.

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

12 As previously mentioned, equal access
13 to educational opportunities is a civil rights
14 issue, one that the Department of Justice takes
15 very seriously. All parties that respond to
16 reports of sexual assault, be they educational
17 institutions, police or prosecutors, need to
18 respond promptly and fairly to such reports and
19 maintain public safety. The responses must be
20 non-discriminatory and should encourage survivors
21 to report and seek help, not dissuade them from
22 coming forward.

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1 Despite its prevalence, sexual
2 assault remains one of the most underreported
3 serious crimes to day. This is because too often
4 survivors are afraid to report sexual assaults not
5 only to school administrators, but also to campus
6 law enforcement, community law enforcement or
7 prosecutors' offices out of fear of biased
8 treatment that denies victims access to fair and
9 impartial resolutions and that can traumatize and
10 re-traumatize survivors.

11 To reverse this trend of
12 under-reporting, survivors of sexual assault must
13 believe their reports will be taken seriously and
14 will be handled without bias or stereotypes
15 throughout the entire process. That means from
16 the time the survivor first reports an assault
17 through any subsequent law enforcement
18 investigation or prosecution. We need to ensure
19 that schools, their Title IX coordinators, their
20 campus police and local law enforcement are all
21 considered safe and effective sources of help so
22 that all students are protected and that survivors

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1 of sexual assault are treated with dignity and
2 respect and have equal access to education and
3 justice.

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

18 In May of 2012, the Department of
19 Justice opened a four-pronged investigation into
20 allegations that the University of
21 Montana-Missoula, the university's campus police,
22 the Missoula Police Department and the Missoula

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1 County Attorney's Office discriminated against
2 women by failing to adequately respond to reports
3 of sexual assault. The investigation of the
4 University of Montana was conducted jointly with
5 OCR. The Department engaged in these
6 investigations of unlawful gender discrimination
7 using the full breadth of its enforcement
8 authorities. That is Title IX, Title IV, the
9 Violent Crime Control and Law Enforcement Act of
10 1994, and the anti-discrimination provisions of
11 the Omnibus Crime Control and Safe Streets Act of
12 1968.

13 The Department did so because it knew
14 that if one or more of these entities were not
15 meeting their civil rights obligations, this
16 likely was negatively impacting the willingness of
17 women in Missoula to report sexual assault and the
18 ability of the other entities to respond
19 effectively to such reports. Experience has shown
20 that coordinated and informed community responses
21 to sexual assault are more likely to produce better
22 outcomes.

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1 Our comprehensive investigation
2 resulted in detailed findings of non-compliance.
3 While we won't share all of them today, we want to
4 highlight some that DOJ and OCR made regarding the
5 University of Montana that are relevant to today's
6 discussion.

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

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

21 Third, the university's sexual
22 harassment and assault policies did not provide

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1 clear notice of the conduct prohibited by the
2 university or clear direction about where and how
3 to file complaints.

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

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

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

19 Further, DOJ's investigation
20 determined that these deficiencies in responding
21 to sexual assaults were in large part due to
22 reliance on gender-based stereotypes. DOJ also

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1 found it necessary to assess the propriety of the
2 practices of the Missoula County Attorney's
3 Office, the law enforcement agency with primary
4 responsibility for prosecuting sexual assault
5 cases in Missoula County.

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

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

16 DOJ also entered into ground-breaking
17 agreements with the university's Office of Public
18 Safety, the Missoula Police Department, and the
19 county attorney's office. We commend each of
20 these entities for recognizing the structural
21 changes needed to ensure a non-discriminatory
22 response to reports of sexual assault and for

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1 working collaboratively with the Justice
2 Department to comprehensively integrate law
3 enforcement, community, and school-based
4 responses to sexual assault. The agreements put
5 in place common-sense reform that responded to our
6 investigative findings in a straightforward and
7 effective manner. The agreements also require all
8 four entities to develop or revise their sexual
9 assault policies and procedures to encourage
10 reporting and deliver effective and fair
11 responses.

12 We appreciate the chance to testify
13 today.

14 CHAIRMAN CASTRO: Thank you. We
15 appreciate your testimony.

16 **COMMISSIONERS QUESTIONS**

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

22 So I see Commissioner Kirsanow. I'm

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1 going to take the privilege of asking the first
2 question and then we'll go to Commissioner
3 Kirsanow.

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

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

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

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

21 MR. CADOGAN: Thank you for the
22 question, Commissioner. That's not what the

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1 Department was trying to do and the agreements that
2 we entered into with the University of Montana, the
3 local police department and the campus safety force
4 all are consistent with that standard. A hostile
5 environment must be created in order to trigger a
6 liability under Title IX and Title IV.

7 CHAIRMAN CASTRO: Okay. Anybody
8 else want to add to that?

9 MR. GALANTER: On behalf of the
10 Department of Education I agree completely. As
11 you see both from the complete letters of findings,
12 the agreement and the policy that Montana actually
13 implemented in result of the agreement, a hostile
14 environment is required to find a violation. What
15 the agreement required was--based on these
16 findings that a lot of people weren't reporting
17 things--there was a problem. They didn't trust
18 the system. They didn't respect the system. And
19 the system, the way it was written, said if you're
20 going to come to us, you have to have a severe
21 pervasive -- you have to be able - "we're open if
22 you have a -- if you can show us a hostile

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1 environment."

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

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

13 CHAIRMAN CASTRO: Sure.

14 MR. GALANTER: Many institutions find
15 it useful to collect this kind of information as
16 warning signs, because sometimes a lot of things
17 that individually aren't going to rise to the level
18 of a hostile environment together will become a
19 hostile environment. And so knowing about these
20 things, even if you aren't acting on any particular
21 complaint, is particularly useful, and many
22 schools have done that.

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1 CHAIRMAN CASTRO: Okay. Thank you.
2 Commissioner Kirsanow?

3 COMMISSIONER KIRSANOW: Thank you.
4 I want to thank the panelists. This is very
5 informative. I appreciate your testimony.

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

8 COMMISSIONER KIRSANOW: Yes, okay.
9 Again, I want to thank the panelists for your
10 testimony. It was very informative. And I want
11 to thank the staff for getting a splendid panel.

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

19 MR. CADOGAN: In the law enforcement
20 context I don't know and will have to get back to
21 you. All I can say is that for the purposes of
22 Title IX and Title IV DOJ has an obligation to

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1 ensure that universities are meeting the standards
2 laid out in those statutes. So the criminal
3 context is different if there happens to be
4 criminal conduct that arises out of an incident of
5 sexual assault, sexual harassment or sex-based
6 violence, but our focus is on making sure that
7 universities live up to their responsibilities
8 under the statute in the administrative side.

9 COMMISSIONER KIRSANOW: Okay. Thank
10 you.

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

17 MS. RANDALL: Based on what I remember
18 from the written comments that this victim
19 submitted, she raised a -- filed a complaint on
20 campus which many survivors do, to use the campus
21 sexual assault process, go to campus police for
22 assistance. And I don't recall, but we'd be happy

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1 to provide you all with follow-up information to
2 see if she had also contacted local police.
3 Unfortunately, we hear all too often that someone
4 may be found responsible for very serious
5 violations of the Student Conduct Code and that
6 there may be very little disciplinary action.

7 COMMISSIONER KIRSANOW: Okay. Thank
8 you.

9 Thank you, Mr. Chair.

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

20 Commissioner Karen Narasaki is an
21 independent civil and human rights consultant.
22 She was previously the president and executive

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1 director of the Asian American Justice Center.
2 She was also the Washington representative for the
3 Japanese American Citizens League and was a
4 corporate attorney at Perkins Coie.

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

21 Welcome, Commissioner.

22 COMMISSIONER NARASAKI: Thank you,

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1 Mr. Chair.

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

10 Prior to her appointment to the
11 district court, Justice Timmons-Goodson was a
12 staff attorney at Lumbee River Legal Services from
13 1983 to '84. She was also assistant district
14 attorney for the 12th Prosecutorial District of
15 North Carolina and began her career as district
16 manager for the U.S. Census Bureau.

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

22 Justice Timmons-Goodson received her

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1 B.A. and J.D. from the University of North Carolina
2 at Chapel Hill and her L.L.M. from Duke University
3 School of Law.

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

7 (Applause)

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

11 **COMMISSIONERS QUESTIONS**

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

17 I wanted to ask the federal officials
18 sort of a 30,000-foot question, because I've been
19 concerned about the fact that there have been a
20 number of reports, most notably Senator
21 McCaskill's survey on sexual assaults and how
22 higher education institutions have handled them.

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1 And her survey, however informal, showed that 41
2 percent of the schools have not conducted a similar
3 investigation in the past five years, 21 percent
4 in the private institutions have conducted fewer
5 investigations than the number of incidences they
6 actually reported to the Department of Education.
7 Many provide no sexual assault response training
8 at all for faculty or staff and 31 percent do not
9 provide any sexual assault training at all for
10 their students. There is an absence of talent for
11 Title IX coordinators. And compounding that is
12 the most recent -- I won't call it an attempt, but
13 information release by the American Council on
14 Education basically are warning colleges and
15 universities from complying with the survey
16 because of questions of legal liability.

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

21 How do you deal with some of the
22 results that the McCaskill survey showed and how

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1 do you intend to deal with what appears to be
2 institutional reluctance, would be a nice way to
3 put it, institutional intransigence would be a
4 better way to put it, are these universities and
5 colleges from getting their act together when it
6 comes to issues of sexual assault and sexual
7 harassment on campuses?

8 CHAIRMAN CASTRO: Who would like to
9 answer that?

10 MR. GALANTER: This is from the
11 Department of Education perspective. I
12 appreciate the breadth of the question and there
13 is a lot in there. The first is clearly one thing
14 it's training. Schools have to be providing
15 training to faculty, staff and students. The
16 Title IX coordinator, which every school is
17 required to have, is a good resource for that. We
18 are collecting at both -- now for the first time
19 in this administration at both the K-12 level and
20 the higher ed level we'll be collecting Title IX
21 coordinator names and contact information. There
22 will be a national database available so that

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1 people can -- so they can learn from each other and
2 they can be contacted about training
3 opportunities.

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

12 I would also say just the last point
13 from OCR's perspective that we see a lot of
14 institutions taking this seriously. We had a
15 conference recently at Tufts. Fifty schools came
16 to hear what they could do, those schools that
17 aren't taking it seriously. The administration
18 was sending a lot of signals that the time for delay
19 is over. We're going to use all our tools, our
20 enforcement tools as well as our policy tools to
21 get people to take their civil rights obligations
22 seriously.

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1 COMMISSIONER YAKI: Well, just a
2 quick follow up. What are the types of tools,
3 levers, sanctions that the Department has at its
4 disposal to ensure basic compliance with these
5 requirements?

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

20 The second thing is our investigations
21 both based on complaints and proactively the Office
22 for Civil Rights has been doing more investigations

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1 about sexual harassment and sexual violence in this
2 administration than ever before and we've yielded
3 some really strong public resolutions, not just in
4 Montana, but recently in Tufts, VMI, SUNY and at
5 the elementary and secondary level in Contra Costa,
6 California.

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

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

22 MR. CADOGAN: I would just briefly

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

17 So using these big cases and
18 successful settlements, which are largely entered
19 into voluntarily, we've been able to try to begin
20 to train at an institutional level other
21 educational institutions and schools who'll be
22 looking to see what liability might attach in the

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1 future and how they can avoid that.

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

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

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1 very well.

2 CHAIRMAN CASTRO: Thank you.
3 Commissioner Kladney is going to be next followed
4 by Commissioner Heriot, then Commissioner
5 Achtenberg. And if any of our new Commissioners
6 want to ask questions, I'll put you on the list as
7 well.

