

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING

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FRIDAY, MAY 13, 2011

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

PRESENT:

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

KIMBERLY TOLHURST, Delegated the Authority of
 the Staff Director

STAFF PRESENT:

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

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COMMISSIONER ASSISTANTS PRESENT:

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

PRESENTERS:

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

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Francisco Negron, National School Boards
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Ken Trump, National School Safety and Security
Services

Eugene Volokh, UCLA

Deborah Lauter, ADL

Adjourn

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P R O C E E D I N G S

9:01 A.M.

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

Welcome back, Michael.

COMMISSIONER YAKI: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 (The panelists were sworn.)

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

24 PANEL 1: FEDERAL AGENCY EFFORTS TO ENFORCE

25 CIVIL RIGHTS LAWS

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

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

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

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

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

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

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

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

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

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

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

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

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1 real time.

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

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

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

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

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

25 The other aspect of our work -- as I

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

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

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

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

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

21 Thank you.

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

25 Commissioner Heriot.

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1 COMMISSIONER HERIOT: Thank you very
2 much.

3 ASSISTANT SECRETARY ALI: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

3 COMMISSIONER HERIOT: Sure.

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

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

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

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

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

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1 today.

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

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

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

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

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

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

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

19 COMMISSIONER YAKI: Yes.

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

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

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

7 CHAIRMAN CASTRO: The chair recognizes
8 Commissioner Gaziano.

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

13 CHAIRMAN CASTRO: Try to keep it brief.

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

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1 administration views.

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

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

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

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

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

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

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

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

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

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

13 Commissioner Titus.

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

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

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

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

15 COMMISSIONER TITUS: Thank you.

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

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

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

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

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

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

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

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

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

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

14 CHAIRMAN CASTRO: The chair recognizes
15 Commissioner Achtenberg.

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

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

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

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

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

18 So we were helping to articulate the
19 difference.

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

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

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

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

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

25 ASSISTANT SECRETARY ALI: To the latter,

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

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

25 Our work is designed to help them where

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

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

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

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

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

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

25 Before I get started, I'd like to

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

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

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

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

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

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

25 Now under Title IX, both Courts and the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 better one.

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

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

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

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1 I'm happy to take your questions.

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

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

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

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

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

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

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

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

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

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

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1 should be going.

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

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

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

25 CHAIRMAN CASTRO: Ask your question now,

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1 Mike.

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

13 Thank you.

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

19 (New microphone given to Ms. Samuels.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 COMMISSIONER KIRSANOW: I'm sorry --

19 CHAIRMAN CASTRO: Commissioner
20 Achtenberg?

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

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

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

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

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

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

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

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

21 COMMISSIONER ACHTENBERG: Thank you.

22 CHAIRMAN CASTRO: The chair recognizes
23 Commissioner Heriot.

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

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

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

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

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

18 CHAIRMAN CASTRO: The chair recognizes -

19 -

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

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

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1 Commissioner Titus?

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

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

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

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

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

5 COMMISSIONER TITUS: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

25 We ask the panelists to please take your

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1 seats.

2 (Pause.)

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

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

12 Please panelists, take your seats.

13 (Pause.)

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

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

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1 accurate to the best of your knowledge and belief.

2 (The panelists were sworn.)

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

5 PANEL 2: GENDER & LGBT

6 FATIMA GOSS GRAVES, NATIONAL WOMEN'S LAW

7 CENTER

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

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

25 Or a girl who targets a female classmate

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

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

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

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

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

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

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

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

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

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1 masculinity or femininity.

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

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

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

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

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

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

14 Mr. Clegg.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Children, adolescents, and adults whose

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

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

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

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

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

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

25 The problem may be more extensive today

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 CHAIRMAN CASTRO: Thank you. Professor
14 Meyer?

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

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

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

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

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

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

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

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

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

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

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

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1 have more stressful experiences than their
2 heterosexual peers.

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

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

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

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

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

25 It is important to note that stress

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

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

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

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

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

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1 more than twice as likely to have suicide ideation.

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

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

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

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

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

25 Overwhelming observations of the

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

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

11 CHAIRMAN CASTRO: Thank you, professor.

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

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

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

25 The Liberty Institute, like federal

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

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

11 Next three paragraphs were inaudible.]

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

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

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

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

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

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

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

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

25 You have little kids who wanted to hand

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 They need your help to cut through the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 CHAIRMAN CASTRO: Professor Eastman?

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

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

25 In fact, the misunderstanding of federal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 federal intervention here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 It's time to let the school districts,

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

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

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

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

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

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

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

3

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

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

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

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

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

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

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

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1 saying things.

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

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

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

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

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1 strongly disagree with.

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

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

17 CHAIRMAN CASTRO: The Chairman
18 recognizes Commissioner Kirsanow.

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

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

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

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

20

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

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

25 CHAIRMAN CASTRO: We will move on to

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1 Commissioner Achtenberg.

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

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

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

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

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

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

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

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

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

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

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

5 COMMISSIONER ACHTENBERG: Thank you.

6 CHAIRMAN CASTRO: The chair recognizes
7 Commissioner Gaziano.

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

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

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

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

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

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

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

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1 universities acknowledge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 There you had — 50 years ago — a

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

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

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

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

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

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

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

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

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

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1 is some need to train.

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

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

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

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

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

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

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

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

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

15 CHAIRMAN CASTRO: Commissioner Heriot --

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

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

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

25 COMMISSIONER HERIOT: Do you charge for

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1 your services?

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

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

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

8 COMMISSIONER HERIOT: Do you charge?

9 MS. BYARD: I have said yes --

10 CHAIRMAN CASTRO: Commissioner.

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

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

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

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

3

4 The Chair recognizes Commissioner Yaki.

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

7 CHAIRMAN CASTRO: Okay. Commissioner
8 Titus.

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

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

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

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

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

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

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

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

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

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

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

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

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

18 CHAIRMAN CASTRO: We will come back.

19 COMMISSIONER TITUS: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 But one of my concerns is that it seems

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

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

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

25 It is a very dangerous slope to head

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

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

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

23 MR. CLEGG: May I answer that?

24 [portion inaudible]

25 VICE CHAIR THERNSTROM: Sure. But I

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1 would love for Mr. Sasser to answer it.

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

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

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

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

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

12 CHAIRMAN CASTRO: Thank you Mr. Sasser.

13 MR. MEYER: Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 CHAIRMAN CASTRO: Commissioner Heriot.

18 MR. MEYER: I just wanted to --

19 CHAIRMAN CASTRO: I'm sorry.

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

25

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

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

10 CHAIRMAN CASTRO: Thank you.
11 Commissioner Heriot?

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

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1 community.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. BYARD: Sorry, the Anti-Defamation

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1 League.

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

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

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

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

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

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

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

20 CHAIRMAN CASTRO: The Chair recognizes
21 Commissioner Titus.

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

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

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

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

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

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

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

9 You have students who want --

10

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

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

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

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

4 CHAIRMAN CASTRO: The Chair recognizes
5 Commissioner Gaziano.

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

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

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

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

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

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

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

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

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

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

19 CHAIRMAN CASTRO: Mr. Clegg.

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

25

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

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

18 CHAIRMAN CASTRO: The Chair recognizes
19 Commissioner Yaki.

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

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

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

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

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

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

25 There are consequences to speech that is

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

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

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

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

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

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

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

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

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

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1 stressors. We all face stressors all the time.

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

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

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

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

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

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

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

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

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

8 CHAIRMAN CASTRO: The Chair recognizes
9 Commissioner Kirsanow.

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

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

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

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

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

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

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

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

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

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1 viewpoints on a wide range of topics.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 CHAIRMAN CASTRO: We are back after our

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

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

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

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

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

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

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

8 (CHORUS OF YESES.)

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

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

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

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

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

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1 Prevention Month, which is in October.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 bullying.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Thank you.

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

23 Ms. Gym?

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

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

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

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

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

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

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

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

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

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

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

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

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

25 My own involvement began in October 2008

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

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

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

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

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

25 In response to the October 2008

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 CHAIRMAN CASTRO: Thank you, Ms. Gym.

20 Mr. Buck?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 popularity.

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

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

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

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

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

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

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

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

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

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

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

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1 So, as far as I know, there's been only
2 one federal lawsuit alleging that the "acting white"
3 criticism was so pervasive that it created a hostile
4 racial environment in violation of federal law, and
5 that lawsuit was settled out of court for \$150,000 as
6 reported, and the citation's in my written statement.

7 As reported in South Carolina Lawyers
8 Weekly, the plaintiff's lawyer said, you have a
9 culture where to act like you want to do well in
10 school is considered "acting white," and that's part
11 of why we're saying that it was racial, even though
12 the students were all the same race, because they
13 weren't acting how the others thought they should be
14 acting as members of that race.

15 So I guess the further question is,
16 should the law be involved here? However you answer
17 that question, I think the answer ought to be the
18 same as your answer to the question of sexual
19 orientation discrimination that was discussed this
20 morning.

21 And I say this because, as I read the
22 statutes, the statutory prohibitions on sex
23 discrimination and race discrimination are exactly
24 parallel to each other. They're practically
25 verbatim, except that one says race and the other

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1 says sex.

2 So if you think that sex discrimination
3 should include discrimination against someone not
4 merely for their sex in and of itself, but for
5 displaying a particular pattern of behavior and
6 preferences along with -- that's deemed inappropriate
7 for that sex, then, likewise, it seems you ought to
8 interpret the ban on race discrimination as including
9 acts of discrimination, and it could be white or
10 black or any other race, that are aimed at a
11 particular student, not for the race in and of
12 itself, but for acting in a way that is deemed
13 inappropriate for that particular race.

14 So I think the answers to those two
15 questions ought to be kind of parallel, just like the
16 statutes are.

17 So that's all I have, and I thank you
18 for inviting me.

19 CHAIRMAN CASTRO: Thank you, Mr. Buck.

20 Mr. Marcus?

21 MR. MARCUS: Thank you. Chairman
22 Castro, Vice Chair Thernstrom, and members of the
23 Commission, it's a pleasure to appear before you
24 today on an occasion where I cannot be blamed for
25 anything that goes wrong here at the Commission for

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1 once.

2 (Laughter.)

3 I have been asked to address harassment
4 and bullying of religious minorities today, and I
5 appreciate your including within this briefing the
6 topic of religious harassment, an understudied topic,
7 because I believe that any comprehensive approach to
8 the problem of bullying and harassment needs to
9 include a discussion of religious minorities.

10 Today I will urge the Commission to
11 recommend that Congress introduce legislation that
12 would prohibit harassment of religious minorities,
13 which surprisingly still is not barred by federal
14 civil rights law.

15 In my experience, the best way of
16 understanding the problem of religious harassment is
17 by way of examples, so I will give you just a few.

18 The first one that came to my attention
19 when I was Acting Head of the Office for Civil Rights
20 a few years ago involved a Sikh seventh-grade student
21 in New Jersey who faced serious and repeated
22 harassment at his school.

23 This included taunts of Osama, and a
24 physical assault on the school grounds that resulted
25 in head injuries.

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1 In Pennsylvania, a Sikh eighth-grader
2 was called Bin Laden, told to go back to turban land,
3 and had his religious head covering yanked, again,
4 because students conflated his religious identity
5 with those responsible for the 9/11 attacks.

6 According to a 2007 report, nearly one
7 in five New York City Sikh students were harassed
8 because they were misidentified as terrorists.

9 Mr. Chairman, I hope I'm not swimming
10 too much in Mr. Singh's lane. There are many other
11 examples that could be raised.

12 In a different incident, a Muslim junior
13 high school student reported being beaten until he
14 bled at a Staten Island middle school.

15 "They punched me," he reported. "They spit in
16 my face. They tripped me on the floor, they kicked
17 me with their feet, and they punched me. And as they
18 were kicking and laughing," he said, "they kept
19 saying, `You F-ing terrorist, F-ing Muslim, you F-ing
20 terrorist.'"

21 This young man reported being kicked so
22 hard in the groin that he bled in his urine.

23 In another incident, students at a
24 different school allegedly yanked a 13-year-old
25 Muslim girl's head scarf and beat her. "They just

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1 attacked me," she said. "They called me terrorist.
2 They called me Muslim. I am afraid that they will
3 come back and beat me again."