8 Commissioner Kladney?

9 COMMISSIONER KLADNEY: Thank you, Mr.
10 Chairman.

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

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

18 COMMISSIONER KLADNEY: Okay.

19 MR. GALANTER: What I was saying was
20 words can be a form of harassment, but
21 offensiveness to an individual is not the test
22 about whether there's a hostile environment. The

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1 question of a hostile environment looks at it from
2 both a subjective and an objective perspective.

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

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

20 COMMISSIONER KLADNEY: Okay. So
21 then when they take the discipline -- you did say
22 that the school has established their own

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1 disciplinary levels, is that correct?

2 MR. GALANTER: I don't know if I said
3 that in my oral remarks, but absolutely we expect
4 the schools based on the circumstances -- a K-12
5 school is going to be different than a higher
6 education. The responses are going to have to be
7 individualized.

8 COMMISSIONER KLADNEY: Right. So in
9 higher education if the range of discipline can be
10 from minor to major, right, does the person who is
11 being disciplined have any ability to come to the
12 Department of Education and say we were disciplined
13 too much? Do you know what I'm trying to say? I
14 mean, is there recourse for them?

15 MR. GALANTER: Let me answer that in
16 two ways:

17 COMMISSIONER KLADNEY: Yes.

18 MR. GALANTER: Presume every system
19 regardless of what the offense is -- let me put it
20 into -- it -- one, OCR recommends but doesn't
21 require that schools permit appeals from
22 disciplinary decisions and many schools, both

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

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

21 MR. GALANTER: Well, let me start by
22 saying before we issued our guidance on sexual

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1 violence in 2011, surveys said about 80 percent of
2 higher education institutions used a preponderance
3 of the evidence standard as their standard of proof
4 in disciplinary issues involving sexual violence.
5 Our 2011 guidance said that Title IX requires using
6 a preponderance of the evidence standard for
7 determining whether sexual violence has occurred
8 and whether it created a hostile environment and
9 what you're going to do about it. And since that
10 time we have been telling schools and repeated in
11 our 2014 guidance that a preponderance of the
12 evidence standard is necessary as part of any
13 investigation of sexual harassment and sexual
14 violence.

15 COMMISSIONER KLADNEY: Thank you.

16 CHAIRMAN CASTRO: Next is Commissioner
17 Heriot.

18 COMMISSIONER HERIOT: Thank you, Mr.
19 Chairman.

20 CHAIRMAN CASTRO: You're welcome.

21 COMMISSIONER HERIOT: My question is
22 for Ms. Randall. You used the word "incapacitated."

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1 What's the definition of "incapacitated" under DOJ
2 policy here and what do you do about the case of
3 the perpetrator who's also incapacitated, the
4 perpetrator who maybe had had just as many drinks
5 as the victim? How do we treat that case?

6 MS. RANDALL: So what we do is fund
7 schools to improve their work. We don't enforce
8 or have any explicit requirements, nor have any
9 legal definitions. And so my office does not have
10 an explicit definition of "incapacitated." So
11 what we do is train schools from the International
12 Association of Chiefs of Police and others who have
13 a great deal of expertise in this. And so they
14 train on the latest research on toxicology to help
15 schools determine was the student so intoxicated
16 that they were incapacitated and to think through
17 thorny situations when both parties were
18 intoxicated. So we don't tell schools this is
19 exactly how you have to respond to this, but we
20 train them on the array of issues surrounding it
21 and that the process should be completely fair
22 obviously to both parties.

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1 COMMISSIONER HERIOT: Mr. Galanter,
2 you mentioned Title IX coordinators being required
3 by law. What's the source of that requirement?
4 Is that statutory? And I've been reading about
5 Title IX coordinators being hired at Harvard and
6 at Stanford and at Colorado and I think Missouri
7 who are former Department of Education employees.
8 What kind of safeguards do we have against the
9 revolving door problem, the notion of having an
10 incentive to create laws in a particular way to
11 maximize one's chances of getting the lucrative job
12 as a Title IX coordinator? And I understand that
13 some of these jobs aren't quite that lucrative.

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

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

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

22 COMMISSIONER HERIOT: Sure.

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1 MR. GALANTER: Every agency now -- I
2 believe up to 40 agencies have Title IX
3 regulations. They all have the Title IX
4 coordinator requirement in them.

5 COMMISSIONER HERIOT: Yes.

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

14 In terms of ethics issues, on both
15 sides we recommend that the Title IX coordinator
16 not have a conflict of interest; that is, not have
17 too many hats within the institution. And there
18 are general Government ethic regulations, which I
19 apologize I can't quote verbatim, that would
20 prohibit people who recently left the Department
21 from working directly with the Department of
22 Education. But again, I don't know the scope of

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1 those regulations. Obviously it depends on the
2 level of the person when they left the Department,
3 but --

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

7 MR. GALANTER: I would be pleased to.

8 COMMISSIONER HERIOT: Thank you.

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

12 COMMISSIONER ACHTENBERG: Thank you,
13 Mr. Chairman.

14 CHAIRMAN CASTRO: You're welcome.

15 COMMISSIONER ACHTENBERG: I want to
16 begin by commending the panel and the departments
17 that they represent. I'm a trustee of the
18 California State University System, so I'm hoping
19 I'm not expressing some kind of conflict of
20 interest here when I say that I know for a fact that
21 our university system, which is the largest
22 university system in the country -- but our

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1 university system benefits enormously from the
2 guidance that your departments offer.

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

16 And in that capacity we have found the
17 Department of Education and the Department of
18 Justice to be partners in that regard. So
19 sometimes I think you all get the reputation of
20 being the heavy hand of Government. That has not
21 been our experience, at least to my knowledge. So
22 I want to commend you on that and thank you for your

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1 guidance because we are constantly trying to evolve
2 policies that address the real needs of our
3 students and not based on anecdote. And so,
4 anecdote actually is the topic of my question now
5 that I've made my statement.

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

20 MR. GALANTER: Let me start and let me
21 take a moment just to say again not prejudicing any
22 pending or future investigations how pleased we are

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1 that the University of California has elected to
2 undertake an audit of their sexual violence
3 practices, and it's that kind of proactive activity
4 that we hope many universities and schools will
5 undertake.

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

11 (Laughter)

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

14 MR. GALANTER: See, so that's what I
15 get for straying outside my role, which was
16 actually going to be my first response to your
17 question, which is that I'm a lawyer, not a
18 statistician and you're very fortunate that on one
19 of your -- I think the third or fourth panel you'll
20 have someone from our Institute for Education
21 Sciences. What we did in our statement was try and
22 report all the data that we as the Federal

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1 Government collected in this area and tried to be
2 really clear about what questions we were asking,
3 were these nationally representative samples?
4 And Mr. Chapman will be able to go into that.

5 What I'd like to say to kind of just
6 feed on that is these numbers that we see seem
7 really large, and some people call those into
8 question. Our experience on the ground is
9 consistent with the numbers that are being
10 reported. And so when we go into an institute and
11 we do see many times pervasive sexual harassment,
12 sexual assault and reasons why you would see low
13 numbers of reporting despite high incidence of
14 occurrence. So I don't know if that helps or not.

15 MS. RANDALL: And when we look at some
16 of the larger numbers we use, like that almost one
17 in five students have been victims of attempted or
18 completed sexual assault, for instance -- so we're
19 looking at several different National Institute of
20 Justice-funded surveys there.

21 The one that we most commonly use that
22 found that almost 20 percent had experienced some

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1 type of attempted or completed sexual assault since
2 entering college, when you look at it even more
3 closely, when you look at a college senior -- so
4 by the time you've left college what are you likely
5 to have experienced, it was actually closer to 25
6 percent. That one in five number is a snapshot
7 from freshman through senior. So when you look at
8 by the time you actually graduate from college, the
9 number is even higher.

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

19 So to many people these seemed like
20 shockingly high numbers. To those of us who work
21 on domestic violence and sexual assault, sadly this
22 is no surprise, because these are the numbers that

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1 we do see consistently. What makes it surprising
2 for many is, as Seth mentioned, so few of these
3 cases are reported and few of those cases that are
4 reported are taken up by police or prosecutors. So
5 it's a small number of sexual assault cases that
6 really rise to our public consciousness.

7 CHAIRMAN CASTRO: Commissioner
8 Narasaki?

9 COMMISSIONER NARASAKI: Thank you,
10 Mr. Chair.

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

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

15 I'm very pleased about this hearing.
16 The daughter of a very close friend of mine
17 experienced rape in her college and the odyssey
18 that she went through to try to get justice was
19 quite painful for her and her family, so I think
20 these issues are very important. And as someone
21 who has a niece in college right now, the statistics
22 I think are quite frightening.

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1 So my question is in the Department of
2 Ed's testimony you note the importance of
3 stakeholder engagement, and I could not agree with
4 you more. I worked on hate crime issues in
5 colleges and I was often shocked to find that the
6 only thing a college would do is stick a one-page
7 notice that hate crimes were a bad thing in college
8 in the freshman packet that literally had thousands
9 of pages. And of course most of the students I
10 talked to had no awareness of any kind of policy
11 at all.

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

21 MR. GALANTER: Thank you for your
22 question, and I'm honored to be your first

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1 question. There are two or three things I'd like
2 to say about that.

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

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

21 And then if I might be so respectful,
22 Ms. Randall might have a better sense of the

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1 training available right now for educational
2 institutions.

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

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

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

21 COMMISSIONER TIMMONS-GOODSON: Thank
22 you very much, and I do. I believe --

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1 CHAIRMAN CASTRO: Your microphone,
2 Your Honor. There you go.

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

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

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

12 MR. GALANTER: Yes, Your Honor.

13 COMMISSIONER TIMMONS-GOODSON: Yes,
14 as a trustee of a small liberal arts school, that
15 certainly came to our attention. I was wondering
16 just what role, if any, you see such publication,
17 such information -- how it assists in this
18 education and confronting the problem. I believe
19 I've read reports about the parents of the female
20 students taking into account the names of the
21 institutions listed on that. Talk to us if you
22 will, please, about the role such listing may play

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1 in assisting us to getting to where we want to be.

2 MR. GALANTER: Absolutely, and
3 Congress started with the Clery Act requiring
4 schools to openly report the sexual assault reports
5 that they receive, and those are posted on our web
6 site and are supposed to be posted by the
7 universities themselves. Many schools have some
8 data quality issues with that and they obviously
9 have incentives to keep the numbers low, because
10 when they're doing a good job and encouraging
11 reporting, the numbers may go up and then the
12 parents may get worried.

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

19 We thought long and hard about
20 releasing that list a few months ago. There was
21 a great demand for it and we were concerned because
22 these are investigations. There has been no

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1 finding, no determination. All we found was that
2 there's enough allegation to move forward with the
3 investigation. Our primary reason for doing so
4 was to make sure we were getting all the evidence.
5 That is by telling the community we have an
6 investigation about sexual violence we hoped other
7 people with information would come forward.

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

18 Many people thought that was worth the
19 cost of having a list, but we do caution people in
20 the list itself and whenever we talk about it that
21 it is just a list of investigations and those are
22 generated both by complaints and also by our

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1 proactive investigations, but they are not a signal
2 that those schools are different than the thousands
3 of schools that are not on the list.

4 COMMISSIONER TIMMONS-GOODSON: Thank
5 you.

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

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

12 CHAIRMAN CASTRO: Okay.

13 COMMISSIONER YAKI: Commissioner
14 Yaki.

15 CHAIRMAN CASTRO: All right.

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

20 The legal predicate for sexual
21 harassment doctrine began with Title VII sexual
22 harassment law emanating all the way from the

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1 Supreme Court cases of Faragher and Ellerth, Harris
2 v. Forklift. You've got Meritor Savings. And the
3 idea was that conduct that is sufficiently severe
4 or pervasive, that is unwelcome; the subjective
5 component, and also is objectively unwelcome in
6 terms of how a reasonable person would view it,
7 would be a form of sexual discrimination that could
8 render an employer liable, both under a quid pro
9 quo standard and a hostile environment
10 standard. And there is strict liability if the
11 harasser is somebody in a determinative position
12 such as a supervisor.

13 And I know I threw a lot out there. To
14 what extent, if any, is there a difference between
15 employment sexual harassment and sexual harassment
16 in the Title IX sector? Is the definition
17 different? If it is different, why should it be
18 different? Are there other considerations? For
19 example, if there's sexual harassment being
20 conducted by somebody in a determinative position
21 such as a professor, is that handled differently
22 than sexual harassment that's student-to-student?

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1 MR. CADOGAN: Thank you,
2 Commissioner. What I would say is that under Title
3 IX and Title IV DOJ and OCR are trying to enforce
4 school obligations and any proceeding that follows
5 an investigation of sexual harassment or sexually
6 invasive violence, is in the administrative
7 context. That is, it is run by the school. The
8 processes and procedures are determined by the
9 school. And DOJ and OCR do not get to the substance
10 of that. We get to whether or not the school is
11 responding to any complaint in a prompt, fair and
12 equitable manner. And the Title IX and Title VII
13 connection really depends on the case itself. We
14 make all our determinations when we are working
15 with schools on an individualized and case-by-case
16 basis.

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

21 MR. GALANTER: If I could just -- the
22 answer is in part it depends. Congress created a

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1 whole variety of fora. For Title VII the primary
2 way to enforce it is in federal court. For our
3 statutes, Title VI -- or sorry, Title VI, Title IX
4 and 504, we have both administrative enforcement
5 and private court enforcement. For private court
6 enforcement the Supreme Court's decision in Gebser
7 and Davis require showing not only of sexual
8 harassment that creates a hostile environment, but
9 also deliberate indifference and actual knowledge
10 in order for an individual to get damages.

11 In our administrative enforcement we
12 use a definition of "sexual harassment" that is the
13 same as the one in Title VII, that it's unwelcome
14 conduct. The definition of "hostile environment"
15 is consistent with the one that the Supreme Court
16 applied in Davis, which uses the same words. And
17 I think the important thing to remember is all these
18 words: "severe," "persistent," "pervasive,"
19 they're all trying to get at this notion that it's
20 got to be sufficiently serious. It's not going to
21 be an off-color remark, a stray remark. But that
22 if one thing is particularly potent, like a sexual

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1 assault, it may only happen once, but that's going
2 to create a hostile environment. So you have to
3 look at all these factors that the Supreme Court
4 decides.

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

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

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1 harassment?

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

10 COMMISSIONER KIRSANOW: Great.
11 Thank you very much.

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

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

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1 standard?

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

17 This is how civil litigation goes.
18 This is how the university, if it were sued in
19 court, would be held accountable; that is, what was
20 more likely than not? And this is how most, and
21 certainly in Government, employment decisions are
22 made. That is, if someone's not performing, you

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1 don't have to say I can prove by clear and
2 convincing evidence that you didn't show up to work
3 yesterday. It's you didn't show to work. Here's
4 the information.

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

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

14 Commissioner?

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

17 I just wanted to elevate it up again
18 to about the 30,000-foot level, not that I'm not
19 concerned with the valid discussions ongoing, but
20 we'll get to that with some of the other panels.
21 But I still am trying to ask the question, the Clery
22 Act notwithstanding, how do you take the model of

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1 the Montana letter and make it one that requires
2 compliance by every university and college in a
3 country that receives federal funding in a way that
4 is not reactive but proactive? How do we -- is
5 there a way to require that the -- because we can
6 talk a lot about how the individual things are being
7 implemented, but the structure itself seems to be
8 lacking in some universities. How do we assure
9 that you're not simply chasing the one -- from one
10 college campus to another? How do we assure
11 greater compliance with the Montana requirements
12 on a nationwide basis absent individual
13 enforcement actions?

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

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1 institutions can learn from that example.

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

13 MR. CADOGAN: I would say that we will
14 aggressively enforce Title IX and Title IV
15 consistent with the extent of the law at as many
16 universities and educational institutions as we
17 possibly can. It is true that we can't necessarily
18 go after every institution that doesn't live up to
19 its obligations under the statutes, but in addition
20 to those enforcement actions we will certainly
21 work -- and OCR has certainly done an enormous
22 amount of work to bring institutions into voluntary

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1 compliance and reach agreements to take action that
2 haven't needed to be referred to DOJ for
3 investigation or further action.

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

16 COMMISSIONER YAKI: But don't we have
17 the power now, or is there a law not that basically
18 would tell the university or college prior to your
19 receiving federal funds for fiscal year blah, blah,
20 blah, blah, blah we must have in our office the
21 following information that would demonstrate your
22 compliance with essentially a Montana-type regime?

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1 MR. GALANTER: This is Mr. Galanter
2 from the Department of Education. Title IX
3 requires assurances of compliance. Our regs and
4 our guidance identify what we expect from them. I
5 understand the -- I hear the frustration you have.
6 We are using all the tools we have. Grant making
7 from the Department of Justice, publicity,
8 enforcement, technology, data collection. We are
9 working with the resources we have and the tools
10 we have. If there are other tools that would be
11 useful, we would love to hear your thoughts and the
12 thoughts of the other witnesses on how we can expand
13 the scope of our work.

14 But given all the civil rights laws
15 we're enforcing and the -- there are 17,000 public
16 school districts, 7,000 institutions of higher
17 education. We rely on voluntary compliance and we
18 use all the tools we have to tell them what we expect
19 of them. And when we find there are problems, we
20 use our authority to resolve those problems and
21 publicize that so that others know that we are both
22 enforcing the law and what is expected of them as

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1 one of many models they can adopt to come into
2 compliance.

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

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

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

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

21 (Whereupon, the panelists were
22 sworn.)

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1 CHAIRMAN CASTRO: Thank you. Mr.
2 Marcus, please proceed.

3 **III. ISSUE PANEL II - OCR/DOJ GUIDANCE**

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

6 CHAIRMAN CASTRO: Your microphone?

7 MR. MARCUS: Can you hear me now?

8 CHAIRMAN CASTRO: Push the button.
9 There you go.

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

12 (Laughter)

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

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

22 Both are important. As I review the

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1 data on sexual violence, I consider this to be a
2 stunning and shocking matter, and I hope that the
3 Commission addresses these matters.

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

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

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

22 In my written remarks, I indicated

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1 that the Montana agreement, the agreement between
2 OCR and DOJ and the University of Montana, which
3 is known as the Blueprint Agreement, I indicated
4 that it could be interpreted in either of two ways.

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

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

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

18 And I have seen other written remarks
19 from other speakers, specifically Professor
20 Volokh, who was even more elaborate in coming up
21 with the different examples why someone might think
22 that they had something very different in mind.

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1 I believe that the people in this room
2 got some very good clarification on that issue and
3 on a corollary point from Mr. Galanter along the
4 lines that the standards for sexual harassment are
5 not met unless the complainant has faced serious
6 or pervasive conduct that a reasonable person would
7 find.

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

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

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

20 So the first thing is I think it's
21 important, both from the Commission and from OCR
22 and perhaps DOJ, that they say what they said in

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1 the room and they say it in a way that will as heard
2 as loudly as the Montana Agreement itself is heard.

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

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

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

19 And if so, maybe they should be
20 focusing on that and elaborating on that. And you
21 can help them. Mr. Galanter indicated that even
22 if the standards of hostile environment are not

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1 met, universities nevertheless should make
2 inquiries.

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

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

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

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

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1 take action.

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

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

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

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

21 MR. LUKIANOFF: If you had told me
22 before I started working the Foundation for

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1 Individual Rights and Education that I would
2 routinely battle the startling misapplications of
3 harassment codes to punish speech that is clearly
4 protected by the First Amendment, I probably would
5 not have believed you.

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

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

17 The proponents of harassment speech
18 codes have quietly achieved tremendous success
19 despite the fact that courts have consistently
20 recognized that merely labeling a speech code a
21 harassment policy does not magically inoculate it
22 from First Amendment scrutiny.

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1 Since 1989 at least 37 lawsuits have
2 been filed challenging speech codes over half of
3 which involved over-broad harassment codes.
4 Despite loss after loss in court, 58 percent of
5 public colleges, bound by the First Amendment,
6 maintain unconstitutional speech codes today.

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

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

20 This blame game became so ridiculous
21 that in 2003 OCR issued a Dear Colleague letter to
22 every university in the country spelling out that

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1 the federal government was not mandating --

2 (Off microphone comments)

3 MR. LUKIANOFF: Okay. And indeed
4 could not mandate the adoption of campus harassment
5 codes that violate the First Amendment norms.
6 After 2003, universities could no longer argue that
7 they're being forced by the Executive Branch to
8 maintain speech codes.

9 But in 2013, in response to the
10 University of Montana's mishandling of sexual
11 assault cases, the Department of Justice and OCR
12 issued a resolution agreement they deemed a
13 blueprint for every college in the country.

14 The blueprint's definition of
15 harassment was even broader than the speech codes
16 repeatedly struck down in federal court over the
17 past 25 years.

18 For context, in the 1999 Supreme Court
19 decision *Davis v. Monroe County Board of Education*,
20 which has already been mentioned, involved student
21 on student harassment in the K through 12 setting.

22 The court was very aware that the

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1 standard for harassment must be clear and rigorous
2 in order to prevent creating an all-purpose tool
3 to punish disagreeable speech.

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

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

19 Under the blueprint, universities
20 must investigate harassment claims even when a
21 reasonable person would not have found this speech
22 objectionable thereby weaponizing the

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1 sensitivities of the least speech tolerant members
2 of the community.

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

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

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

20 In the face of public outrage OCR
21 eventually gave some indication, and you heard some
22 of that today, that it is backing away from this

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1 unconstitutional standard.

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

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

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

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

22 Troublingly, the Legislative Branch

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1 has followed suit. Senator McCaskill has recently
2 suggested legislation to counter the Davis
3 standard.

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

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

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

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

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

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1 **COMMISSIONERS QUESTIONS**

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

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

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

12 CHAIRMAN CASTRO: Microphone.

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

18 Then there's a question of whether
19 it's a public institution or state actor that could
20 be subject to other sorts of lawsuits. I don't
21 think I can speak to the full range of jurisdiction
22 of Department of Justice though.

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1 MR. LUKIANOFF: It's surprisingly
2 messy to be honest. There are schools like Temple,
3 for example, that was considered to be a private
4 college but is now considered under the law to have
5 the same duties as a public college.

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

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

15 COMMISSIONER KIRSANOW: Thank you.

16 CHAIRMAN CASTRO: Commissioner
17 Heriot.

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

21 If you have a case of a student whose
22 First Amendment rights have been violated, whether

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1 against a public or private university, are there
2 differences in the ability of that person to get
3 money damages, for example? What can you comment
4 about that?

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

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

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

19 They are very worried about being sued
20 by students for harassment, discrimination or
21 other liability claims. They're not that worried
22 about being sued for First Amendment violations.

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1 COMMISSIONER HERIOT: Why not?

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

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

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

22 They were also told that they had to

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1 get two days advanced notice in order to use it.
2 And in that case, there was no damages awarded and
3 it was just a small, I think it ended up maybe around
4 \$15,000 and attorney's fees in that case.