4 Over the last few years, we've seen some
5 schools that have had "Kick a Jew Day" on school
6 grounds during school hours. Some of these events
7 may have been inspired by a 2005 television episode
8 called "Kick a Ginger Day" on the South Park
9 television program, which has mutated into scores, if
10 not hundreds, of facebook "Kick a Jew" pages, which
11 have been enacted by dozens of students on some
12 school grounds.

13 These incidents are sadly representative
14 of a host of problems that were faced -- that we're
15 facing around the country. In some cases, school
16 administrators or law enforcement officials take
17 prompt and effective action. In other cases, they do
18 not.

19 What I would argue is that whatever
20 apparatus that we have to deal with harassment of
21 other minority groups, we should have the same degree
22 of protection for religious minority students, and
23 yet we don't.

24 There is a gap in federal civil rights
25 law which has allowed these incidents to occur, and

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1 this Commission can play an important role in fixing
2 it.

3 To this day, Congress has never acted to
4 prohibit religious discrimination in federally-
5 assisted programs and activities such as elementary
6 and secondary schools.

7 Title 6 of the Civil Rights Act of 1964
8 prohibits discrimination on the basis of race, color,
9 or national origin in federally-assisted programs or
10 activities. This list of classifications has been
11 expanded by legislation over the years to include
12 discrimination on the basis of sex, disability, age,
13 and even membership in certain patriotic youth
14 organizations like the Boy Scouts of America, but has
15 not been included -- has not been expanded to include
16 religion.

17 Now, there is an exception. There is a
18 difficult problem that arises with respect to what
19 one might call ethno-religious groups, that is to
20 say, groups that have both religious and ethnic
21 attributes.

22 The Office for Civil Rights at the
23 Department of Education has gone back and forth over
24 this issue during the years. For most of the Office
25 for Civil Rights' history, when it got complaints

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1 from groups like Jews, it would say, I'm sorry, Jews
2 are members of a religious group, we do not have
3 jurisdiction.

4 In 2004, when I headed the Office for
5 Civil Rights, I issued guidance which said that, if a
6 group like Jews or Sikhs that have both ethnic and
7 also religious characteristics faced discrimination
8 based on ethnic or ancestral attributes, OCR needs to
9 move forward. That policy was essentially
10 disregarded for several years after my departure.

11 I'm pleased to say that in October of
12 this year, Assistant Secretary Russlynn Ali included
13 a very important provision in her Dear Colleague
14 Letter which established once again that OCR will
15 address ethnic or ancestral discrimination against
16 groups like Jews or Sikhs. I think that was a very
17 important development for which Assistant Secretary
18 Ali should be commended.

19 However, that policy remains an informal
20 guidance. It is not permanent in the way -- or
21 durable in the way that legislation is. It could be
22 disregarded by future administrations in the same way
23 that the 2004 policy was disregarded between 2004 and
24 2010. Moreover, it has an enormous loophole for
25 students who face discrimination on purely religious

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1 grounds.

2 There is, I would argue, no reason why a
3 school should escape any sort of overview or
4 oversight on the grounds that the hostile environment
5 that it permits is merely religious and not racial or
6 ethnic. There are many other reasons why I think
7 legislation would be appropriate here, and I would
8 suggest that the written submission describes those
9 reasons in greater length.

10 I would suggest that, while
11 administrative action like Assistant Secretary Ali's
12 is helpful, it is really only Congress that can
13 provide the fix that's required here, and that this
14 Commission can play a very important role by
15 recommending that legislation.

16 CHAIRMAN CASTRO: Thank you, Mr. Marcus.

17 MR. MARCUS: My pleasure.

18 CHAIRMAN CASTRO: We'll come back and
19 ask you some questions.

20 Mr. Shelton?

21 MR. SHELTON: Thank you, Chairman
22 Castro, and members of the US Commission on Civil
23 Rights for holding this important briefing and for
24 inviting me to participate. The NAACP greatly
25 appreciates the opportunity to voice our thoughts and

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1 concerns on this crucial issue.

2 Founded more than 102 years ago in 1909,
3 the NAACP is our nation's oldest and largest
4 grassroots-based civil rights organization. We
5 currently have more than 2200 membership units across
6 the nation, with members in each and every of the 50
7 states throughout our country.

8 For over 15 years now, I have served as
9 the Director of the NAACP's Washington Bureau, the
10 federal, legislative, and national public policy arm
11 of this organization.

12 For nearly 46 years after the enactment
13 of the landmark Civil Rights Act of 1964, and despite
14 a number of groundbreaking laws since then, including
15 the Voting Rights Act of '65 and the Fair Housing Act
16 of '68, harassment and bullying on the basis of race
17 is still prevalent in our nation today.

18 Members and friends of the NAACP know
19 all too well the insidious taunts and harassing
20 comments and bullies based solely on our race or
21 ethnic background. Bullying and racial harassment
22 ruins individuals' lives, decimates families, and can
23 break apart whole communities.

24 Is it because of these ongoing problems
25 associated with bullying that the NAACP is so

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1 appreciative to this Commission looking at all the
2 approaches being employed by the federal government,
3 including the US Department of Education, the US
4 Department of Justice. Bullying and harassment based
5 on race, ethnicity, national origin, sex, disability,
6 or sexual orientation is so damaging that we need an
7 aggressive, coordinated response.

8 Furthermore, with the advent of new
9 technologies, including cellphones, texting, emails,
10 and social media tools such as Facebook and Twitter,
11 to name a few, there seem to be new avenues for
12 bullies to take in their quest to make the lives of
13 others absolutely miserable.

14 As such, the NAACP commends and
15 appreciates the US Department of Education,
16 Department of Justice, and of course, this
17 Commission, as well as various other government and
18 non-government organizations for aggressively
19 pursuing the laws in an attempt to protect our
20 children.

21 Yet, sadly, there always seems to be a
22 case in which their efforts fall short. Take for
23 example the case of Derrion Albert. Derrion was a
24 16-year-old junior and high school student at
25 Christian Fenger Academy High School on Chicago's

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1 South Side when he was beaten to death.

2 Although the location of this beating was
3 outside the school grounds, it has been reported that
4 he had been bullied and harassed by the two opposing
5 gangs on school property during school hours for some
6 time.

7 Derrion's death serves as a tragic
8 reminder of the dangerous and sometimes lethal
9 repercussions of bullying and harassment.

10 I've been asked to give my opinion and
11 that of the NAACP on the extent of the problem.
12 Because many victims of bullying and harassment are
13 oftentimes too frightened to come forward, suffice it
14 to say that cases such as Derrion's offer proof that
15 bullying is alive and prevalent in our nation's
16 schools.

17 On October 26, 2010, Russlynn Ali, the
18 Assistant Secretary of Civil Rights at the US
19 Department of Education, issued a Dear Colleague
20 Letter to schools outlining which actions would
21 instigate actions by the US Department of Education
22 or the US Department of Justice.

23 In her letter, Assistant Secretary Ali
24 was careful to point out how -- and I quote, "that
25 even when bullying or harassment is not a civil

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1 rights violation, schools should still seek to
2 prevent it in order to protect students from the
3 physical and emotional harm that it may cause."

4 She went on in her letter to state to
5 school boards, and I again quote, "that if an
6 investigation reveals that discriminatory harassment
7 has occurred, a school must make prompt and effective
8 steps reasonably calculated to end the harassment,
9 eliminate any hostile environment and its effects,
10 and prevent the harassment from reoccurring."

11 Yet a careful review of Assistant
12 Secretary Ali's letter demonstrates, and what the
13 NAACP believes to be true, that punishment is not
14 always the answer.

15 In fact, the NAACP firmly advocates a
16 comprehensive or holistic approach to eliminate and
17 discourage bullying, which not only educates the
18 victims of his or her rights and helps him or her to
19 heal, but investigates, determines, and eliminates
20 the roots behind the actions of the bully.

21 Mr. Chairman, bullying and harassment is
22 a real problem in our schools, and one that needs to
23 be dealt with effectively. We need a response to
24 this at the root of the problem if we are to
25 completely eliminate it once and for all.

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1 And because bullying affects individuals
2 as well as families and whole communities, we need a
3 response that allows input from all who have been and
4 might be affected.

5 Thus, the NAACP supports the
6 establishment of anti-bullying programs to put a
7 structure in place. That structure would, number
8 one, determine the extent of the problem, the damage
9 done to the victim or victims, and determine an
10 appropriate recourse.

11 Number two, offer support for victims --
12 or victim or victims so that he or she or they may be
13 able to fully heal and move beyond the incident.

14 And three, provide the services to the
15 perpetrators and ensure that they stop their abusive
16 behavior while being mindful of their age and stage
17 of their development.

18 If the war on drugs has taught us
19 anything, it's that blanket incarceration and zero
20 tolerance can easily result in a racially disparate
21 implementation of the law, which only further
22 decimates our people and our neighborhoods.

23 Rather, the NAACP would like to see
24 school districts establish groups and committees made
25 up of teachers, counselors, administrators, as well

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1 as community representatives and people from local
2 advocacy organizations who are familiar with
3 resources, whether they are educational, health-
4 based, or others, to help the bully realize the
5 hurtfulness of his or her actions and eliminate the
6 root causes.

7 I suspect the Department of Justice and
8 the Department of Education already have resources to
9 assist in the establishment of such groups, but if
10 not, we would certainly support legislation to assist
11 in the creation of such interventions.

12 Chairman Castro, members of the
13 Commission, I again thank you for your attention to
14 this very important issue. School-based bullying,
15 whether it is due to an individual's race, ethnicity,
16 national origin, sex, disability, or sexual
17 orientation, is not only hurtful but dangerous.

18 As well, it should be eliminated if we
19 are as a society to reach our full potential.

20 Again, I thank you very much and look
21 forward to your questions.

22 CHAIRMAN CASTRO: Mr. Singh?

23 MR. SINGH: Thanks very much for
24 convening this hearing. It's a privilege and a
25 pleasure to be here.

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1 By way of background, the Sikh Coalition
2 is the largest Sikh-American civil rights
3 organization in the United States. We were
4 constituted on the night of September 11th, 2001, in
5 response to a torrent of hate crimes against Sikh
6 Americans throughout the United States.

7 The Sikh religion was founded over five
8 centuries ago in South Asia, and it's presently the
9 fifth largest world religion with more than 25
10 million adherents throughout the world.

11 Sikhs are distinguished by visible
12 religious articles, including uncut hair, which Sikh
13 males are required to keep covered with a turban.

14 Although the Sikh turban is a symbol of
15 nobility and signifies a commitment to upholding
16 freedom, justice, and dignity for all people, the
17 physical appearance of a Sikh is often ignorantly
18 conflated with images of foreign terrorists, some of
19 whom also wear turbans and many of whom have received
20 copious publicity in the mainstream media in the
21 aftermath of the 9/11 attacks.

22 As a consequence, Sikhs in the United
23 States are ridiculed and stereotyped because of their
24 appearance and subjected to bias crimes, racial
25 profiling, employment discrimination, and school

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1 bullying.

2 In the course of offering this
3 testimony, we are guided by a belief that all
4 children, regardless of religion, race, sex,
5 disability, national origin, and sexual orientation
6 have the right to enjoy a safe and healthy learning
7 environment at school.

8 Our focus on the experiences of Sikh
9 children is designed to highlight challenges and
10 opportunities that implicate the fundamental rights
11 of all our nation's children.

12 Now, in the course of the day, I'm sure
13 you've heard of statistics which reinforce the fact
14 that bullying is a severe and pervasive problem for
15 many communities in this country. Our own studies,
16 our own reports, are consistent with these findings.

17 A Sikh Coalition community survey
18 published in 2007 revealed that 62 percent of turban-
19 wearing Sikh students in the Queens borough, the very
20 multi-cultural diverse Queens borough of New York
21 City, experienced bias-based bullying, and that 42
22 percent of them had been hit or involuntarily touched
23 because of their turbans.

24 A similar survey published last year
25 found that 74 percent of turbaned Sikh boys in the

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1 San Francisco Bay area suffered bias-based bullying
2 and harassment.

3 Now, what does this mean in human terms?
4 I offer to you the personal testimony, in their own
5 words, of two individuals who we have worked with in
6 the last several years. One is Mr. Gurwinder Singh,
7 a young man from New York City.

8 Again, speaking in his own words, "I
9 grew up in Richmond Hill, in Queens, and ever since I
10 can remember, I've been treated differently.