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

8 COMMISSIONER HERIOT: Is that a
9 public university?

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

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

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

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

21 MR. LUKIANOFF: Yes.

22 COMMISSIONER HERIOT: You've still

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1 got the First Amendment problem.

2 MR. LUKIANOFF: Exactly.

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

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

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

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

19 COMMISSIONER HERIOT: Yes, that's
20 very troubling the notion that this really is a
21 First Amendment issue in the sense that the action
22 is being taken because of pressure from the federal

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1 government. But the lawsuit seems very difficult.

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

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

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

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

19 COMMISSIONER KLADNEY: Mr.
20 Lukianoff, oops.

21 (Off microphone comments)

22 COMMISSIONER KLADNEY: I find it

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1 interesting that you say First Amendment doesn't
2 bring many damages. If I use words to someone and,
3 in a sexual sense --

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

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

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

19 COMMISSIONER KLADNEY: It's not
20 finished yet?

21 MR. LUKIANOFF: Amazingly, the
22 student's won at pretty much every level. It was

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1 so bad that they even pierced qualified immunity
2 in that case because it was so clear that the
3 university president had to know he was violating
4 both due process protections and First Amendment
5 protections.

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

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

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

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

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

21 COMMISSIONER KLADNEY: No, how much
22 those wind up with damages?

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1 MR. LUKIANOFF: Yes, I've heard
2 estimates from different experts in the field, and
3 they usually talk about even a frivolous lawsuit
4 can end up costing the university \$100,000.

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

8 MR. LUKIANOFF: And that found to be
9 harassment?

10 COMMISSIONER KLADNEY: Right.

11 MR. LUKIANOFF: That I can think of --

12 COMMISSIONER KLADNEY: Personal
13 knowledge.

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

17 COMMISSIONER KLADNEY: Okay. And
18 another question I have is in your estimation, Mr.
19 Marcus was talking about, and Mr. Galanter talked
20 about it earlier about doing an investigation about
21 a person using words and whether it was offensive
22 to the person first and then a reasonable person

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1 standard.

2 When do those kind of words become an
3 assault in a tort sense?

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

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

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

20 MR. LUKIANOFF: In terms of tort, I
21 mean as far as, I mean certainly threatening
22 somebody is very clear cut.

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1 COMMISSIONER KLADNEY: Threatening
2 somebody --

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

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

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

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

12 MR. LUKIANOFF: Right.

13 COMMISSIONER KLADNEY: -- to arrive
14 at that.

15 MR. LUKIANOFF: Right.

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

19 MR. LUKIANOFF: Usually they'll try
20 to combine those two standards where, and that's
21 one of the things that's actually also very bright
22 about the way we adjudicate threats is that it's,

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1 there's a fair amount of common sense.

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

5 COMMISSIONER KLADNEY: And that would
6 be different than the Davis standard?

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

13 COMMISSIONER KLADNEY: Thank you.

14 MR. LUKIANOFF: Sure.

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

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

20 CHAIRMAN CASTRO: Okay. You'll come
21 after Commissioner Narasaki. Commissioner
22 Achtenberg, you have the floor.

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1 (Off microphone comments)

2 CHAIRMAN CASTRO: No problem.

3 You've probably got my old one.

4 (Off microphone comments)

5 COMMISSIONER ACHTENBERG: Thank you.

6 CHAIRMAN CASTRO: There we go.

7 COMMISSIONER ACHTENBERG: Mr.

8 Marcus, you are typically pretty sensitive to

9 issues of First Amendment concern.

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

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

21 MR. MARCUS: Certainly, Commissioner
22 Achtenberg, thank you. There's no First Amendment

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1 problem because I'm not suggesting regulatory
2 conduct or certainly not regulatory conduct with
3 respect to protected speech.

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

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

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

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

19 Think about the incident, how it
20 reflects on the campus climate and what needs to
21 be said to students as a whole to sensitive them
22 to what's happening.

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1 COMMISSIONER ACHTENBERG: Sure.

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

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

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

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

16 CHAIRMAN CASTRO: Commissioner
17 Narasaki.

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

22 It seems to me that there's well

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1 documented incidents of really powerful bullying
2 now particularly supercharged because of the use
3 of social media that could really be damaging to
4 students that fall short of physical, actual
5 physical violence or threats of violence.

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

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

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

17 (Simultaneous speaking)

18 COMMISSIONER NARASAKI: Yes. I know
19 that you're raising the fact that the Montana
20 standard you have concerns about, but have they
21 actually sued a university for saying you did not
22 act on an incident that may not meet the Davis

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1 standard, right, because that's what you seem to
2 be afraid of.

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

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

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

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

18 MR. LUKIANOFF: Right.

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

22 MR. LUKIANOFF: What the problem is,

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1 is that in drafting the Montana letter the OCR just
2 wasn't careful enough in trying to address very
3 legitimate concerns about sexual assault and --

4 (Simultaneous speaking)

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

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

13 COMMISSIONER NARASAKI: And it hasn't
14 threatened that?

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

18 COMMISSIONER NARASAKI: No, I --

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

21 COMMISSIONER NARASAKI: You seem to
22 be making the argument that schools believe that

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1 they might get their federal funding taken away
2 from them --

3 MR. LUKIANOFF: Right.

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

8 MR. LUKIANOFF: Right.

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

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

17 (Simultaneous speaking)

18 COMMISSIONER NARASAKI: The answer's
19 no then.

20 MR. LUKIANOFF: Have the OCR
21 investigated universities on the basis of speech?
22 I mean they're currently investigating I think,

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1 what 60 or 70 colleges around the country. And
2 some of those instances I know do involve speech.

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

6 (Simultaneous speaking)

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

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

14 (Simultaneous speaking)

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

18 MR. LUKIANOFF: I disagree. They had
19 a duty to provide a constitutionally consistent and
20 constitutional standard for what harassment was
21 that did not interfere with what the Supreme Court
22 had said.

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1 The OCR had done this perfectly well
2 back in 2003 in its 2003 letter, which we still
3 point to as a model even though we would like it
4 to go even further towards states.

5 CHAIRMAN CASTRO: Commissioner Yaki.

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

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

19 MR. LUKIANOFF: Not exactly because
20 most times when people are talking about serious
21 patterns of hate speech, they're talking about
22 things that do cross into unprotected speech.

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1 They're talking about threats.
2 They're talking about stalking. They're talking
3 about intimidation. They're talking about actual
4 Davis level harassment. And it's been
5 interesting, sorry.

6 COMMISSIONER YAKI: Go ahead.

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

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

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

21 I mean where do you think you can, that
22 the university can't deal with ensuring the route

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1 it has environment that is not oppressive or
2 hostile because obviously a campus, especially
3 certain types of campuses where there's a lot of,
4 where, that are geographically compact, that have
5 a lot of working and living situations in a close
6 area to create a campus atmosphere.

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

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

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

21 I write in my book that I would like
22 to point out that fraternities consistently give

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1 me the least sympathetic free speech cases to ever
2 deal with.

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

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

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

17 My overall thinking on this is that,
18 is a theory of suppression, that essentially what
19 we're saying is we're going to get rid of
20 hatefulness by saying you can't say that only
21 buries the problem. I don't think overall that
22 actually even works.

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1 COMMISSIONER YAKI: How, but to
2 address Commissioner Narasaki's point, how do you
3 distinguish between that and say a bully, or do you
4 not? You think bullying is simply protected
5 speech?

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

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

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

20 COMMISSIONER YAKI: Well, let me ask
21 you this. What did you think, and this may sound
22 like it's from left field, but there's a reason for

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1 it.

2 What did you think of the Supreme
3 Court's decision to declare unconstitutional the
4 death penalty for minors?

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

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

9 COMMISSIONER YAKI: But it has
10 nothing to do with policies. It has to do with
11 science, and it has to do with the fact that more
12 and more the vast majority, in fact I think overall
13 in bodies of science is that young people, not just
14 K through 12 but also between the ages of 16 to 20,
15 21 is where the brain is still in a stage of
16 development.

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

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1 a crime.

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

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

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

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

21 And because of that, and because of the
22 unique nature of a university campus setting, I

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1 think that there are very good and compelling
2 reasons why broader policies and prohibitions on
3 conduct in activities and in some instances speech
4 are acceptable on a college campus level that might
5 not be acceptable say in an adult work environment
6 or in an adult situation.

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

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

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

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1 definitely heard.

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

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

10 One of them is the moral and
11 philosophical underpinnings of the 26th Amendment.
12 Essentially, we have decided in this country that
13 18 year olds, that is considered the age for
14 majority.

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

20 Now, to understand, I'm also never --
21 (Simultaneous speaking)

22 CHAIRMAN CASTRO: Commissioner Yaki,

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1 I'm going to need to ask you to wrap up because we
2 have two other Commissioners that want to ask
3 questions, and we are getting really close to the
4 end of the period for this panel.

5 COMMISSIONER YAKI: Okay.

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

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

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

21 COMMISSIONER TIMMONS-GOODSON: Yes,
22 as I understand your argument you say that colleges

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1 and universities actually interpret more
2 restrictively free speech because of fear of losing
3 federal funding.

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

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

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

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

19 MR. LUKIANOFF: Against the federal
20 government?

21 COMMISSIONER TIMMONS-GOODSON:
22 Absolutely.

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1 MR. LUKIANOFF: It's kind of funny --

2 COMMISSIONER TIMMONS-GOODSON: On

3 that --

4 (Simultaneous speaking)

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

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

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

18 COMMISSIONER TIMMONS-GOODSON: Thank
19 you.

20 MR. LUKIANOFF: Okay. Thank you.

21 CHAIRMAN CASTRO: Commissioner
22 Kirsanow, you have the last question.

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1 COMMISSIONER KIRSANOW: This is for
2 Mr. Lukianoff. Supreme Court for a while now, the
3 last several years beginning with I think with New
4 Hampshire v. --

5 (Simultaneous speaking)

6 MR. LUKIANOFF: Yes.

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

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

16 Should they differentiate in terms of
17 what the standard is, and do they differentiate?
18 Is there some jurisprudence that suggests that?

19 MR. LUKIANOFF: As far as the case law
20 that I'm familiar with, a lot of the case law since
21 Davis has been telling universities that they went
22 a step too far with their harassment codes.

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1 And that's been pretty consistent.
2 As I said, there's been 37 lawsuits, and about half
3 of them involve harassment codes which is one of
4 the reasons why even some of the risk management
5 people that I'm very critical of are saying Davis
6 makes sense because the Supreme Court will never
7 overturn its own language.

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

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

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

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

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1 in which they'll speak.

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

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

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

14 **IV. ISSUE PANEL III - OCR/DOJ GUIDANCE**

15 MR. CHAPMAN: Thank you for the
16 opportunity to speak with you today. Data about
17 sexual harassment and exposure to hate related
18 words in our nation's elementary and secondary
19 schools have been regularly collected by U.S.
20 Department of Education's National Center for
21 Education Statistics, which is where I work,
22 through two data collections.

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1 One of them is the School Survey on
2 Crime and Safety, often referred to as SSOCS, which
3 is its acronym. And the second is the School Crime
4 Supplement or SCS.

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

10 The SSOCS collections have been
11 fielded every two or three years starting back with
12 the 1999 - 2000 school year. The most recent year
13 for which we have released data are for the 2009
14 - 2010 school year.

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

19 Collection of the School Crime
20 Supplement also has occurred on about a two year
21 cycle. It was first fielded back in 1999 in its
22 present form. And the most recent year for which

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1 we have data are for the 2011 time period.

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

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

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

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

20 Sexual harassment is defined in the
21 questionnaire as conduct that is unwelcome, sexual
22 in nature and denies or limits a student's ability

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1 to participate in or benefit from a school's
2 education program.

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

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

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

19 So it's a much bigger number. We plan
20 on updating the estimates early next year. I was
21 also asked to talk some about information that we
22 have related to hate-related words.

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1 We collect information about
2 hate-related words through the School Crime
3 Supplement, which I mentioned earlier. The School
4 Crime Supplement is part of the National Crime
5 Victimization Survey.

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

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

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

22 We call these hate-related words. If

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1 a student responds yes to the question, we ask about
2 each type of hate word that I just mentioned,
3 individually.

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

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

15 There was no measurable change in that
16 rate from the 2008 - 2009 school year. However,
17 we did see a reduction in that rate from the 2000
18 - 2001 school year when it was at approximately 12
19 percent.

20 In 2010 - 2011, we also noted that 28
21 percent of students reported seeing hate-related
22 words on school property. Again, this did not

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1 change from the 2008 - 2009 school year but again
2 was a decline from the 2001 time period when 36
3 percent of students reported seeing hate-related
4 words on campus.

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

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

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

19 CHAIRMAN CASTRO: Thank you.

20 MS. HILL: Yes, thank you for this
21 opportunity to testify about sexual harassment at
22 school and colleges. The American Association of

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1 University Women also referred to as AAUW is a
2 leading voice promoting equity in education for
3 women and girls in this country for 130 years.

4 We have 170,000 members, 1000 branches
5 and 800 university and college partners. We've
6 been a leader on the issue of sexual harassment.

7 (Off microphone comments)

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

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

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

21 We chose to do an independent study in
22 addition to what we have available through the

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1 federal agencies because we were then able to look
2 at impacts.

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

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

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

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

20 And students were then provided
21 definitions about specific behaviors such as
22 having someone make unwanted sexual comments,

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1 jokes or gestures, being called gay or lesbian in
2 a negative way, being shown sexual pictures that
3 you didn't want to see, physical harassment, such
4 as being touched in an unwelcome sexual way, being
5 physically intimidated in a sexual way or being
6 forced to do something sexual.

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

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

14 We also wanted to have a survey that
15 would be understandable for students as young as
16 7th, 8th grade so 12 or 13. What did we find?
17 Broadly defined sexual harassment is common in
18 schools.

19 About nearly half have had some kind
20 of experience with sexual harassment in the 2010
21 - 2011 school year. For the vast majority of those
22 students, about 87 percent, they had some kind of

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1 negative reaction to their experience.

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

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

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

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

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

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1 different kinds of harassment.

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

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

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

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

22 About 80 percent of the students had

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1 some suggestions for their schools of what could
2 be done to make the situation better. They wanted
3 a person that they could talk to.

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

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

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

19 Those could have effects that could
20 really impact someone's school experience, their
21 ability to do well in school. And a sizeable
22 minority of students do things, such as dropping

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1 sports or staying home.

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

7 CHAIRMAN CASTRO: Thank you, Ms.
8 Hill.

9 **COMMISSIONERS QUESTIONS**

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

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

15 CHAIRMAN CASTRO: Okay.

16 COMMISSIONER ACHTENBERG: When I
17 asked the prior panel about anecdotal verse
18 statistically significant, they referred me to
19 you. So I'm going to ask you to explain to us what
20 makes the findings that both of you cited, that each
21 of you cite, statistically significant as opposed
22 to merely anecdotal.

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1 MS. HILL: Certainly, I can start that
2 conversation. It's about a probability based
3 sample.

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

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

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

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

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1 sampling.

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

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

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

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

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

22 So that is a relatively large portion

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1 of the schools, so that's what that was in reference
2 to.

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

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

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

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

19 And that meant that people could
20 answer the questions at home, in the safety of their
21 own house. And it was also I think nice,
22 particularly for young men.

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1 I think we got more young men talking
2 about how difficult and how challenging these
3 experiences were, in part, because they felt a
4 greater sense of privacy.

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

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

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

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

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1 they had those kinds of experiences.

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

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

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

18 The second question I have is are they
19 asked, since they're asked about what approaches
20 they feel would help, are they also asked what they
21 think their school, what they know their schools
22 do.

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1 In other words, do you have a sense of
2 do they know that their schools have policies? Do
3 they know that their schools are actually doing
4 anything?

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

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

14 MS. HILL: Certainly, on the first
15 question we did have a lengthy parent approval
16 process, of course. So these were minors, of
17 course. [And we did have, there were several
18 languages that Knowledge Networks was, did cover.

19 However, it was not every language, so
20 it was somewhat limited in that respect. But they
21 did certainly have Spanish, which is a large group

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1 of Americans.]1

1 Ms. Hill subsequently corrected this by withdrawing the statement in brackets, stating that AAUW could afford only to provide the materials in English and that only students who read English were surveyed for the research discussed in Crossing the Line: Sexual Harassment at School.

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1 COMMISSIONER NARASAKI: Do you know
2 if they had any Asian languages, because as you
3 know, Asians are now 15 percent of California's
4 population. And the school age is even higher, so.

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

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

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

² Ibid.

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

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

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

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

22 I'm sorry. Did I miss a question of

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1 yours?

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

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

10 Nearlly all the people that, only about
11 9 percent told any adult at their school. And only
12 a handful knew about Title IX.

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

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

20 Are there particular types and can you
21 give examples of verbal harassment that is more
22 severe than others? And I think in your testimony

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1 or your written intro you may have referenced
2 sexual jokes.

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

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

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

19 And for the most part what they said
20 as their rationale was I'm trying to be funny. I
21 thought it was just the way school is, so it wasn't
22 seen as a big deal.

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1 And they were not able to cognitively
2 understand that what was not a big deal to them
3 might in fact be a big deal to somebody else.

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

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

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

19 I think people, this has been
20 mentioned several times, but the electronic forms
21 of cyber harassment and cyber bullying can be
22 extraordinarily painful in part because they are

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1 such a public humiliation.

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

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

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

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

19 And we found that these things, these
20 measures like feeling sick to your stomach, things
21 that are feeling, having trouble concentrating,
22 those are all things around anxiety.

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1 We know that anxiety does not help the
2 learning experience. That's well established, so
3 this way we're sort of maybe getting at this a
4 little bit, a different way.

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

8 CHAIRMAN CASTRO: Commissioner
9 Heriot.

10 COMMISSIONER HERIOT: I just wanted
11 to clarify --

12 MR. CHAPMAN: Your microphone.

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

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

20 MS. HILL: That's an earlier
21 iteration.

22 COMMISSIONER HERIOT: Okay.

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1 MS. HILL: It's the same study. We
2 made many of the same findings, but there are some
3 differences.

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

8 MS. HILL: Absolutely.

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

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

18 Instead, it tended to be things like,
19 and I've got the whole list here. I don't know.
20 I thought it was normal kids' stuff, because I
21 didn't really care, it was not a big deal, I could
22 handle it myself, I didn't think it was necessary.

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1 I liked it was one of the responses,
2 and if there'd been some response that was more
3 along the lines of actual fear, I would've thought
4 that the 2001 study would point that out.

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

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

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

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

20 COMMISSIONER HERIOT: But it was
21 there in the report.

22 MS. HILL: In that older report, yes,

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1 but not in the new report.

2 COMMISSIONER HERIOT: Okay.

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

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

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

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

19 MS. HILL: Yes, I think that the
20 people in our new report, we have a more balanced
21 approach of different things remembering that the
22 quotes are absolutely just examples.

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1 They are not nationally
2 representative. The quotes are just one
3 individual student.

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

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

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

16 CHAIRMAN CASTRO: Okay.
17 Commissioner Kirsanow followed by Commissioner
18 Kladney.

19 COMMISSIONER KIRSANOW: Thank you.
20 Mr. Chapman, you indicate in your testimony that
21 in the 2010 - 2011 school year, that approximately
22 9 percent of 12 to 18 year olds in elementary and

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1 secondary education reported being called
2 hate-related words at school.

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

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

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

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

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

22 In sports context, for example, just

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1 about everybody on a team is uttering hate-related
2 words every three seconds.

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

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

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

18 COMMISSIONER KIRSANOW: Okay. Thank
19 you very much.

20 MS. HILL: Sure.

21 CHAIRMAN CASTRO: Commissioner
22 Kladney.

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1 COMMISSIONER KLADNEY: Thank you, Mr.
2 Chairman.

3 CHAIRMAN CASTRO: You're welcome.

4 COMMISSIONER KLADNEY: Ms. Hill, I
5 might have heard this wrong because I have small
6 ear holes. I think you said that 9 percent knew
7 who their Title IX officer was.

8 MS. HILL: Actually, it was smaller
9 than that. I meant to say 9 percent of the middle
10 school and high school students went to some adult
11 at the school, teacher, guidance counselor, other
12 adult.

13 COMMISSIONER KLADNEY: Okay. So
14 that would mean that 91 percent did not.

15 MS. HILL: That's correct.

16 COMMISSIONER KLADNEY: Okay. Is
17 that because students didn't know how to activate
18 the policy?

19 MS. HILL: I think it's a combination.
20 Some of the students are, it wasn't a big deal to
21 them. Or they just didn't want to.

22 COMMISSIONER KLADNEY: They're used

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1 to taking the punch?

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

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

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

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

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

20 COMMISSIONER KLADNEY: Could you add
21 that to your next survey?

22 MS. HILL: Absolutely.

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1 COMMISSIONER KLADNEY: Okay. And
2 one more question. What do students say schools
3 should do to deal with and prevent sexual
4 harassment?

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

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

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

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

21 COMMISSIONER KLADNEY: In any of
22 these school situations, especially when you get

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1 to middle school or K through 12 I guess, are there
2 specific ages or classes or class grades where this
3 type of education should take place about sexual
4 harassment or whatever you're surveying there?

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

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

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

17 COMMISSIONER KLADNEY: Thank you.

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

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

22 CHAIRMAN CASTRO: Okay.

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1 Commissioner Yaki, then Commissioner Kirsanow.

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

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

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

19 CHAIRMAN CASTRO: Commissioner
20 Kirsanow.

21 COMMISSIONER KIRSANOW: Thank you.
22 Are there any longitudinal studies showing whether

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1 or not there's been an increase, decrease, plateau
2 in terms of sexually harassing speech or
3 hate-related speech?

4 I looked at some of the studies here.
5 Most of them seem to be in the 2000s. I'm wondering
6 if we have any studies from say the '60s, '70s,
7 '80s, '90s that would show that.

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

13 So we could do some trend analysis, at
14 least on some of these items going back to the late
15 1980s in a consistent manner. But I don't have
16 knowledge of other ones that go back further.

17 CHAIRMAN CASTRO: Commissioner
18 Achtenberg.

19 COMMISSIONER ACHTENBERG:
20 Commissioner Yaki's mention reminded me that about
21 ten years ago when I took my son to the orientation
22 week for his college, I remember the university

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1 president talking to the parents and students
2 extensively about alcohol consumption and
3 alcohol-fueled incidents on campus and the fact
4 that the students were going to be spoken to about
5 this, that there are, workshops were going to be
6 undertaken about it.

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

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

21 I'm wondering if you're familiar with
22 any programs on the side of sexual harassment and

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1 sexually aggressive behavior, either on the
2 college level or on the high school or junior high
3 school level.

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

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

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

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

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1 prevention.

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

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

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

13 (Whereupon, the above-entitled matter
14 went off the record at 11:52 a.m. and resumed at
15 11:59 a.m.)

16 CHAIRMAN CASTRO: Okay. We're back on
17 the record. I'll remind the panelists that they
18 have a seven minute opportunity that will be
19 governed by the little traffic lights in front of
20 you, and then we'll begin our questioning of our
21 fourth and final panel who I will introduce now in
22 the order in which they will speak.