11 "It wasn't exactly bullying that started
12 in elementary school, but the other kids didn't look
13 at me very much. I stood out from the rest of them
14 because my uncut hair, tied in a topknot, made me
15 look different.

16 "When I got to elementary school, they
17 used to call me an egghead. Loneliness just became a
18 part of my life. After 9/11, things became much
19 worse. Kids called me names and would ask me things
20 like, are you related to Osama Bin Laden? They
21 called me a terrorist.

22 "Once on the bus ride home, someone
23 pulled my turban off my hair. I had to walk home
24 without my turban, and my hair was open, which was
25 very embarrassing. I was crying and wondering what I

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1 could do."

2 Now, if that wasn't bad enough for
3 Gurwinder, subsequent to those experiences, one of
4 his best friends turned on him, initially ignoring
5 him, and then denying their friendship, but then
6 ultimately leading a group of bullies one day as they
7 chased Gurwinder through the city, eventually
8 catching hold of Gurwinder and slamming his head
9 against a metal pole.

10 None of the bystanders helped him. They
11 just watched as Gurwinder began bleeding profusely
12 and nearly passed out.

13 Now, in the interest of the time, as
14 detailed more fully in our written testimony, our
15 written statement, we have a statement from a mother,
16 a Sikh mother in San Francisco named Upinder Kaur,
17 who documents some of the experiences that her own
18 son faced while going to school.

19 Among other things, he had his turban
20 ripped off, and she said, in one of our surveys,
21 that, "As a mother, I will repent for the rest of my
22 life that I cannot bring back my son's childhood. I
23 think every child, every child has the right to grow
24 up in a much healthier environment and achieve their
25 full potential."

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1 Now, this is sort of a foundation for a
2 discussion that we very much look forward to having
3 about the need for federal intervention. The Sikh
4 Coalition regards a safe and healthy learning
5 environment as a fundamental human right for every
6 child who attends school in the United States.

7 In light of our own experiences, in
8 particular, in recent years with school officials in
9 New York City, we believe that vigorous federal
10 intervention is needed to hold schools and school
11 districts accountable for their inactions and perhaps
12 more importantly, their inaction.

13 Consider some of our experiences in New
14 York City of late. Between 2007 and 2008, the Sikh
15 community in New York City experienced a spate of
16 brutal bias attacks against its children.

17 One student had his orbital bone broken
18 at school. Another one had his turban set on fire by
19 a bully. Two had their hair, which we're required to
20 maintain uncut, forcibly cut by bullies.

21 Now, in response to this, our
22 organization and a number of others undertook an
23 effort to pass a Chancellor's Regulation, an
24 administrative regulation in New York City that on
25 paper is very strong and affords relief and redress

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1 mechanisms to students who have been bullied, for
2 whatever reason.

3 However, the implementation has been
4 quite poor. We conducted a survey over the last
5 couple of years of teachers and, according to our
6 survey results, only 14 percent, 14 percent of
7 teachers and staff surveyed said that the regulation
8 and some of the training diversity programs that are
9 called for under the auspices of that regulation are
10 effective or very effective.

11 Only 31 percent of the respondents said
12 that students in their schools received diversity
13 training, as mandated by the regulation. And perhaps
14 worst of all, according to Pat Compton, a former
15 teacher at a high school in New York City in
16 Brooklyn, "Any staff training on harassment that my
17 school did last year was conducted in a
18 lackadaisical, perfunctory manner." Okay, this is a
19 former teacher speaking about the non-implementation
20 of the Chancellor's Regulation that we had hoped
21 would afford redress to students in New York City.

22 In the interest of time, we will defer
23 our discussion of recommendations, but we look
24 forward to having that discussion.

25 CHAIRMAN CASTRO: Thank you, Mr. Singh.

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1 At this point, we're going to open it up
2 to the Commissioners for questions, concise questions
3 directed to a panelist.

4 The Chair recognizes Vice Chair
5 Thernstrom, thereafter Commissioner Yaki and
6 Commissioner Achtenberg.

7 VICE CHAIR THERNSTROM: Well, I have a
8 lot of questions, and I hope we'll be able to go
9 around several times, because I know I only have -- I
10 should get closer to mine.

11 But I should start out directing my
12 questions to only one of the panelists, and it will
13 be to Stuart Buck.

14 This comes with a question and then a
15 thought after that question on my part. The question
16 is whether there's any difference in terms of the
17 bullying you were talking about between integrated
18 schools, you made your study, was it Roland Fryer's,
19 he looked at only integrated schools, and whether
20 there's any evidence that the same bullying doesn't
21 go on in all-black schools.

22 But that leads me to a larger question
23 here. It seems to me that a lot of what we've heard
24 today suggests that more school choice, so that
25 parents can send their children to schools where they

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1 think the children will be safer. And where -- and
2 schools of choice are schools in which bullying can
3 be thrown out and sent wherever, you can have
4 different state and local arrangements to where
5 bullies are sent and as to what kind of programs
6 they're sent.

7 But so much of the testimony today seems
8 to me indirectly an argument for vouchers. So, I get
9 from my question -- what about all-black schools,
10 which voucher schools, of course, could be, and is
11 there the same kind of bullying, to a larger point
12 about, a lot of the testimony doesn't end up as
13 amounting to advocacy for much greater school choice.

14 CHAIRMAN CASTRO: Is that for Mr. Buck?

15 VICE CHAIR THERNSTROM: yes.

16 CHAIRMAN CASTRO: Okay.

17 VICE CHAIR THERNSTROM: Well, anybody
18 else can weigh in.

19 MR. BUCK: Yes, actually, Roland Fryer
20 in his work, and again, that doesn't deal
21 specifically with bullying, it deals with the drop in
22 popularity among high-achieving black students, but
23 he found the effect was, I think, seven times greater
24 in well-integrated schools, as opposed to largely
25 black or largely white schools.

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1 And there are several other studies that
2 have found kind of similar findings. In fact, the
3 first study that even noticed the "acting white" kind
4 of attitude was a 1970 book about a desegregated
5 school. It was by four Arizona sociologists, and one
6 student, for example, was asked, what pressures do
7 you feel from the fact that you attended a
8 desegregated school?

9 And he said, well, I participate in
10 speech, and using the language of the time, he says,
11 I'm the only Negro in the whole group. The Negroes
12 accuse me of thinking I'm white.

13 And so the idea that some scholars have
14 put forth is that, well, to quote a couple of
15 scholars from Michigan, is that high achieving
16 students of color in racially balanced schools appear
17 most likely to be accused of "acting white" because
18 their enrollment in advanced classes puts them in
19 constant contact with white students, and at the same
20 time, there's a large number of students of color who
21 are in a position to notice and comment on the
22 supposed defection. So it can sometimes ironically
23 set up a sort of clash where students might be forced
24 to kind of pick sides, at least, so they feel. That's
25 not to say that integration is a bad idea at all.

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1 It's just to say that this might be one aspect of
2 students' attitudes that might be important to
3 address and to figure out how to handle and to
4 combat. And as to your further point, I guess I
5 suppose I agree. I mean, it seems a lot of the
6 disputes and clashes that go on in schools, from
7 bullying incidents to curriculum disputes and so
8 forth, possibly occur because 90 percent of everyone
9 is forced into the same school, and with different
10 clashes of values, people want to see their own side
11 prevail.

12 And so if you had more of a freer system
13 for people to choose their own school, as is the case
14 in Belgium, for example, over there, it's been seen
15 as a way to allow people to sort themselves out and
16 to find an environment that's more comfortable.

17 VICE CHAIR THERNSTROM: Well, as opposed
18 to choose the students, and that's not something
19 they're able to do, expel.

20 CHAIRMAN CASTRO: Commissioner Yaki?

21 COMMISSIONER YAKI: Yes. This is for
22 Ms. Gym. I know that you didn't quite finish your
23 statement. I think I know where you were headed, so
24 let me see if I can help you get there.

25 What -- I'm curious as to what was the

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1 nature of the federal intervention, and how -- what
2 has its effect been on the Asian-American student
3 population at South Philadelphia?

4 MS. GYM: The US Department of Justice
5 on December 15th filed a suit, and then a settlement
6 agreement, with the School District of Philadelphia
7 and the School Reform Commission.

8 Among the things that we felt that were
9 covered in an important way was the establishment of
10 an effective anti-harassment policy and procedures,
11 including timely investigations as well as it also
12 required anti-harassment and anti-bias training for
13 staff and students.

14 It clarified issues of language access,
15 so, for example, like at the school, there's a huge
16 number of Nepali-Burmese students. The school
17 district has one Nepali interpreter in the entire
18 school district.

19 It clarified that language access is
20 required at the school, so they can use an online
21 telephone service, they can find other ways, they can
22 train other people.

23 Victim services and counseling were
24 among the things that were recommended, that a
25 process kicks in for perpetrators, but there's

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1 nothing left for victims, and the appointment of an
2 independent consultant and compliance monitor.

3 In terms of what the impact has been, I
4 mean, the thing that I thought was most helpful is
5 that, at the school that we experienced, there was
6 such a lack of clarity about what was -- when did
7 something rise to the point of being a problem?

8 And even today, people still think that
9 it was not really an issue, this was a student-on-
10 student problem, you know, it was isolated, I didn't
11 hear about it.

12 So, you know, to some extent, like what
13 we wanted to talk a little bit about and why we felt
14 that the Justice Department settlement was really
15 important was that there's a difference in some ways
16 between bullying among students and harassment and
17 how you handle bias-based harassment within a school.

18 So, for example, harassment at South
19 Philadelphia High School caused students to drop out,
20 to walk in groups for their safety. Even though one
21 student was victimized, the whole group felt
22 threatened by it.

23 Sources of bias go well beyond what
24 bullying is, so it's not a personality conflict with
25 that child and another child, so, for -- you know,

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1 peer mediation is a popular resource for conflict,
2 but wholly inappropriate for bias, physical violence.

3 A punitive approach also fails to
4 substantially address problems, because, you know,
5 things like racial verbal attacks did not rise to
6 that level.

7 There wasn't an understanding that you
8 can punish one individual student, but if whole
9 groups of students carry biased feelings towards
10 whole other groups that cause them to act in a
11 certain manner, then punishing one individual student
12 on a case-by-case basis simply wasn't helping people
13 identify patterns of bias.

14 CHAIRMAN CASTRO: Thank you.
15 Commissioner Achtenberg, and after that, Commissioner
16 Gaziano.

17 COMMISSIONER ACHTENBERG: Mr. Chairman,
18 thank you.

19 Earlier this morning, we heard a number
20 of witnesses express concern about federal
21 intervention per se, and some speculated that the
22 laws that seem to authorize federal intervention,
23 whether it comes in the form of Title 6 or the ADA or
24 Title 9 perhaps were, if not wrongly adopted, then to
25 the extent that they have been validated by the

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1 courts as not being ultra vires, those decisions may
2 have been false.

3 I'd like to ask Mr. Marcus, Mr. Shelton,
4 and Mr. Singh, why your plea for federal
5 intervention, in your case, Mr. Marcus, when it comes
6 to religious-based discrimination, Mr. Shelton, in
7 your plea for protection of all groups, and your
8 similar plea, Mr. Singh, about protections for all
9 groups and federal intervention, if that's what's
10 required.

11 MR. MARCUS: Thank you, Commissioner
12 Achtenberg. I would like to stress at the outset
13 that I am not recommending any federal intervention
14 on behalf of religious minorities beyond what is
15 already provided for other groups. What I'm urging is
16 only equal protection for religious minorities.

17 It would not require any degree of
18 expansion of existing law, only the extension of
19 existing law to cover groups that are protected under
20 many other civil rights laws but not under Title 6.

21 So then the question becomes, I think,
22 why is it important for religious minority groups to
23 have that same protection which other groups have?

24 And what I would say is this. There are
25 many, many schools that have existing policies that

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1 prohibit religious discrimination. That's widespread
2 in the policies of school boards, of state education
3 agencies, so on and so forth. It's also true with
4 respect to accreditation agencies in the higher ed
5 field.

6 The problem is that it is one thing to
7 require teachers and administrators to refrain from
8 discrimination and another thing to actually create
9 an enforcement apparatus that will make them
10 accountable if they don't.

11 And what I'm saying is that when you
12 create an administrative apparatus that's available
13 for some groups but not others, the excluded groups
14 are not able to hold educators accountable when they
15 fail to comply with policies of their schools.