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1 We have Professor Eugene Volokh of the
2 University of California Los Angeles School of Law.
3 Our second panelist is Ada Meloy, General Counsel
4 of the American Counsel on Education, and I might
5 add was one of my partners at the Oxford Union in
6 November. We were on the same debate team in support
7 of Affirmative Action, so it's good to see you
8 again. Our third panelist is Anita Levy, Ph.D.,
9 Senior Program Officer at the American Association
10 of University Professors. And our fourth panelist
11 is Fatima Goss Graves, who is the Vice President
12 for Education and Employment at the National
13 Women's Law Center.

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

19 **V. ISSUE PANEL IV - DATA ON SEXUAL HARRASSMENT**

20 MR. VOLOKH: As Ken Marcus pointed out,
21 there are two things going on here. One has to do
22 with sexual violence and related physical conduct,

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1 and the other has to do with speech. I'm not going
2 to speak to the first part, but I'm going to focus
3 on the second because, unfortunately, the term
4 sexual harassment--in addition to dealing with
5 violence, offensive touching and the like-- also
6 covers material that could very well be protected
7 under the First Amendment.

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

21 And, indeed, university
22 administrators and faculty members have often

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1 viewed prohibitions on sexual harassment as
2 covering this kind of speech. For instance, in 2004
3 a student at Occidental College in Los Angeles, who
4 had a radio show on the University radio station,
5 had made on-air sexually themed jokes about his
6 rivals in student government--not terribly good
7 behavior--there's a reason the word "sophomoric"
8 is part of the English language, but it's still
9 constitutionally protected. It was speech in the
10 context of government, although in that case
11 student government, debates; yet it was labeled
12 sexual harassment.

13 In 2005, a Muslim student employee at
14 a public university in New Jersey was charged with
15 sexual harassment. A professor had promoted a film
16 labeled, "A Lesbian Relationship Story," and the
17 student responded with an email to the professor,
18 saying that he thought that homosexuals are
19 perverted and that he didn't want to get any
20 promotional pro-gay material from the professor.
21 He was actually disciplined on the grounds of
22 sexual harassment, and it took an appeal to a New

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1 Jersey Hearing Officer within the New Jersey
2 Administrative Court system to get the sanction
3 reversed.

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

15 Similarly, in late 1994 there was a
16 controversy at Santa Rosa Junior College in
17 Northern California. The student newspaper ran an
18 ad that some perceived as sexist. It was an ad
19 containing a picture of the rear end of a woman in
20 a bikini. This led to hot debate on various online
21 chat rooms. (You might recall this was the infancy
22 of the internet age.) And two of the most

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1 prominent critics of this ad were themselves
2 criticized, including using "anatomically
3 explicit and sexually derogatory terms." Again,
4 something that I do not approve of but lots of
5 Supreme Court cases and lower court cases have made
6 clear that especially in the context of these
7 public debates and public issues, people are
8 entitled to insult each other even in harsh and
9 unfair ways. Hustler v. Falwell is the classic
10 example of that.

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

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1 including "acts that purport to be jokes or pranks,
2 but are hostile and demeaning," and a range of other
3 speech.

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

10 This danger is exacerbated by the
11 language in the University of Montana case, which
12 suggested that OCR treats, and the Justice
13 Department treats, harassment as including not
14 just speech that is severe and pervasive to create
15 a hostile environment; of course, there's a dispute
16 about which standard should be used to create a
17 hostile environment, but even individual instances
18 of this kind of speech that when added together may
19 amount to a hostile environment. So, to the extent
20 that that is the OCR's position, as it seemed to
21 be in the Montana documents--although now it
22 appears that perhaps that was a misstatement--that

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1 suggests that the OCR thinks that even more speech
2 should be restricted, without regard to whether it
3 falls within the existing First Amendment
4 exceptions.

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

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1 that, unfortunately, recent actions on the part of
2 OCR seem to have in some ways exacerbated.

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

18 So, I think that the solution would be
19 for both the Justice Department and the Education
20 Department to make clear that certain kinds of
21 speech, in fact, a wide range of speech is
22 constitutionally protected and cannot be punished;

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1 while, of course, violence and death threats, and
2 other kinds of constitutionally unprotected
3 behavior can be.

4 CHAIRMAN CASTRO: Ms. Meloy.

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

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

17 I must begin by saying that every
18 college and university president wants to have a
19 campus that is safe for the students, the faculty,
20 and staff, that is safe both physically and
21 psychologically. However, sexual assault is a
22 complex societal issue. The negative behaviors

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1 that sometimes manifest themselves on college
2 campuses start long before the students arrive
3 there. They are grounded in lack of respect for
4 others and in highly sexualized and
5 alcohol-infused media that young people are
6 exposed to from an early age.

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

13 Colleges are redoubling their efforts
14 in the past several years, particularly following
15 the April 2011 "Dear Colleague" letter issued by
16 the Education Department's Office for Civil
17 Rights. Initially, we struggled with that letter
18 that appeared almost from nowhere with no notice
19 or comment, no attempt to engage those who, like
20 myself, have long years of working on campus
21 issues, who might have informed the various
22 commands to institutions found in that letter.

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1 However, over the subsequent years
2 many institutions were able to conform their
3 policies and practices to align with the spirit,
4 and some with the actual letter of that document.
5 The lengthy clarifications issued three years
6 later in the Q&A released in April 2014 with the
7 "Not Alone Report" were similarly not subjected to
8 notice or comment.

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

17 One point I must make is that the focus
18 of the attention in the sexual assault has been the
19 traditional residential campus with student bodies
20 mostly in the 18 to 22 age range. That is where I
21 expect most of the people in this room experienced
22 college. However, that is a minority of the

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1 institutions and the students now in higher
2 education. The vast majority are in commuter
3 campuses, whether community colleges or regional
4 institutions, and some are in online programs, and
5 many are working adults. In addition, the majority
6 of 18 to 22-year olds are not in college at all.

7 When dictates from OCR or the
8 Department of Justice come out, they do not take
9 into account the complexity of the non-traditional
10 campuses in attempting compliance.

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

18 Just to clarify, in general, a
19 grievance process is one when a student claims the
20 college or faculty member did not follow its rules
21 and the student is harmed. A disciplinary process
22 is when an institution undertakes to assess whether

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1 a student has broken college rules and should be
2 sanctioned. The confusion surrounding the "Dear
3 Colleague" letter, the McCaskill survey, and other
4 pronouncements on the issue of sexual assault on
5 campus using terms like adjudicate and defendant
6 is evidence of the misunderstanding of the way
7 campuses actually address student misconduct. We
8 are not courts.

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

18 We admit that there are cases that
19 appear to have been mishandled, and cases that
20 reflect egregious conduct by the accused, but there
21 are many more that are resolved outside the
22 spotlight of attention by experienced campus

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1 officials and through effective campus processes.

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

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

20 The drastic effects of a finding of
21 sexual assault cannot be overstated. Whether in the
22 campus proceedings, or in the Criminal Justice

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1 system that is the most qualified arena to assess
2 this serious felony, it is a crime that has lifelong
3 consequences for both the accuser and the accused.

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

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

22 I would also like to correct one

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1 statement for the record, which is that ACE did not
2 in any respect try to discourage any school from
3 responding to the survey that Senator McCaskill
4 issued. And, indeed, we encouraged responses by the
5 schools with which we communicated. Thank you very
6 much for this opportunity.

7 CHAIRMAN CASTRO: Thank you, Ms. Meloy.
8 Ms. Levy.

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

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

22 The AAUP has long recognized that the

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1 freedom to teach and to learn is inseparable from
2 the maintenance of a safe, hospitable learning
3 environment. Several association documents
4 identify important elements of such an
5 environment. The Joint Statement on Rights and
6 Freedoms of Students formulated in 1967 states
7 that, "The freedom to learn depends upon
8 appropriate opportunities and conditions in the
9 classroom, on the campus, and in the larger
10 community."

11 The 1966 Statement on Professional
12 Ethics emphasizes the responsibility of faculty
13 members to avoid any exploitation of students. Our
14 1995 statement "Sexual Harassment Suggested
15 Policies and Procedures for Handling Complaints,"
16 reiterates this ethical responsibility asserting
17 that acts of harassment clearly violate
18 fundamental standards of campus conduct.

19 The same statement emphasizes that the
20 success of any policy requires campus leadership
21 to provide appropriate ethical standards and to
22 provide suitable internal procedures to secure

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1 their observance.

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

14 Sexual harassment and sexual violence
15 are not only women's issues. Too often, addressing
16 sexual harassment is seen only as a means to protect
17 women. The AAUP is concerned with addressing
18 systemic gender inequities by educating both men
19 and women on campuses. By educating men and women
20 on our campuses about sexual harassment and sexual
21 violence, and by educating every member of our
22 campus community. We're professors, of course.

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1 The Department of Education's Office
2 for Civil Rights "Dear Colleague" letter was
3 released, as you well know, and then the May 9th,
4 2013 resolution agreement was also released
5 regarding the investigation of the University of
6 Montana's handling of allegations of sexual
7 assault. These are necessary and welcome steps
8 forward in this process.

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

14 In an effort to improve the likelihood
15 of bringing perpetrators to justice, the Office for
16 Civil Rights has mandated lowering the standard of
17 proof in disciplinary proceedings involving sexual
18 assault. The Office argues in "Dear Colleague" that
19 replacing the prevailing standard of clear and
20 convincing evidence with a preponderance of the
21 evidence standard would help level the playing
22 field for victims of sexual violence. The proposal

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1 has, in general, been favorably received by women's
2 advocacy groups and sexual assault support
3 agencies, but has been opposed by many
4 organizations representing both progressive and
5 conservative values.

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

20 Given the seriousness of accusations
21 of harassment and sexual violence, and the
22 potential for accusations, even false ones to ruin

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1 a faculty member's career, we believe that the
2 clear and convincing standard of evidence is more
3 appropriate than the preponderance of evidence
4 standard.

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

16 While clear policies and timely
17 responses are critical for both the complainant and
18 the accused, preserving a higher standard of proof
19 is vital in achieving fair and just treatment for
20 all. We urge both the Departments of Education and
21 Justice to reconsider the preponderance of
22 evidence standard.

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1 We are also concerned about the
2 potential violation of academic freedom for those
3 who teach courses with sexual content. We would
4 call your attention to the AAUP Statement on Sexual
5 Harassment which provides guidelines on speech in
6 the classroom and what would be considered
7 reasonable speech in a teaching context.

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

20 Again, I see my time is running short
21 but we very much appreciate the Department of
22 Education and Justice's action on these efforts,

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1 and hope that the standard of evidence will be
2 reconsidered, and that academic freedom will be
3 duly protected in the classroom. Thank you.

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

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

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

21 And schools can comply with Title IX
22 requirements without running afoul of the First

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1 Amendment. Of course, as was discussed earlier, in
2 many cases of sexual harassment, First Amendment
3 concerns may not even be implicated. The First
4 Amendment applies only to state actors, which for
5 educational institutions largely means public
6 school districts or state universities. And nearly
7 all private colleges and universities that receive
8 federal funding in addition to these public
9 institutions must comply with the requirements of
10 Title IX.

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

20 In addition, harassment often doesn't
21 fall neatly into a single category. We like to, at
22 the Law Center, think about it as a part of a

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1 continuum in many cases. And where conduct involves
2 both speech and non-speech elements, what courts
3 have said is that a sufficiently important
4 governmental interest in regulating the non-speech
5 element can justify incidental limitations on
6 First Amendment freedoms. So, as these courts have
7 emphasized there's a compelling government
8 interest in preventing discrimination and
9 harassment, and schools both have a duty to protect
10 their students from harassment, and schools
11 administrators must be able to prevent and address
12 it. And they also must be able to do their job in
13 providing safe school environments that are
14 conducive to learning, and ensure that students
15 have equal access to that learning.

16 Finally, and there's far more detail
17 in my written testimony, but cases indicate that
18 Tinker and Title IX are consistent in that they
19 allow, through Tinker, and that they require,
20 through Title IX, a school to intervene in response
21 to such conduct, including speech that
22 simultaneously creates a hostile environment, and

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1 a foreseeable risk of substantial disruption of the
2 school environment. And as the Third Circuit, which
3 has considered several of these cases raising the
4 First Amendment and harassment at the same time has
5 held, intimidation of one student by another,
6 including intimidation by name calling is the kind
7 of behavior that school authorities are expected
8 to control or prevent, and there isn't a
9 constitutional right to be a bully.

10 There's been a lot of mention of the
11 University of Montana Missoula agreement, so I
12 think it's critical to revisit some of the facts
13 that were described in the agreement. According to
14 the findings, there were over 20 reports of sexual
15 assault and 10 reports of sexual harassment at the
16 university in a three-year period. And the findings
17 also found that the policies the university had in
18 place at the time were confusing. There were eight
19 different types of policies that left it really
20 unclear when students should report harassment,
21 how students should report it, what appropriate
22 steps that the university must and should take, and

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1 the process was really burdensome and left
2 complainants with unequal rights in the process.

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

13 There are also other forms of
14 harassment that are gender-based but don't involve
15 unwanted sexual advances. And like the
16 longstanding guidance, the Montana agreement tells
17 schools to look at the type of harassment, its
18 frequency, the setting or context of the
19 harassment, any other incidents of harassment that
20 have occurred, and the severity of the harassment,
21 the more severe the harassment the less need for
22 repetition to support a finding of a hostile

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1 environment. For example, as we heard earlier, a
2 single instance of rape can be enough.

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

14 In any event, the agreement outlines
15 a constellation of factors that are considered both
16 from the objective and the subjective perspective.
17 And that's really important, because whether a
18 reasonable person would find the conduct hostile,
19 and whether a particular victim would subjectively
20 perceive it as hostile are both important questions
21 that have to be considered. So, there may be some
22 conduct that is offensive to a reasonable person,

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1 but the complaining individual does not perceive
2 it that way, and as a result that sort of conduct
3 would not be actionable.

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

20 **COMMISSIONERS QUESTIONS**

21 CHAIRMAN CASTRO: Thank you. I'll open
22 with a question to any of the panelists. The first

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1 panel I asked questions that actually some of you
2 raised in your written, and now your oral
3 presentations about the issue of the burden of
4 proof, clear and convincing versus preponderance.
5 And I believe it was Mr. Galanter that responded
6 that well, most schools are already using the
7 preponderance standard anyway, so we really didn't
8 reduce the threshold. Could you speak to that? Is
9 that the case? Does anyone here know if that was
10 the prevalent policy?

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

20 MS. LEVY: I don't have statistics on
21 what schools were using which standard, but the
22 AAUP has advocated in proceedings involving

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1 faculty members, either dismissal proceedings or
2 other kinds of conduct issues, that the clear and
3 convincing standard be used. So, we are looking to
4 carry that standard over to proceedings involving
5 sexual harassment because it is one that we deem
6 protective, amply protective of academic freedom
7 and faculty governance.

8 CHAIRMAN CASTRO: So, you're just
9 focused on the faculty as opposed to the student
10 ---

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

18 CHAIRMAN CASTRO: It's working.

19 MS. LEVY: Okay. That we also address.
20 But we are primarily focused on faculty issues in
21 relation to classroom teaching and other
22 environments where students and faculty intersect.

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1 CHAIRMAN CASTRO: Ms. Goss Graves.

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

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

20 COMMISSIONER ACHTENBERG: Thank you,
21 Mr. Chairman.

22 COMMISSIONER YAKI: Commissioner Yaki.

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1 CHAIRMAN CASTRO: Okay.

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

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

18 If you could, Ms. Goss Graves,
19 reassure Ms. Meloy that is a more collaborative
20 process than some of the universities and colleges
21 may fear.

22 MS. GRAVES: Well, I think it's kind

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

13 I think what probably makes the most
14 sense is for there to be as much information out
15 there as possible. I was really gratified to hear
16 that the Department of Education is holding
17 meetings with colleges and training sessions. I
18 think that sort of information will be good,
19 because I think we're in a particular time where
20 students are becoming really aware of their rights,
21 and are wanting their universities to move quickly.
22 So, it's not sort of an academic thing, it's sort

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1 of in real time they expect to be able to have access
2 to their universities, and access to their
3 classrooms and dorms without being in fear.

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

8 MS. MELOY: Well, I think we heard from
9 some of the other speakers today on the panels that
10 we are put in --- higher education institutions are
11 put in a very difficult spot because OCR puts out
12 the blueprint and says this is what we want you to
13 do, essentially. They seem to have backed away a
14 little bit from that in their testimony today, but
15 that blueprint simply cannot be carried out at
16 every higher education institution in this
17 country. By some counts, and I believe even the
18 Department of Ed said there are over 7,000
19 institutions, and many of them do not have the state
20 funding, for example, that the University of
21 Montana would have. Many of them are very small
22 institutions, some of them are for-profit, they're

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1 community colleges that really don't have the same
2 kinds of fact patterns coming up, and yet they're
3 being told that you must, essentially, have the
4 entire sort of bells and whistles that the
5 University of Montana, very excellent programs
6 that they are putting into effect at great expense.
7 So, colleges and universities are kind of caught
8 in the middle of how do we comply with this, and
9 how are we also at the same time fair to all of our
10 students, and not kind of overstepping the bounds
11 or treating our faculty in ways that they are
12 unhappy with because of the kinds of standards that
13 the Department of Education imposes by guidance
14 without notice and comment proceedings upon
15 colleges and universities.

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

22 MS. MELOY: That has been the way it was

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1 portrayed from time to time by the Department, but
2 I'm happy to hear if they are stepping back from
3 that some and will have more recognition of the
4 great diversity of higher education institutions,
5 and the different situations that arise in these
6 many different kinds of institutions that they have
7 not been really dealing with in their enforcement
8 procedures, if you look at the list that they put
9 out.

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

11 COMMISSIONER ACHTENBERG: Please.

12 MR. VOLOKH: The resolution agreement
13 expressly says it is meant to "serve as a
14 blueprint." It strikes me as not just an example,
15 a blueprint is something that is the foundation for
16 building your building. And a blueprint, among
17 other things, to protect students from sexual
18 harassment. It faults the university for defining
19 sexual harassment using the severe or pervasive
20 standard. It faults the university for treating
21 objective offensiveness as a necessary condition.
22 It says whether conduct is objectively offensive

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1 is a factor used to determine liability, but not
2 an element of the standard for liability. It
3 demands that sexual harassment be defined to
4 include individual instances like, for example, an
5 individual instance of a sexual rumor, or a sexual
6 joke, or sexually explicit material that's seen by
7 someone. And then it calls for the "prohibition"
8 of sexual harassment, "elimination" of sexual
9 harassment, defining sexual harassment and, making
10 clear it is "unacceptable," a statement that the
11 university does not tolerate sexual harassment.

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

19 Now, it looks like it may have been a
20 misstatement, may have been --- may not have
21 properly captured the position of the Justice
22 Department or the Education Department, so that's

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1 great. But I can see why there was a lot of concern
2 about the Montana resolution agreement.

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

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

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1 COMMISSIONER KIRSANOW: Thank you.
2 This is for Professor Volokh. Actually, I had a
3 different question, but this -- your last comments
4 prompted this.

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

13 MR. VOLOKH: I don't think that they
14 would have a viable compelled speech claim. It's
15 not completely clear, compelled speech doctrine is
16 some degree of disarray now, but cases -such as
17 Rumsfeld v. FAIR suggest that the government, when
18 the government imposes requirements on various
19 institutions it can also, among other things,
20 require them to convey information about those
21 requirements. Rumsfeld v. FAIR did not actually
22 include these kinds of educational programs but

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1 might, in fact, include them. And I think that's
2 especially so if there is a condition attached to
3 funding. I think that the government is entitled
4 to buy speech through funding. So, it could say
5 look, here is the funding we're giving you, and a
6 condition of this funding is that you have
7 workshops on sexual harassment, or whatever else.

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

15 I don't accept the notion that was
16 suggested in earlier commentary by Ms. Goss Graves
17 that because private universities aren't bound by
18 the First Amendment, that the First Amendment is,
19 therefore, not in play. It's true that if a private
20 university --- if, say, Harvard wants to restrict
21 allegedly racist, or sexist, or religiously
22 bigoted speech by its students, that doesn't

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1 violate the First Amendment. But when the
2 government pressures private universities to
3 restrict speech of their students, that is
4 implicating the First Amendment.

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

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

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1 boat that way.

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

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

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

19 MR. VOLOKH: I'm not a standing expert.
20 There is a whole body of law on associational
21 standing. I think they might. It's possible,
22 although I think that for similar reasons there

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1 might be a reluctance to bring that kind of lawsuit.

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

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

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

20 MR. VOLOKH: Yes.

21 COMMISSIONER KIRSANOW: --- a
22 cigarette package. It says --- the warning label

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1 says this may cause all kinds of things and make
2 you look like a Klingon. It can do that. And, of
3 course, that's commercial speech, a different
4 context.

5 MR. VOLOKH: Yes.

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

9 MR. VOLOKH: Yes.

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

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

18 COMMISSIONER KIRSANOW: Right.

19 MR. VOLOKH: But in *Rumsfeld v. FAIR*,
20 for example, it's not that the universities were
21 required to convey specific government prescribed
22 messages, as such, it's that they were required to

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1 convey particular facts about when recruiters were
2 going to be showing up.

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

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

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

21 COMMISSIONER KIRSANOW: Okay. Thank
22 you very much.

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1 CHAIRMAN CASTRO: Commissioner Heriot.

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

5 MR. VOLOKH: Okay.

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

13 I can imagine a private college that
14 would want to be the super civil college, and would
15 want to attract students on that basis and say, you
16 know, here we are always polite to each other, and
17 we require that of our students at all times. We're
18 very formal, we have very formal interactions
19 between students and faculty, even between
20 students and students. And I can imagine a private
21 university that would go completely in the other
22 direction, the sort of let it all hang out, you

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1 know, you need to develop a tough hide, and if
2 somebody calls you a dirty name, call them a dirty
3 name back. You know, two different schools, two
4 different worlds.

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

21 MR. VOLOKH: You know, I haven't
22 thought about it from the perspective of, for

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1 example, a Catholic university. It's true, I don't
2 work at one, and haven't really focused on it much.
3 My sense is that the universities that want to be
4 more restrictive, and there are some such, are free
5 to do so. And if they make it clear that we are
6 disciplining you because we don't like your speech,
7 either because we think it's vulgar or uncivil, or
8 because it's contrary to our religious values (say,
9 you are expressing particular views about
10 evolution that we think are wrongheaded views) I
11 think generally speaking that a university would
12 have, subject --- actually, I'm sorry, there might
13 be some ban on religious discrimination by students
14 --- by universities with regard to students, so
15 let's change it to political views. We don't like
16 your political views, and if you express pro
17 abortion rights views, we are going to expel you.
18 Not that Catholic universities do that, but if the
19 university wants to do that, I think it would be
20 free to do that, at least setting aside California
21 state law.