16 COMMISSIONER ACHTENBERG: Thank you.

17 MR. SHELTON: Commissioner Achtenberg,
18 first, I'd like to clarify that, as we're talking
19 about federal intervention, that we would strongly
20 oppose any use of school vouchers as a tool of
21 achieving this goal. I know it's a little confusing
22 earlier on how somehow that kind of went into
23 consideration.

24 COMMISSIONER ACHTENBERG: I am very
25 shocked to hear that.

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1 (Laughter.)

2 MR. SHELTON: It's so good to see you,
3 yet again.

4 (Laughter.)

5 Well, let me say that, quite frankly,
6 that as we talk about federal intervention, we're
7 talking quite frankly about the creation of programs
8 to help students understand what's going -- we're
9 talking about a very young age, students that are in
10 grade schools and in our high schools that for some
11 reason take exception to those they perceive as being
12 different.

13 One of the commonalities in all the
14 descriptions that we've heard here is that, whether
15 it's black students seeing other black students as
16 somehow acting more white, which is not compliant
17 with the type of behavior they're used to or they
18 expect within their schools, or other behaviors,
19 other differences in students, most of the bullying
20 described here in this place is bullying against
21 those who are perceived for one reason or another as
22 being different.

23 Creating programs to help educate
24 students and actually help prepare them for the
25 differences not only in their schools but in the

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1 world is what we're talking about for federal
2 intervention, educational programs that, again, help
3 us understand each other better, and why this kind of
4 behavior is so damaging.

5 I'm very fortunate that I have children
6 from 7 to 16 that attend schools that put a lot of
7 emphasis on diversity. They talk about how important
8 the differences are between us and how we should
9 celebrate those differences and not somehow ostracize
10 each other because of that.

11 It is that kind of prevention, we
12 believe, both by the federal government as well as
13 programs that can be sponsored by non-governmental
14 organizations that we'd see as being most successful
15 in preventing the kind of bullying we're discussing
16 today from occurring.

17 MR. SINGH: I share the sentiments
18 expressed by Mr. Marcus. You know, we're not really
19 looking for or pursuing an expansion of civil rights
20 law. We're looking for parity with respect to the
21 categories that are protected under existing law.

22 So, for example, religion is recognized
23 as a protected category in the context of employment
24 and accommodations under the Civil Rights Act.
25 Similarly, it's afforded protection under the Hate

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1 Crimes Prevention Act.

2 But beyond sort of the legal argument,
3 rather, we believe that federal intervention becomes
4 a moral imperative when local, state, school
5 officials, as similar to the ones that I described in
6 my testimony in New York, you know, when they become
7 sort of lackadaisical in their sort of obligations
8 with respect to protecting children.

9 I would like to add, also, that many of
10 the arguments that have been made about the
11 appropriateness of affording federal protection to
12 students in the bullying context were made during the
13 civil rights movement, in opposition to efforts to
14 afford minimal civil rights that we enjoy now under
15 the Civil Rights Act. So, that is a point that we
16 would like to underscore.

17 CHAIRMAN CASTRO: The Chair recognizes
18 Commissioner Gaziano, and thereafter Commission
19 Titus.

20 COMMISSIONER GAZIANO: Thank you all,
21 too. And like in just the last panel, I would like
22 to ask several of you questions. Maybe I'll get a
23 second chance, but I think I'm going to address my
24 first question.

25 Is it Ms. Gym?

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1 MS. GYM: Gym.

2 COMMISSIONER GAZIANO: Okay. I thought
3 your testimony was very helpful, and you're a very
4 effective advocate. It's very chilling to hear the
5 incidents recounted, although most of us on the
6 Commission have read and heard them before, and quite
7 frankly, this is why it's so helpful to me, in
8 contrast, in the situation you described in South
9 Philadelphia, it was physical violence.

10 There was actual knowledge, there was no
11 question, there was actual involvement by the school
12 officials themselves in discriminating and denying
13 rights. It was absolutely objectively unreasonable
14 by anyone's standard. It was pervasive, by the
15 number of students involved.

16 And yet we asked for months for
17 information from the Justice Department on what they
18 were going to do, and we got a big goose egg.

19 Now, maybe they were really acting fast,
20 and I expect since you're pleased with the final
21 resolution, you are going to be less likely to -- but
22 I read some of the news reports, and it seemed like
23 there was a lot of impatience in the community, and
24 one of the -- it is undoubtedly the federal
25 government's role to serve as a backstop to enforce

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1 the non-discrimination where there really is
2 bullying, but here are my two concerns, and I wonder
3 if you could address them.

4 One is that, when you call everything
5 bullying, you kind of dumb down real bullying. And
6 secondly, whether it really will distract the federal
7 government from moving swiftly in incidents like
8 yours, or if there was a situation similar to what
9 PACER has described for disabled that are equally
10 chilling, if they are told that they really need to
11 police teasing that some people consider -- or
12 wearing t-shirts that someone doesn't like.

13 How long did the investigation run? How
14 many months was it before you got some sort of
15 response back from the Justice Department?

16 MS. GYM: We filed on January 19th, and
17 federal investigators were at the school beginning
18 their interviews by the end of February. So I'm not
19 really familiar at all with any federal processes of
20 any sort, so this was our first experience.

21 COMMISSIONER GAZIANO: And when was the
22 final settlement?

23 MS. GYM: The final settlement was in
24 December of 2010. There was a letter of intent --
25 I'm sorry, I'm not sure what the exact title was,

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1 that was delivered to the school district in the
2 summer that indicated that they had found -- a
3 finding of merit, that's right, a finding of merit
4 toward the school district in the summer.

5 The school district began to move once
6 the finding of merit was delivered to them, and then
7 began to -- for example, they passed a brand-new
8 harassment policy. They replaced the principal of
9 the school. They hired a consultant to work with
10 them. They presented different programs that they
11 had done.

12 And I think that that might have -- I
13 don't know -- what we were worried about is that we
14 weren't sure how complicated that made it for the
15 federal government.

16 And what we were trying to present to
17 them was that the essential issue of harassment
18 within the school, of training for students, I think
19 that they did that for literally five minutes. They
20 had a five-minute training for students on
21 harassment, and then another one that followed up at
22 ten minutes.

23 So that those were not valid, they
24 weren't sincere efforts, that there was a real need
25 to take a look at harassment and not to kind of gloss

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1 over it, and that the school district's harassment
2 policy itself was deeply flawed because it
3 essentially reiterated the Fourteenth Amendment,
4 which just said, please don't harass anybody based on
5 their race.

6 So, you know, it was hard for us to
7 understand what -- exactly what the process was
8 happening, and what I'd like to commend the US
9 Department of Justice for a bit is that they were in
10 contact with us.

11 We were deeply afraid that once we filed
12 with them in January that we would hear nothing back
13 from them ever at any point in time, and you know, we
14 would just write it off.

15 But they ended up collaborating with the
16 state Human Relations Commission where we also filed
17 another -- a separate complaint as well just in case
18 things weren't -- you know, we weren't sure what was
19 going to happen.

20 And they ended up collaborating and
21 collapsing the settlements agreements together. They
22 had a little -- a stronger statement actually from
23 the State Department of Human Relations in terms of
24 their findings. But, you know, the settlement
25 agreement is the same.

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1 COMMISSIONER GAZIANO: Thank you.

2 MS. GYM: Thank you very much.

3 CHAIRMAN CASTRO: Thank you. The Chair
4 recognizes Commission Titus, who will be followed by
5 Commissioner Heriot. Then I'll recognize myself and
6 then Commissioner Kirsanow, and then Commissioner
7 Yaki.

8 COMMISSIONER TITUS: Thank you, Mr.
9 Chairman.

10 I'd like to address my question to Ms.
11 Goldberg, and it's kind of a continuation of
12 Commissioner Achtenberg's question earlier.

13 As you mentioned, statistics show that
14 students with disabilities are more likely to be
15 harassed and bullied than students under any other
16 protected class, and yet we probably hear less about
17 that in the press and from policymakers.

18 You went on to say that, kind of because
19 of that, you support federal legislation to address a
20 problem with things like teacher training, data
21 collection, school sensitivity programs.

22 Now, I know from experience in Nevada
23 that you work with non-profits at a state level, and
24 also with state legislatures, and yet you see the
25 need for and value of federal legislation.

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1 I wonder, do you agree with Mr. Singh
2 that not only is it better policy to have a federal
3 standard instead of a patchwork of different
4 definitions and also results in better enforcement,
5 but it is a moral imperative?

6 MS. GOLDBERG: I believe it's a moral
7 imperative. I think it's so pervasive, we hear about
8 children with disabilities, but we hear about
9 children with any issue, we had 800,000 people,
10 students, visit our website last year. We had a
11 young girl who said she was thinking of committing
12 suicide. She went on our website for teenagers and
13 changed her mind.

14 So it's kids with disabilities, it's all
15 kids, it is so pervasive that indeed it is a moral
16 imperative.

17 The harm that's happening to these kids,
18 you talk about mental health issues, these kids end
19 up with mental health issues, 160,000 kids drop out
20 of school every day because they've been bullied.
21 Children end up with so many issues their entire
22 life. The story I told about the family, their life
23 has been changed forever. So, yes, I agree that we
24 need federal legislation, we need it across -- I
25 think we have 45 states that have their own laws, but

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1 it is not working.

2 We wouldn't be here today, you wouldn't
3 have this hearing today, if it was working. It's not
4 working. Therefore, we need something consistent.

5 With kids with disabilities, we passed
6 the Individuals With Disabilities Education Act 30-
7 some years ago. States had their own, but we needed
8 a federal law to protect children, to educate
9 children, to have positive outcomes. That's why we
10 need a federal law across the country. Thank you.

11 CHAIRMAN CASTRO: Thank you. The Chair
12 recognizes Commissioner Heriot.

13 COMMISSIONER HERIOT: Thank you. I
14 would like to ask the rest of the panel to comment on
15 something that Mr. Shelton mentioned. Some civil
16 rights organizations, and I believe the NAACP is
17 among them, have taken the position, not with regard
18 to bullying generally, but rather that there's a
19 problem with excessive school discipline across the
20 board.

21 Too many expulsions, too many
22 suspensions in schools. And I'd have to say I agree
23 with Mr. Shelton when he sees concern about zero
24 tolerance rules. I think they're a big problem and I
25 believe very much that federal intervention here

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1 creates an incentive to zero tolerance rules.

2 I guess I don't agree — if we're talking
3 about outside the area of zero tolerance rules —
4 that there's a problem with excessive school
5 discipline. I guess my question here has to be, you
6 know, it seems to me that part of the solution has to
7 lie with more disciplining, yet what I'm hearing,
8 from most of the witnesses, is not a call for more
9 discipline but a call for more sensitivity training.

10 I think there was some mention of more
11 multi-cultural curriculum decisions. Is it possible
12 to control this problem without tougher discipline,
13 and is it possible to use proper discipline under the
14 jurisdiction of the federal government.

15 Doesn't the federal intervention make it
16 more difficult for teachers and principals to use the
17 kind of discretion that's necessary to control real
18 bullying.

19 CHAIRMAN CASTRO: Whoever feels
20 comfortable, I don't expect everyone to answer this.

21 MS. GYM: I can only speak to what
22 happened in our case at South Philadelphia High
23 School. So this school district in Philadelphia does
24 have a zero tolerance policy.

25 It certainly has the highest number of

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1 persistently dangerous --

2 COMMISSIONER HERIOT: Zero tolerance of
3 what?

4 MS. GYM: Zero tolerance policy on
5 violence in schools.

6 COMMISSIONER HERIOT: Violence is an
7 exception, yes. I'm against violence.

8 MS. GYM: That's exactly right. And,
9 you know, what we felt like with that, incidences of
10 violence and harassment, that it was an easy crutch.

11 We, after the South Philadelphia, after
12 the December 3rd beatings they automatically
13 suspended 10 students. We didn't actually know who
14 they were, why they were.

15 It ended up including two of the
16 immigrant student victims who had actually been
17 beaten in the melee. So it was a simple crutch for
18 them, and then they wiped their hands and walked
19 away.

20 So essentially they got, they changed
21 over the security staff, they put in \$700,000.00
22 security cameras and they suspended 10 students. And
23 that satisfied them.

24 COMMISSIONER HERIOT: Should those
25 students have been expelled, in your opinion?

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1 MS. GYM: The question was whether that
2 incident was investigated. I would not argue that
3 students should not be punished for, especially in
4 the situation that we were seeing at the school, that
5 it was the --

6 COMMISSIONER HERIOT: Would you argue
7 that they should have been expelled? There should
8 have been more punishment. CHAIRMAN CASTRO:
9 Commissioner, we're going to --

10 COMMISSIONER HERIOT: There should have
11 been more punishment?

12 MS. GYM: I'm saying that there should,
13 it certainly exists, discipline and punishment for
14 students who are doing that. But, the larger issue
15 of tackling, really what we felt was rampant anti-
16 Asian, anti-immigrant bias at this school, was not
17 addressed and instead the simple crutch of relying
18 upon a handful of expulsions, give you a couple
19 thousand dollars in security cameras, and then we're
20 done, we can walk away.

21 That is not effective either. And it's
22 all too simple, I think, and something that people
23 lean on. So we got a lot of reactions from a lot of
24 people saying you should just, you know, just can the
25 whole school, find them out. But it's a lot more

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1 complicated than that.

2 COMMISSIONER HERIOT: I think a lot of
3 people are taking an opposite position.

4 CHAIRMAN CASTRO: Thank you,
5 Commissioner Heriot. I will take the mic at this
6 point. Thank you for your question, we'll come back
7 at the end, again.

8 Mr. Singh had mentioned that the
9 Chancellor's policy was great on paper, but not
10 enforced or implemented properly. You mentioned
11 that, Ms. Gym, that there were procedures and
12 training and policies that were put in place and then
13 there was also requirements for language access.

14 My question is, in terms of the language
15 access aspect of this, while there may be something
16 good on paper, what is the actual practical effect of
17 making these policies, procedures, and trainings
18 accessible to individuals who are English proficient
19 limited?

20 And the flip side to that is to the
21 extent any of your organizations have anti-bullying
22 materials web sites, to what extent do you make those
23 accessible for folks who are limited English
24 proficient?

25 MS. GYM: Ultimately that change, the

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1 changes that we've seen at the school, that story
2 isn't going to ever be told through the courts or
3 through settlements or policies or things like that.

4 The most dramatic change that we've seen
5 is that there's been an incredible group of students
6 who were once victims became very organized around
7 these issues.

8 They now go out and work with other
9 students at other schools and talk to them and have
10 done workshops around the country. So, you know, for
11 us, the language access, the thing that was very
12 crystal and helpful was that the Department of
13 Justice was crystal clear about what the District's
14 and that school's obligations were for language.

15 So that they must use language line if
16 an Interpreter is not available. The school district
17 actually agreed to train half of its bi-lingual
18 counseling force, which is not, it's a kind of a
19 flexible position, shall we say.

20 But they agreed to train them into
21 formal interpretation, how to become a formal
22 interpreter. So that they, it wasn't just a matter
23 of someone at the school who spoke the language, but
24 someone who had been formally trained, who actually
25 knew how to interpret, particularly in a disciplinary

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1 situation or if there were consequences or if a
2 student is reporting violence against them.

3 The school, by having and working with a
4 consultant, actually not just leading up to this
5 school district, the Department of Justice allows
6 some flexibility for the schools to determine how
7 best to share the information with a broader school.

8 But the harassment training is for the
9 students and the staff. It feels like there's a lot
10 more responsiveness and responsibility that the
11 school is conscious of.

12 We also have a brand new Principal,
13 which has made a big difference as a result of the
14 work. He's been much more conscientious about
15 language access and being concerned that translation
16 is done effectively.

17 CHAIRMAN CASTRO: The Chair recognizes
18 Commissioner Kirsanow, and thereafter, Commissioner
19 Yaki, Vice-Chair Thernstrom and Ms. Tolhurst.

20 COMMISSIONER KIRSANOW: Thank you, Mr.
21 Chairman. Commissioner Heriot actually asked most of
22 what I wanted to address. What strikes me is we have
23 the issue with respect to definition.

24 I've heard a considerable amount of
25 testimony and there's been, no fault of your own, I

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1 think this is a definitional issue that's pervaded
2 all panels on the entire issue.

3 We have a spectrum. We have bullying,
4 or maybe teasing, bullying, harassment, violence and
5 some of those things kind of overlap. Ms. Gym, your
6 testimony especially struck me, insofar as there were
7 10 suspensions of students for actions that, based on
8 what you describe, would normally land people in jail
9 for a considerable period of time.

10 These were criminal acts. I'm struck by
11 the fact that the only punishments were suspensions.
12 Did anyone actually end up serving jail time for
13 assaulting, battering, it seems to me almost, you
14 know, a battery with intent to commit grievous bodily
15 harm, if not death? Any jail time at all?

16 MS. GYM: No.

17 COMMISSIONER KIRSANOW: It also strikes
18 me, that I didn't hear in your testimony, any kind of
19 repercussions, other than possibly the firing of a
20 Principal — I'm not sure she was fired — toward
21 the staff that would normally happen in any kind of
22 functional environment.

23 This was clearly dysfunctional. It
24 seems to me some of these staff members should have
25 not just been fired, but should have private causes

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1 of action against them in tort for permitting this
2 negligent conduct. Was any of that, did any of that
3 occur?

4 MS. GYM: No.

5 CHAIRMAN CASTRO: The Chair recognizes
6 Commissioner Yaki.

7 COMMISSIONER YAKI: I have a question
8 for Messrs. Marcus and Shelton and Singh. I think I
9 know what the answer would be for Ms. Gym, from the
10 testimony already and should just go over and
11 testify as well, Mr. Buck, I don't think this is in
12 your wheelhouse.

13 But, in testimony this morning, there
14 was much ado by some who criticized the notion of
15 expanding the protections of, against bullying to
16 members of the LGBT community because, quote/unquote,
17 it's really local discretion.

18 And it could be better handled at a
19 local level, we don't need the federal government
20 coming in to deal with this. I'd like your opinion,
21 as people who've dealt with this issue for quite some
22 time, about whether you believe that bullying is an
23 issue that should just be handled locally with their
24 own thing or why you believe, instead, in a federal
25 policy that deals with the issue.

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1 [Unofficial discussion re speaking into
2 the microphone . . .]

3 MR. MARCUS: Commissioner Yaki, I would
4 distinguish between those forms of bullying which
5 also constitute harassment, and those that do not.
6 To the extent that bullying constitutes harassment on
7 the basis of a group characteristic, which we
8 collectively consider to be invidious, I would say
9 that it is entirely appropriate for the federal
10 government to continue to act as it has acted for
11 several decades, and could step in, and to insist
12 that if federal dollars are being used to fund an
13 educational program, that those federal dollars
14 should not be used in ways that support activities
15 that harass people based on minority status.

16 But, I would also say that the topic of
17 bullying can be much broader and can include activity
18 that does not address a minority, or which is not
19 raised to the very high legal threshold for
20 constituting harassment.

21 And in those cases I would say that I
22 share a skepticism about federal displacement of the
23 responsibility of local officials.

24 MS. SHELTON: I would just say that I
25 think the federal government has a tremendous role

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1 in helping to set standards and a clear
2 understanding. I do agree with some of what
3 Commissioner, I hope I'm saying your last name right,
4 Kirsanow, said about --

5 COMMISSIONER KIRSANOW: It's a Klingon
6 name.

7 (Laughter.)

8 MS. SHELTON: -- the differential in
9 terms of definitions and interpretation. And I think
10 there are many, many different definitions of
11 interpretation. Whether it's just a childish
12 behavior and when it's actually criminal behavior, in
13 many of these cases.

14 We didn't make much of a distinction,
15 quite frankly, in the conversation between forms of
16 bullying that there are physical and violent, from
17 the forms of bullying that are harassing and
18 otherwise demeaning.

19 And I think we have to have those kind
20 of national or federal standards to help understand
21 at the local level. And I do, however, think that
22 every community has its differences and that very
23 well communities should be left to determine what is
24 in the best interest, certainly, within the guise of
25 those particular standards.

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1 CHAIRMAN CASTRO: Mr. Singh.

2 MR. SINGH: I don't disagree with much
3 of what has been said, as a general matter, speaking
4 in general terms, you know. To the extent that a
5 student finds him or herself in an environment that
6 might lead him or her to commit suicide, for example,
7 on the basis of actual or perceived sexual
8 orientation, your question had to do with, you know,
9 extension of rights to people because of LGBT sort
10 of characteristics.

11 That's unacceptable and that seems
12 uncontroversial to us. And so as we vigorously
13 pursue extension of protection to students in respect
14 of religion, it would be sort of intellectually,
15 morally inconsistent for us to withhold those sorts
16 of protections to LGBT students, you know, subject to
17 some of the issues that have been raised earlier
18 about definitions and this sort of thing.

19 But, in general terms, that's where we
20 stand on that particular issue.

21 CHAIRMAN CASTRO: The Chair recognizes
22 Vice-Chair Thernstrom.

23 VICE-CHAIR THERNSTROM: I have a
24 question for Goldberg and, but I do have a
25 preliminary statement first. I have been, I've seen

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1 a lot of schools. I've seen some great schools.

2 And they are orderly, there's no
3 bullying, there's no running in the halls, there's no
4 fighting. There's no fighting in the playgrounds,
5 there's no ugly language to other kids.

6 There's no sassy language to teachers.
7 There is a general culture of civility in the school.
8 But it all starts at the top, with the Principal, and
9 that Principal insists that every teacher in every
10 classroom, all day long, reinforces that culture.

11 And it seems to me that the description,
12 descriptions, I should say, Goldberg provided and the
13 whole Philadelphia incident, which I've been very
14 interested in, are, you're talking about stories of
15 failures of school authorities.

16 Of principals, of teachers of, you know,
17 in the case of Philadelphia it went beyond that one
18 school. And there is no solution to that, except
19 allowing [inaudible]. And schools have been totally
20 delinquent in the way that they train teachers.

21 I mean there's very little emphasis on
22 the importance of civility to learning and managing
23 classrooms. But, we've got to have schools in which
24 principals are, in which principals have the freedom
25 to look at the kids in their particular school, and

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1 those kids may be a different group than the, you
2 know, a school a mile away.

3 And say, in this school, these are the
4 messages we need to deliver. These are the kids that
5 we need to work with and we need to work closely with
6 them.

7 And, my preference is that the schools —
8 and most of the grade schools I've seen are Charter
9 schools — my preference is that these principals and
10 these teachers be able to save your child. It's your
11 choice if they want to be in the school or not.

12 You can't go along with this, you can't
13 go along with our culture of civility. But I know
14 this isn't a school you want to be at. So choose.
15 And in regular public schools, that is not possible.

16 And moreover, when Commissioner Kirsanow
17 said, well, was anybody let go in the Philadelphia
18 schools, in that Philadelphia school, no. Letting go
19 of a teacher is, you know, the teacher has to engage,
20 they're not going to break the child or something.

21 I mean it is really, if a teacher has
22 tenure, it's really difficult to get rid of them.
23 Anyway, it's my little speech in my, you can
24 disagree.

25 MS. GOLDBERG: I think that every

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1 student and every school has to be safe. You have to
2 have a safe school in a climate that has respect for
3 everyone. So I agree with you and I think leadership
4 is important at the level of the Administrator.

5 And I think we have a way to go to
6 change that. So I do agree with you in many ways. I
7 think there are excellent public schools out there.
8 And one of the things I recommended was positive
9 behavior intervention supports.

10 There's a noted researcher, a professor,
11 George Sugai, and he has done amazing work in
12 building that respect. And he talks about a
13 triangle. And there are a few children at the top.

14 And you build that respect, and he
15 doesn't say label bully, the kids who are bullied,
16 because they also have issues. So you build that
17 respect all the way through the school, and you
18 provide some more intensive help for those kids who
19 are having problems, who are the bullies, or who have
20 been bullied.

21 So there are ways that have been noted
22 by a number of years of research that we can do to
23 improve our schools. So, thank you for bringing that
24 up.

25 MS. GYM: I have two quick responses.

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1 The first thing is, is that when people talk about
2 South Philadelphia High School, they talk about it as
3 a failing public school.