22 COMMISSIONER HERIOT: What if came to

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1 be a question of fact, are you doing this because
2 the Department of Education --- if the trier of
3 fact found that it was because the Department of
4 Education policy, I take it that would be a problem.

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

12 COMMISSIONER HERIOT: Okay.

13 CHAIRMAN CASTRO: Commissioner Yaki.

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

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1 create a hostile environment.

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

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

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

21 MS. MELOY: I don't know that ACE has
22 put out a specific proclamation or resolution that

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1 would respond to your question, but I think ACE does
2 support its members in acting in legally
3 responsible ways.

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

6 COMMISSIONER YAKI: But ---

7 CHAIRMAN CASTRO: I'm sorry, go ahead.

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

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

19 MS. GRAVES: Well, I guess two things.
20 One, I don't think that's the state of the law right
21 now, that it has to be physical or a true threat.
22 I just don't think that's the state of the law. As

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1 I said in my testimony, I think that Title IX and
2 the First Amendment are entirely consistent, and
3 that includes what that looks like when you're
4 bringing a case in federal court for damages under
5 the Davis and Gebster standards, and the ways in
6 which the Department of Education has articulated
7 what schools obligations are as recipients.

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

14 MS. GRAVES: Well, I don't --- I mean,
15 I think that there could be ways to address some
16 concerns I have with Davis, but I don't think that
17 is the concern. I think, you know, some courts are
18 taking up cases that are raising the relationship
19 of cyber harassment and what happens on line, the
20 relationship between on line and off line, and
21 things don't happen so neatly. You know, even in
22 the last couple of years online harassment can

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1 happen in the same room with someone from one cell
2 phone to another, so they're tough questions. You
3 know, the standards still apply. You know, I think
4 it would be a good idea for the Department of
5 Education to articulate what --- and provide
6 guidance to institutions about what that means,
7 what harassment looks like in an online
8 environment.

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

20 CHAIRMAN CASTRO: Thank you.
21 Commissioner Kladney, you have the floor.

22 COMMISSIONER KLADNEY: Thank you. And

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1 if the panel would bear with me, I'm sure these are
2 not going to be well formulated questions because
3 I'm not exactly sure where I'm going with this. But,
4 Professor Volokh ---

5 COMMISSIONER YAKI: I'm just teasing
6 Kirsanow.

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

12 MR. VOLOKH: Yes.

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

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

19 COMMISSIONER KLADNEY: And how much can
20 they, do you think, discipline for that kind of
21 thing?

22 MR. VOLOKH: So, the court has set forth

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1 three extra ways in which K through 12 students
2 could be disciplined for their speech. One is if
3 it's vulgar, that's under the Fraser case,
4 obviously, not at colleges. In colleges, vulgar
5 speech is protected, too. But in the case of that
6 context the court said that's okay.

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

16 COMMISSIONER KLADNEY: Environment?

17 MR. VOLOKH: --- work of the school.
18 And, generally speaking, either that standard has
19 not been applied in a higher education context, or
20 the courts applying it have essentially said that
21 doesn't give the government any extra leeway at
22 least outside the classroom because the whole point

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1 of modern colleges and universities, public ones,
2 is to have ferment, have debate, have things that
3 may even be offensive.

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

14 COMMISSIONER KLADNEY: Kind of like the
15 Long Arm Statute.

16 MR. VOLOKH: There you go. There you go.
17 On the other hand, one saving grace historically
18 of restrictions in schools was look, you want to
19 say what you want to say, just don't say it here,
20 don't say it during the school day at school. If
21 the restrictions become 24/7 restrictions, which
22 says essentially any time you're enrolled in a

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1 public school, if you say certain things outside
2 school which could even be political things, if
3 you say very racist things, or religiously bigoted
4 things, or harshly criticize some religious group
5 outside campus that's causing fights on campus,
6 then in that case you could be expelled from the
7 school, or suspended, or something along those
8 lines. That becomes a much broader burden, and
9 that's something that lower courts have not yet---

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

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

15 COMMISSIONER KLADNEY: Oh, okay.

16 MR. VOLOKH: So, the hypothetical is
17 imagine somebody says something that's harshly
18 critical of some religious group, Mormonism, for
19 example, or Catholicism. And then as a result,
20 somebody on campus starts punching him. The puncher
21 could certainly be disciplined, but the question
22 is can the student be disciplined on the grounds

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1 that you are creating disruption? You better stop
2 saying these incendiary things off campus because
3 this is causing disruption on campus.

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

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

11 COMMISSIONER KLADNEY: But in
12 reference to this Title IX.

13 MR. VOLOKH: Yes.

14 COMMISSIONER KLADNEY: It could pretty
15 much be controlled.

16 MR. VOLOKH: Yes.

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

19 MR. VOLOKH: Yes. Most of what Title IX
20 would be seen as restricting would either be vulgar
21 or disruptive. There may be some exceptions, but
22 generally speaking not much of a problem with the

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1 K through 12 ---

2 COMMISSIONER KLADNEY: Well, let me ask
3 you this question. When we talk about Twitter,
4 Facebook, social media people seem to be getting
5 all in a twitter about that. If a student Twitters
6 while on campus, or Facebooks while on campus these
7 terrible things, K through 12, can that be
8 disciplined, as well, in your opinion? Something
9 sexual or harassing in nature?

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

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

21 MR. VOLOKH: Yes.

22 COMMISSIONER KLADNEY: --- when

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

8 MR. VOLOKH: Yes.

9 COMMISSIONER KLADNEY: Not you, I
10 apologize.

11 MR. VOLOKH: Yes.

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

18 MR. VOLOKH: Yes.

19 COMMISSIONER KLADNEY: With the
20 Department to decide what's right or wrong. In
21 other words, do you really think that the
22 Department of Education would come right in and

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1 shut a school right down without interaction back
2 and forth?

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

7 COMMISSIONER KLADNEY: Right.

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

22 COMMISSIONER KLADNEY: Well, they

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

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

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1 thought.

2 CHAIRMAN CASTRO: All right.

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

4 COMMISSIONER KLADNEY: Ms. Goss Graves
5 has ---

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

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

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

21 CHAIRMAN CASTRO: Thank you.

22 Commissioner Narasaki.

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

15 And that, plus some of the comments you
16 have made during the Q&A causes me concern, so I
17 want to give you an opportunity to clarify, because
18 I must be --- I might be mishearing you. And that
19 is, you seem to be arguing that the university has
20 --- that there's no constitutional ability and it
21 is wrong for the universities to say things like
22 they don't tolerate sexual harassment, that that

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1 somehow --- if that's required by the government
2 to make the statement that as a university we do
3 not tolerate sexual harassment, that that would be
4 unconstitutional suppression of free speech. I'm
5 hoping that's not what I'm hearing, but I'm a little
6 concerned that you're saying that unless it rises
7 to a physical act, it's not somehow C-- neither the
8 government nor the school can do anything about it.

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

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

20 MR. VOLOKH: Yes.

21 COMMISSIONER NARASAKI: So, I'm trying
22 to figure out where you think the boundary is,

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1 because I would be concerned because there is
2 harassment that is purely speech that I think is
3 dangerous, and I hope somebody can do something
4 about it.

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

22 COMMISSIONER NARASAKI: So, is there

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1 any kind of speech that you consider to be not
2 protected sexual harassment? That's what I'm
3 trying ---

4 MR. VOLOKH: Absolutely.

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

7 MR. VOLOKH: We do not --- if they say
8 we do not tolerate threats of violence, that's
9 constitutionally unprotected speech. It's
10 unprotected against criminal punishment, it's
11 unprotected against university punishment. We do
12 not tolerate libel or slander in the sense of false
13 statements especially, knowingly false,
14 complicating that, a fact about a particular
15 person. We do not tolerate fighting words personal
16 insults said face to face in a way that is
17 calculated to provoke a violent, or likely to
18 provoke a violent reaction. So, that kind of
19 speech, there are other categories, and I'd be
20 happy to talk about other examples, continued
21 unwanted mailings to someone after they said stop,
22 for example.

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1 COMMISSIONER NARASAKI: Yes, because
2 it seems to be, again, you're tying things only back
3 to where there's some connection to potential
4 physical violence.

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

13 COMMISSIONER YAKI: And bullying is
14 fine.

15 MR. VOLOKH: The problem is that
16 bullying is not a legally well-defined term. To the
17 extent that I have seen attempts to define
18 bullying, it has been often extremely overbroad to
19 the point of --- just to get examples from state
20 statutes and city and county ordinances that I've
21 criticized, where it would be bullying, in fact,
22 even a crime for somebody, for example, or

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1 especially a minor to post about a minor oh, my
2 ex-boyfriend broke up with me, or excuse me,
3 cheated on me and now I want all of you to ostracize
4 him. That would be under the definition of some of
5 those rules bullying.

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

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

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

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

15 COMMISSIONER YAKI: Sorry.

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

22 MR. VOLOKH: Yes.

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1 COMMISSIONER NARASAKI: That no one
2 could do anything about.

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

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

14 COMMISSIONER HERIOT: Herpes, I
15 assume, is a fact issue. If it's a false statement
16 ---

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

22 COMMISSIONER NARASAKI: Okay, it's

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1 fine. So, my question to Ms. Meloy --- thank you.
2 My question to Ms. Meloy is, I was very --- I very
3 much applauded your call for increased attention
4 to what's going on in elementary and secondary
5 schools, because I do think that there has not been
6 sufficient attention to their --- while there has
7 been, thankfully, more attention to what's going
8 on in colleges, I think, obviously, high school and
9 elementary school kids are even vulnerable, and
10 it's important to pay attention. And government has
11 a little bit more ability to do something.

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

18 MS. MELOY: Well, I don't know that
19 there needs to be a dramatic difference in their
20 policies; although, I think that the necessity of
21 some of the policies is probably less in the
22 non-traditional community college-type

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1 atmosphere, because I think that they will have
2 fewer incidents of student on student sexual
3 assault, or that sort of situation happening.

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

19 COMMISSIONER NARASAKI: What I have
20 increasingly seen is for employers who have large
21 employees scattered around the world, is very
22 effective online training which reduces the cost

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1 and the burden. So, I'm just wondering if that is
2 --- if there are options that would help --- is
3 your concern just it's a high cost with little
4 payoff, and there's no way to address that? I'm just
5 trying to figure out like what ---

6 MS. MELOY: Well ---

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

10 MS. MELOY: Well, I think the A number
11 one thing that we would want to ask government to
12 do is to follow the Administrative Procedure Act
13 and to provide for notice and comment before
14 imposing obligations on the institutions, and to
15 make sure that there is real consideration of the
16 reality of how some of these things that sound good
17 to those of us who went to college, it sounds good,
18 as opposed those who actually have to carry this
19 out and do it under the mandate to try to reduce
20 college costs and all of the other mandates that
21 come down on higher education in this day and age.
22 And I thought I had another point, but I lost it.

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1 CHAIRMAN CASTRO: I opened it. I'm
2 good. Let me just get this microphone working here.
3 I appreciate that, thank you.

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

17 Lastly, I want to let folks know that
18 for the record this record of the briefing report
19 is going to remain open for the next 30 days. If
20 panelists or members of the public would like to
21 submit materials or additional materials in the
22 case of panelists, you can either mail them to the

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1 U.S. Commission on Civil Rights, Office of Federal
2 Civil Rights Evaluation, 1331 Pennsylvania Avenue,
3 N.W., Suite 1150, Washington, D.C., 20425, or via
4 email at publiccomments@USCCR.gov, that's
5 P-U-B-L-I-C-C-O-M-M-E-N-T-S@USCCR.gov.

6 **V. ADJOURN BRIEFING**

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

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

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