4 And, in which case, the focus
5 overwhelmingly is on test scores, academic
6 excellence, become better at what you are. And in
7 that context, issues like how are we getting along?
8 is there cultural conflict? Do we have space to even
9 dialogue about what the problems are in the school?
10 are completely off the table. When we met with
11 teachers in March about fostering this dialogue and
12 how students were creating the dialogue, they said,
13 we're in testing season, we don't have time, this is
14 too much time for us. We're stressed out, we're
15 trying to do too much, now you're asking us to do
16 something else.

17 So in a situation where the school has
18 become so overly focused, or has somehow separated
19 the notion that test scores are separated from
20 character or that academic excellence has nothing to
21 do with your values or things like that, then I think
22 it's gotten a little wrong.

23 The second thing I want to point out is
24 that both nationally and specifically in
25 Philadelphia, what we're seeing is an increasing

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1 concentration of immigrant students within
2 neighborhood high schools.

3 You know, the Urban Institute in 2005,
4 showed that 70 percent of English language learners
5 are housed in just 10 percent of elementary schools.
6 In Philadelphia itself, three-quarters of immigrant
7 students are housed in just nine high schools.

8 That's largely to do, you know, in some
9 ways, because Philadelphia is an extremely choice-
10 oriented system. And in a choice-oriented system,
11 there are some who can choose and some who can't.

12 And the ones who can't are typically
13 going to be, well among those who can't, are the
14 immigrant students. They aren't served by charter
15 high schools, there are only four out of 61 charter
16 high schools in a 2007 study, one of which was ours,
17 that served 10 percent or more immigrant students
18 within them. There's no money that goes to Charters.
19 The Charter school that we built, which serves
20 immigrant students, we have a mission to do so.

21 We have five teachers, a home school
22 liaison, a handful or tutors. We get no more money
23 than a Charter school, that serves zero immigrant
24 students.

25 There's no possibility for these

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1 students. So we're seeing them come back to our
2 schools. So if we know that the immigrant students
3 are there and, in fact, that the numbers are
4 increasing, so at a nearby school the numbers have
5 tripled in percentage of Asian students, and
6 immigrant students have tripled in the last three
7 years, then why would we not train, approach it like,
8 it shouldn't be shocking or surprising or
9 disappointing or frightening that people have bias.
10 You know, I think it's like, people carry bias.
11 People have uncertain interpretations when they meet
12 somebody different and new.

13 Conflict shouldn't be scary. But what's
14 wrong is when people don't help children negotiate
15 conflict, help them learn how to handle and identify
16 what is harassment? when have you crossed the line?
17 when is it okay to say, gee, I don't like you and
18 then I will pick up a baseball bat and beat you with
19 it. I mean like, you, where, at what point do we say
20 you should just know better? And I don't think we've
21 taught them that.

22 CHAIRMAN CASTRO: The Chair recognizes
23 the Acting Staff Director, Ms. Tolhurst, followed by
24 Commissioner Achtenberg.

25 MS. TOLHURST: Thank you. My question

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1 is for Mr. Marcus. Regarding religion, what do you
2 say to the suggestion that your 2004 guidance and the
3 current Department of Education guidance on Title
4 IX, simply bootstrap a currently unprotected group,
5 into Title VI protection.

6 And to be clear in your answer, can you
7 please give us some examples of types of religious-
8 based harassment and bullying which, today, would not
9 be covered under Title VI, unless and until it's
10 explicitly expanded to include religion.

11 MR. MARCUS: Thank you, I will start
12 with the second part of your question. And what I
13 would say is that, under current law, I believe that
14 discrimination against a religious group that lacks
15 ethnic characteristics is not covered.

16 Now, I'm not sure that I would want to
17 go through, on a case-by-case basis about all of the
18 different religious groups, but there are some
19 religions that do not claim any sort of ethnic or
20 ancestral particularity, but rather more of a
21 universal characteristic and I think that is a large
22 percentage of the students in the United States, who
23 do not belong to such.

24 So I would say that most forms of
25 religious harassment would not be covered. In

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1 addition, I would say that, to the extent that
2 there's a loophole, where religious discrimination is
3 not covered if it's just based on the tenets of
4 religious belief.

5 And I would say even discrimination
6 against Jews or Sikhs or others are not covered, if
7 it's just based on what they believe, right. So
8 under OCR's guidance, even if it's a group that has
9 ethnic characteristics, like Jews or Sikhs, if you
10 can't prove that it's based on their ethnicity, then
11 it's not covered.

12 So when you have this sort of loophole,
13 it makes enforcement very difficult. It's very
14 difficult, in many cases, to figure out, well, why
15 exactly did this one child beat up or harass another
16 child?

17 Was it religion? Was it ethnicity?
18 It's a group that had different sorts of
19 characteristics. So, as a practical matter it's very
20 important to eliminate that loophole.

21 Now, if I understood the first part of
22 your question, I think you're asking me whether the
23 2004 and 2010 OCR policies create a right that
24 doesn't exist under the statute.

25 In other words, whether the Civil Rights

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1 Act of 1964 does not cover groups like Jews and
2 Sikhs, and whether my policy and Russlynn Ali's
3 policy inappropriately extends that.

4 Now I've written extensively on that.
5 I've got, I've written an entire book on that topic,
6 called Jewish Identity and Civil Rights in America,
7 to address that.

8 And I've also published academic
9 articles to address it. Let me try very quickly.
10 The U.S. Supreme Court in the case of *Shaare Tefila*
11 *v. Cobb*, asked the question whether Jews are covered
12 as a member of a racial group, under the Civil Rights
13 Act of 1866.

14 I answered yes because Congress intended
15 to protect racial groups in a very broad sense, and
16 that in 1866, the term race was understood to include
17 Jews and Arabs and other groups.

18 Now, one might say, well, that might
19 have been true in 1866, but not in 1964. In 1964,
20 Jews were not considered to be members of a distinct
21 racial group.

22 My answer to that is that the Civil
23 Rights Act of 1964 was not intended to create new
24 rights against racial discrimination, but rather was
25 intended to create an administrative enforcement

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1 apparatus to protect the rights that were already
2 established in the Equal Protection Clause and in
3 other parts of the Constitution.

4 And that to that extent, the appropriate
5 way of understanding the scope of anti-racism
6 protection in Title VI is to look back to the Equal
7 Protection Clause, the 1866 Act, so on and so forth,
8 and the Supreme Court has already done that work in
9 *Shaare Tefila v. Cobb*.

10 CHAIRMAN CASTRO: The Chair recognizes
11 Commissioner Achtenberg, thereafter Commissioner
12 Gaziano.

13 COMMISSIONER ACHTENBERG: Mr. Marcus, if
14 religion were a protected class, let's say the, some
15 of the legislation that's currently in front of the
16 Congress were to be, that would specifically include
17 religion, were to be adopted, what would be your
18 reaction to a student coming to school wearing a t-
19 shirt that said, Jews killed Christ.

20 And the reason that I'm postulating this
21 hypothetical is we heard this morning that the issue
22 of student harassment and intra-student violence has
23 to be bounded, to some significant extent, by respect
24 for the First Amendment, and with which I completely
25 concur.

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1 And it was further postulated that we
2 can't, we can't inhibit students from expressing
3 unpopular beliefs, or beliefs that might be motivated
4 by their own religious affiliation or what have you,
5 and I concur with that, as well.

6 I'm wondering what significance, if any,
7 you would ascribe to such t-shirt wearing and where
8 you draw the line in terms of protection of First
9 Amendment speech and where you, where things bleed
10 over into activity, shall we say, that would be
11 subject to civil rights law protection.

12 MR. MARCUS: That's certainly a very
13 difficult and important question, Commissioner. Let
14 me start with the beginning of your question that
15 referred to legislation that is now pending before
16 Congress.

17 And I would say that there is
18 legislation pending before Congress that does the
19 important work of including religion within
20 provisions requiring school districts or universities
21 to prohibit certain forms of bullying.

22 But none of those bills that I've seen
23 are enough, because none of those bills would require
24 the use of an enforcement system, like what's used
25 for Title VI.

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1 So I would say none of those forms of
2 legislation, as written, would actually be terribly
3 helpful. I think it's vitally important that, if the
4 solution comes through one of the existing bills,
5 that those bills be modified with language similar to
6 what was in Title IX, that requires the Department of
7 Education to create an enforcement system comparable
8 to what's used in Title VI.

9 Having said that, in your example I
10 would say that, in my view, the t-shirt that you
11 described that says that Jews killed Christ is
12 protected under the speech clause of the First
13 Amendment.

14 However, it is my view that the correct
15 response of educators to protected but offensive
16 speech is never to do nothing, in that educators need
17 to know that, even if they are legally prohibited
18 from regulating speech or punishing it, that's not
19 the end of the inquiry.

20 Educators need to know that there are
21 lots of forms of hostile behavior that require
22 response from the educators. Often it should be an
23 opportunity to teach students about civility,
24 tolerance, so on and so forth.

25 Where exactly one draws the line is very

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1 difficult. I would say that I think that the
2 standard established by the Supreme Court in *Davis v.*
3 *Monroe County* goes quite some distance, although
4 perhaps not far enough, to prevent the enforcement
5 of harassment law in ways that would chill protected
6 speech, and that less stringent standards create a
7 risk that protected speech would nevertheless be
8 chilled. So I think that the first step is to make
9 sure that the appropriate legal standard is being
10 used.

11 And I also think that educators, before
12 they regulate speech, should try any other less
13 intrusive alternative way of ensuring that their
14 goals are met. But I would also say that there are
15 others with greater expertise than I, including, if
16 I'm not mistaken, Professor Volokh is in the room and
17 may be able to address the First Amendment questions
18 in greater detail.

19 CHAIRMAN CASTRO: We have four minutes
20 left before this panel runs out, so I'm afraid all
21 the Commissioners who had asked for questions of this
22 panel aren't going to be able to. I'm giving the
23 last question to Commissioner Gaziano.

24 COMMISSIONER GAZIANO: Thank you, Mr.
25 Chairman. I'm going to ask Mr. Buck a hypothetical

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1 which I hope will help explain to others that my
2 concern with OCR's new guidance is not so much the
3 new classes, suspect classes, but the extent of the
4 children's behavior that they seem to be reaching.

5 In the situation where we have real
6 physical violence, actual knowledge, you know, I want
7 the Justice Department to swoop in and have a zero
8 tolerance policy on violence and do what it takes to
9 stop it.

10 But in the situation where we've got the
11 "acting white," and by the way I believe your analogy
12 works mostly, but not completely. I think you have
13 the stronger case for racial discrimination.

14 I think the kids, at least, are
15 discriminating. But in the *Davis* standard, where it
16 must be severe, pervasive and objectively offensive,
17 that clearly met in the South Philly situation.

18 The OCR standard is severe, pervasive or
19 persistent. So here's my hypothetical. Every week a
20 particular child is called whitey, a black child is
21 called whitey or "acting white" by some member or
22 whatever.

23 And the school could be set to, it
24 should have had knowledge because they observe or
25 could observe that he's never allowed to play in any

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1 of the reindeer games with any of the other kids in
2 his cohort.

3 Would it be, you think, effective, given
4 the cultural norms that you've been studying, for the
5 DOJ or OCR Swat Team to swoop in and declare zero
6 tolerance for any more "acting white," that there
7 would be immediate suspensions and expulsions.

8 Is that likely to improve the situation
9 for the top high achieving black students, or is it
10 likely to possibly cut the other way?

11 MR. BUCK: Well, it's hard to predict
12 what would happen in that situation. I mean, you
13 could imagine that it might help stamp out the
14 activity, or you could imagine that some people might
15 view it as calling in, you know, a largely white
16 authority group from outside to come in and enforce
17 more, kind of white norms of behavior.

18 And so it might cut the other way, as
19 you suggested. So, yeah, personally I guess I am
20 rather skeptical of turning every incident of kids
21 being mean to each other into a federal crime.

22 And certainly there are many cases where
23 it does rise to that level of abusiveness, but I'm
24 not sure that, you know, it's going to be productive
25 to spend the resources and time of the federal

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1 government in every situation you can imagine.

2 CHAIRMAN CASTRO: Thank you all, I
3 appreciate.

4 COMMISSIONER HERIOT: We have four
5 minutes left, right?

6 CHAIRMAN CASTRO: We have 2:42, is the
7 time we're stopping and that's what I have on my
8 watch here. But I will start with you at the next
9 panel.

10 So, thank you on behalf of the
11 Commission for being here and want to commend you on
12 all your work and look forward to continuing to see
13 your work.

14 We would ask the members of the next
15 panel to please begin to come to the front, while our
16 staff changes the nameplates. Thank you all.

17 **IV. FEDERAL/LOCAL ROLE IN BULLYING**

18 CHAIRMAN CASTRO: We are now turning to
19 our final panel of the day. This last panel shall
20 examine the issues of the role that the different
21 levels of government, both state and federal, should
22 have regarding the issue of bullying.

23 On this panel we have Tammy Aaberg, a
24 Parent Advocate; Francisco Negrón, General Counsel
25 for the National School Boards Association; Ken

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1 Trump, President of the National School Safety and
2 Security Services; Professor Eugene Volokh, of the
3 UCLA School of Law; and Deborah Lauter, Civil Rights
4 Director at the Anti-Defamation League.

5 As with the past panels, each panelist
6 will have seven minutes to make your presentation.
7 We have received your written statements and we've
8 reviewed them. They are part of the record, so don't
9 feel the need to finish through all your statements,
10 as you saw the prior panels.

11 There will be an opportunity for
12 interchange. We will have thereafter a discussion
13 period that will run until 4:25 p.m. We hope that
14 will be 55 minutes, but it may be a minute or so off,
15 depending on how long we can get through our
16 questions.

17 So, with that, I'd like to ask Ms.
18 Aaberg to please begin.

19 MS. AABERG: Good afternoon,
20 Commissioners. My name is Tammy Aaberg, and my
21 story, my son, Justin, died by suicide. I found
22 Justin hanging from his futon frame in his bedroom.

23 This was the most tragic day of our
24 lives and a traumatic vision that will never leave
25 our minds. Justin was 15 years old when he died and

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1 also happened to be born gay.

2 Justin was a wonderful very smiley kid,
3 who loved to play his cello and compose his own
4 songs. He loved his pet chinchillas and loved making
5 sand castles at the beach and laying out in the sun.

6 Soon after Justin took his life, his
7 friends began to describe what life at school was
8 like for Justin. One friend of his told me that in
9 eighth grade she saw him crying down the hallway and
10 the Counselor came out and they found out that, well,
11 at the time Justin didn't say anything, but then the
12 friend, he told a friend the next day what had
13 happened.

14 And when the Counselor called the friend
15 down, to ask what had happened to Justin, she said
16 things like this happen to gay kids all the time.
17 But this time it wasn't just mental, it was physical.

18 And the Counselor just said, you know,
19 thank you for telling me what happened, as Justin is
20 at the top of my worry list, and then just sent her
21 back to class.

22 And I never received a call that he was
23 upset the one day, and I never got a call to say
24 something had physically happened to my son.

25 I was very angry with the Counselor when

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1 I first found this out. But then students, staff
2 members, and parents began to describe how bad the
3 school climate was in the district for LGBT students,
4 as there's a policy in place which people refer to as
5 a neutrality policy, due to the neutral position
6 staff need to take regarding sexual orientation in
7 curriculum. Unfortunately this policy, which is call
8 the Sexual Orientation Curriculum Policy, confuses
9 teachers and staff and they feel like their hands are
10 tied, as they don't know what should or shouldn't be
11 considered neutral.

12 I believe this is what happened with the
13 Counselor. Once she heard the word gay, she didn't
14 ask Justin's friend any further questions and I never
15 received a phone call.

16 Also, the incident that had happened in
17 the hallway was actually also sexual harassment, so
18 if she would have, if the Counselor would have asked
19 the friend more details, she'd have found out that
20 these two boys had grabbed him in his genitals and,
21 actually the police, I believe, should have been
22 called.

23 In the months after Justin's death, I
24 learned more about the effects of the school
25 district's Sexual Orientation Curriculum Policy from

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1 many students, and also a few supportive staff who
2 noticed and felt the harmful school climate against
3 LGBT students.

4 I found out that this so-called
5 curriculum neutrality policy regarding sexual
6 orientation affected a lot more than just the
7 curriculum and is anything but neutral. I heard
8 tragic story after story of things that happen to
9 students that had nothing to do with curriculum.

10 Unfortunately, I found out too late that
11 we lived in a very homophobic area throughout most of
12 Justin's life. It's so sad that the misguided
13 intentions of some in the community have led to
14 policies that are harmful to the young people in the
15 school district who happened to be lesbian, gay, bi-
16 sexual or trans-gender.

17 Even now, eight months of me and others
18 in the community pleading with the school board in
19 the district Justin died in, to please get rid of the
20 harmful neutrality policy and to please get proper
21 training for teachers and staff regarding addressing
22 LGBT bullying and harassment, they still keep saying
23 that this is not a problem in their schools. Many
24 kids and staff members in the district know that this
25 is not true.

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1 Many reports were made regarding an
2 eighth-grade student who completed suicide by her
3 friends and some of the staff members who did grief
4 counseling for students after Justin died, know that
5 they submitted reports.

6 I'm here today not only to tell you of
7 my son's story, but also to make a plea to the
8 Commission to please consider helping to pass a
9 federal law that includes bullying and harassment for
10 all K-12 public schools across the entire country.

11 The law would definitely need to be an
12 enumerated law to include race, gender, sexual
13 orientation, gender identity, religion, socio-
14 economic status, and disability.

15 It is not right that kids in one part of
16 the country have laws that protect them more than
17 others. And some kids really have any protections at
18 all.

19 And if they do have a policy in place,
20 it is not enforced. I believe the federal government
21 should enforce that each school turn in a yearly
22 report of the incidences of bullying and harassment
23 being reported, to make the schools accountable.

24 I met other mothers across the country
25 that have lost children to suicide. In these cases

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1 many attempts were made by the parents to have the
2 schools do something about the harassment that their
3 child was going through, to only fall on deaf ears.

4 A few of these children include Asher
5 Brown, age 13 from Texas; Seth Walsh, age 13 from
6 California; Carl Hoover-Walker, age 11 from
7 Massachusetts. These children are dead, my son is
8 dead. Justin is gone from this earth and I will
9 never be able to give him a hug, see his smile, hear
10 his beautiful cello playing or tell him I love him,
11 because some people believed he deserved fewer
12 protections than others. All of these children and
13 too many others across the country all died too young
14 as a result of bullying and harassment.

15 They'll be forever missed by their
16 friends and family. Life for us will never be the
17 same again without them. The current level of
18 federal involvement in our schools is not sufficient.

19 I also want to mention that last night,
20 as I was getting ready for bed here in D.C., I got a
21 call from a teacher in the district that we lost
22 another student last night to suicide, an eighth
23 grader. Thank you.

24 CHAIRMAN CASTRO: Thank you. We can't
25 imagine what you're going through and we appreciate

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1 your being here and sharing this with us. Mr.
2 Negrón.

3 MR. NEGRÓN: Thank you, Chairman Castro,
4 Vice-Chairman Thernstrom and distinguished
5 Commissioners, good afternoon.

6 My name is Francisco Negrón, I'm the
7 General Counsel of the National School Boards
8 Association. The National School Boards Association
9 is the national organization of state associations of
10 school boards. I'm representing more than 90,000
11 local school board members throughout the United
12 States.

13 Collectively, we govern approximately
14 15,000 local school districts serving the nation's
15 46.5 million public school students.

16 Thank you for the opportunity to be a
17 part of the conversation on inter-student violence,
18 and to share with you a little bit about the
19 perspective of public school boards and school
20 districts.

21 Summed up into one sentence, that
22 perspective is that federal mandates are not the
23 solution, local leadership is.

24 Federalizing the response to bullying by
25 viewing it solely through the lens of federal civil

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1 rights legislation is, in fact, not the best
2 approach. Forty-five states have already addressed
3 the bullying question, passing state statutes,
4 requiring school districts to enact policies,
5 implement prevention measures and report incidents.

6 As a result, NSBA has expressed, as a
7 part of our conversation, our concern that the
8 Department of Education's Office for Civil Rights'
9 approach in their Dear Colleague Letter of October,
10 2010, is too broad. It confuses the legal standard
11 and may, in fact, invite litigation against school
12 districts.

13 OCR's position confuses the standards
14 between liability and enforcement, making it more
15 difficult for school officials to understand the
16 requirements of the law.

17 You know that, in 1999, the Supreme
18 Court ruled in *Davis v. Monroe* that schools could be
19 held liable, under Title IX, for student harassment
20 when the school has actual knowledge, but is
21 deliberately indifferent.

22 OCR now advises school officials could
23 be responsible if they reasonably should have known
24 about an incident of harassment. Additionally, OCR
25 says harassment creates a hostile environment which

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1 is a violation of the law, if it is severe, pervasive
2 or persistent, rather than the *Davis* standard
3 requiring that the harassment be severe, pervasive
4 and objectively offensive.

5 Even though OCR says that this is an
6 enforcement, an agency enforcement standard that's
7 been in play for several years, the confusion around
8 differing standards is spreading and it doesn't lie
9 solely with non-lawyer school officials.

10 Courts are starting to use the OCR
11 standard, granting the Department administrative
12 deference for guidance that has not the same weight
13 as officially promulgated rules under the
14 Administrative Procedures Act.

15 Just last month, in *T.K. v. New York*
16 *City Department of Education*, a federal district
17 court in New York relied on OCR's Dear Colleague
18 Letter, saying that the letter's illustrations, and
19 this is a quote, "of when a school is required to act
20 and what type of response is required," under the law
21 is "useful in applying the appropriate legal
22 standard."

23 The court then melds the *Davis* standard
24 on peer harassment with the OCR's standard to find
25 that the district was not entitled to summary

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1 judgment, upon its failure to provide the free and
2 appropriate public education.

3 Now this is not a money damages
4 situation under Title IX, but it suggests that some
5 courts are willing to apply the OCR standard more
6 broadly. It's too early to tell if a trend is
7 developing.

8 Our fear is that Plaintiffs' lawyers may
9 be emboldened by such an approach to pursue
10 litigation against schools. So let me be clear, it
11 is indeed crucial that school officials respond to
12 incidents of bullying and harassment swiftly and
13 appropriately. But nuanced legal distinctions can
14 create confusion that detracts from an understanding
15 of the requirements of the law and could have the
16 unwelcome effect of chilling educators' actions, for
17 fear of their own personal legal liability.

18 From a practical perspective, it could
19 mean that educators may be reluctant to resolve what
20 may be a routine issue of student discipline with the
21 least intensive, least intrusive, although perhaps
22 more effective approach, rather than risk a federal
23 lawsuit.

24 Lastly, one very real concern for
25 schools is the tension, as has already been

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1 identified, between student freedom of expression and
2 the regulation of a hostile environment.

3 Students do not leave their
4 constitutional free speech rights at the school house
5 gates, simply because their views are unpopular and
6 anti-majority.

7 In fact, even Justice Alito, when he was
8 on the Third Circuit, has said that harassing speech,
9 even in a school setting, is not categorically denied
10 First Amendment protection.

11 The challenge for schools, which OCR
12 does not address in its Dear Colleague Letter, is how
13 to regulate speech that may contribute to a hostile
14 environment without overstepping those constitutional
15 bounds.

16 Forcing schools to pick their poison
17 between threats of litigation for competing federal
18 rights is not the answer. At best, it's a quandary
19 for educators who are not jurists.

20 That bullying and harassment are
21 unacceptable in schools is clear. What is less clear
22 is that federal mandates are the solution. We
23 continue to support the call for research and data to
24 eradicate bullying and nurture positive learning
25 environments. Thank you.

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1 CHAIRMAN CASTRO: Thank you. Mr. Trump.

2 MR. TRUMP: Good afternoon. I bring to
3 you 25 years of experience in working with schools
4 and in schools on school safety issues. I also am a
5 father of two young children and member of a multi-
6 cultural family and one who has had bullying hit
7 home.

8 So I have personal experience as well as
9 front line experience. I'd like to touch on several
10 items that have come up during the course of the day.
11 First, the issue of the data.

12 There are serious gaps in federal data
13 on school violence, in general, and school bullying
14 specifically. The federal violence data relies on
15 half a dozen or so academic surveys that are very
16 limited in scope.

17 Data on bullying is also relatively new
18 and limited to academic research, organizationally
19 commissioned surveys, and various other limited data
20 sources, as far as the extent of bullying.

21 We have heard words such as bullying
22 epidemic, bullying crisis. When we see the headlines
23 in the media and cable and local news, the words
24 crisis and epidemic arrive very quickly, and I had a
25 Principal who shared with me earlier this week the

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1 concern that bullying has become such a broadly- used
2 term and buzz word, that it's really diluting the
3 real chronic bullying issues, to the point where he's
4 had teachers come in and say, Principals are
5 bullying.

6 Principals are saying teachers are
7 bullying. Parents saying everybody is bullying their
8 kid, and it's not perhaps, legitimate incidents are
9 not perhaps receiving the attention that they
10 deserve.

11 So we have to exercise caution while
12 not devaluing anyone's individual experience, but not
13 to also legislate by anecdote and have roller coaster
14 public policy and awareness in a broader issue of
15 school safety.

16 Related to that, bullying needs to be
17 viewed on a continuum and we have violence, we have,
18 a continuum that includes verbal disrespect, physical
19 aggression, fighting.

20 We have potential for school shootings,
21 preparedness for terrorist attacks on school, staff
22 suicide, student suicides, weather and natural
23 disasters, large-scale fights or riots, gang
24 violence, accidental gun discharges, non-custodial
25 parent issues, stranger danger in elementary schools,

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1 and the issues we face go on and on and on in that
2 continuum. So a bullying-alone approach or a gangs-
3 alone or school policing approach alone is not the
4 best. It requires a comprehensive and balanced
5 federal policy and funding in a comprehensive
6 approach at the school-based level.

7 Definitions of bullying in schools.
8 Most schools, the vast majority of schools, focus on
9 those behaviors that would constitute bullying with
10 threats, intimidation, assaults, harassment,
11 extortion, disruption of the school environment in
12 their school policies and the laws that have been
13 proposed at the state and federal level largely are
14 very vague and general and are very much open to
15 frivolous lawsuits, increased confusion within the
16 school community, and less focus on the behaviors of
17 bullying and more on personal characteristics of the
18 victims.

19 And we need to make sure that we're very
20 clear, so that those cases do occur that we have
21 language that is very specific focusing on bullying
22 behaviors.

23 We also have concern about the skewed
24 federal policy and funding, which has largely been
25 shifted almost exclusively to bullying alone. The

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1 school climate is important but we also have to have
2 a secure environment.

3 The child who is on his way to the
4 office to talk to the school psychologist is not
5 going to benefit if they have an unsafe and insecure
6 environment where he's beaten in the back hallway on
7 the way to the office.

8 So you have to have a secure environment
9 and a positive school climate. The two go hand in
10 hand and they're not separate and distinct.

11 We have eliminated, the Congress and the
12 Administration have eliminated, the federal Safe and
13 Drug Free Schools grant that helped the schools deal
14 with drug and violence prevention, security and other
15 issues. We've just eliminated the emergency planning
16 grant, the only K-12 school emergency planning grant.

17 We're focusing in a very skewed manner
18 on bullying. We need to make sure that we have
19 addressed bullying, but also as a part of a
20 comprehensive and balanced federal policy, as well as
21 local policies within the schools.

22 At the local level, an overemphasis on
23 bullying and an overreach by the Department of
24 Education is a concern of Administrators. I had a
25 school, a 36-year old veteran school Principal said

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1 earlier this week, quote, As an Administrator it
2 makes you gun shy to actually deal with the problem,
3 when you first have to think about whether your
4 decision will put you on the front page of the paper
5 or get you and your district in a law suit."

6 I also believe, as been said earlier,
7 that when there is that emphasis and fear of the
8 decision making at the local level with the
9 Principals, the Superintendents, when they become one
10 more on a political issue and the fear of lawsuits,
11 it takes away from dealing with the actually
12 incidents at hand, their ability to made good
13 decisions and it could increase the over-reaction
14 that we've heard under so-called zero tolerance
15 decisions that have been in the news where we all
16 shake our heads. So I think that the caution needs
17 to be viewed in terms of making sure that there's not
18 an overreach.

19 And we also need to look at mental
20 health issues. One of the things I was pleased to
21 hear this afternoon was the issue of mental health.
22 Dave Cullen and Dr. Peter Langman, in a 10-year post-
23 Columbine study, found mental health issues, not
24 bullying, were the primary actions behind many school
25 shooters.

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1 We also know that the American
2 Foundation for Suicide Prevention cites that 90
3 percent of all people who died by suicide, had
4 diagnosable psychiatric mental health issues, and
5 that we have not fairly given the great deal of
6 attention to the mental health needs of children.

7 One father of a student who committed
8 suicide in our area in Ohio said the bullying
9 actually pushed his child over the hill, but mental
10 health and family stress issues pushed him up the
11 hill.

12 So we need, when we look at this, we
13 need to look at the suicides, the mental health needs
14 of children, as well. But I believe that we can take
15 a comprehensive approach at the local school level,
16 by dealing with bullying in five areas, supervision
17 and security, and hot spots where it occurs,
18 effective firm, fair and consistent discipline in
19 classroom management, use of the criminal law.

20 I was amazed that the Philadelphia case
21 did not involve any type of law enforcement
22 interaction for assault, as well as civil law, which
23 I can assure you does occur.

24 I get calls from attorneys for expert
25 witness work every week. School climate strategies,

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1 mental health support for students and effective
2 communication plans.

3 I encourage the Commission to focus it's
4 recommendations on the tools available to local
5 schools, supporting the roles of school
6 administrators as the lead persons responsible for
7 local discipline and climate issues, and to make
8 recommendations, most of all, that are practical,
9 day-to-day implications for schools in consideration
10 of the broader social, political and special interest
11 issues that we've heard about all day today. Thank
12 you, Mr. Chairman.

13 CHAIRMAN CASTRO: Thank you. Mr.
14 Volokh.

15 MR. VOLOKH: Thank you, thank you very
16 much for having me here. I specialize in First
17 Amendment law so that's what I'm going to talk about.

18 There are lots of other important issues
19 here;, I just don't have much to say about them. I
20 won't speak to the federalism questions, I won't
21 speak to educational policy, nor will I speak to the
22 questions of the proper way of dealing with violence
23 and threats of violence, which are clearly
24 unprotected by the First Amendment.

25 I've heard many people at both tables,

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1 earlier today, say that really this is not a First
2 Amendment issue. Everybody agrees that the First
3 Amendment should be respected, but these proposals
4 don't really materially impact the First Amendment.

5 I wish that were true, but it seems to
6 me that if you look at what the actual material —
7 for example, the Dear Colleague Letter from the
8 Department of Education — says, it really is in
9 considerable measure about speech. That what is
10 labeled bullying and harassment are capacious enough
11 to include speech, including speech that is protected
12 by the First Amendment, and my question is what to do
13 about it.

14 For example, if you look at the Dear
15 Colleague Letter, it specifically talks about how
16 harassment was defined to include verbal acts.
17 That's lawyer speak for speech or statements.

18 In fact, it specifically says graphic
19 and visual statements. It expressly says that
20 harassment needn't, that speech in order to be
21 harassment need not be limited to speech at a
22 specific target.

23 So it's not limited to personal insults
24 that go to a particular person. It could include
25 general statements, such as condemnation of

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1 homosexuality, of particular religions and the like.

2 The letter specifically refers to
3 creating emails or web sites as a possible vehicle
4 for what would be actionable harassment. Posting to
5 social networking sites is another example.

6 We heard Assistant Secretary Ali
7 specifically echo that in an answer to a question
8 this morning. So what we're talking about is a broad
9 vision of what is punishable harassment and so-called
10 bullying.

11 The definitions are broad enough,
12 capacious enough, not just to cover speech, but to
13 cover speech 24-7. We're not talking about
14 restrictions that are premised on some notion —
15 which indeed the Court has rejected — that free
16 speech stops at the school house gate.

17 There is no more school house gate.
18 Perhaps in part because of technology, it's true that
19 speech that is created outside school can certainly
20 affect the environment in school and can even be seen
21 in school on people's smart phones and computers in
22 the lab and so on and so forth.

23 But, despite that, the reality is that
24 the vision expressed is — as the Dear Colleague
25 Letter suggests — that the students should be

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1 punishable for speech throughout the entirety of
2 their school lives, including perhaps their early
3 adulthood.

4 Many high school students are actually
5 18 by the time they graduate. Now, what kind of
6 speech is punished. As I said, it's not just speech
7 that sets a specific target.

8 Nor is it limited to personal insults
9 more broadly. It covers for example, gossip. So,
10 the letter talks about rumors about sexual behavior
11 — that's often cruel and crude, that's gossip,
12 that's the kind of behavior that most adults engage
13 in, (though I hope at a less vulgar level than some
14 teenagers do.) But according to the letter, say
15 somebody spreads sexual rumors, which is to say, and
16 says, oh, I heard so and so is in a relationship with
17 this and such. Post it, save it to their Facebook
18 page or send an email about it, that could be
19 actionable harassment. Or at least could become part
20 of that actual harassment if it is decided that it's
21 severe, persistent or pervasive.

22 Another example from Ms. Graves'
23 testimony from earlier, the written testimony from
24 earlier today, had to do with Facebook insults of a
25 pregnant student. Now, I'm certainly not in favor of

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1 insulting mothers, pregnant or otherwise, but it is
2 also the sort of thing that, if somebody decides that
3 they want to express their views about a classmate —
4 they think that the pregnancy is a sign of
5 irresponsibility or sexual promiscuity or whatever
6 else — I would think that that's constitutionally
7 protected speech.

8 Now if this were just limited to in-
9 school statements — you can't talk about it at
10 school — I could understand that, although even that
11 might be going too far. But we're talking here
12 about, specifically, things that are posted online.

13 So, again, this is an attempt at 24-7
14 control of student speech. And it may cover
15 criticism of religion, homosexuality and so on and so
16 forth because of the theory that that creates a
17 severe, pervasive or persistent enough to create an
18 offensive environment or an abusive environment for
19 the student — again, whether the speech is on campus
20 or off campus.

21 The NEA — there's available outside the
22 room a report of the NEA, a nationwide study of
23 bullying. Their definition of bullying, which yields
24 some of the high percentages they find for bullying,
25 includes 'sexist remarks' and 'social/relational

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1 bullying.'

2 Professor Meyer's presentation earlier
3 today, I think, was very interesting. It was largely
4 focused on violence, far outside my context, except
5 that I think all of us condemn that kind of violence.
6 But one of the things that he did note is that one of
7 the dangers to the mental health of gay students is
8 anti-gay stigma and prejudice. I think that's
9 probably right, but the consequence of that is that
10 if you take that logic seriously, then again speech,
11 whether on campus or off campus, that expresses and
12 contributes to the stigma of prejudice would be
13 punishable.

14 The university cases — all of which have
15 come out in favor of First Amendment protection, but
16 after a lot of litigation — university cases
17 likewise have made clear that harassment and hostile
18 environment in the eyes of administrators is often
19 defined broadly enough to cover this very kind of
20 speech including political, religious and social
21 commentary.

22 Now one thing that I think is quite
23 correct from what the OCR said, is that the federal
24 government only goes after the most egregious conduct
25 and usually focused in violence.

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1 But it does, this in part because
2 there's such limited staff, that it only goes for the
3 worst thing, correctly so.

4 But the OCR also seeks school policies
5 that are much broader than the particular cases that
6 are the most egregious cases that they did prosecute.
7 And, in fact, we heard Ms. Samuels note that we urge
8 schools to nip these problems in the bud, before they
9 become so egregious. So you put all this together
10 and it seems to me there's a hard to deny potential
11 First Amendment problem.

12 Now, I think schools have some latitude,
13 both to punish threats, and also to punish certain
14 kind of vulgarities under the *Frasier* decision, As
15 well as certain kind of speech that shows an imminent
16 likelihood of substantial material disruption, from
17 fights and the like.

18 So there is some flexibility, but that
19 flexibility is not unlimited, especially once you get
20 to what a lot of people are talking about — cyber-
21 bullying, for example, or control of off-campus
22 speech, as well as on-campus speech controls. This
23 goes far outside the schoolhouse gate and amounts to
24 an attempt to control the expression, both the
25 personal views and religious and political views of

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1 children throughout the entirety of their school
2 lives, on campus and off.

3 CHAIRMAN CASTRO: Thank you, Professor
4 Volokh.

5 Ms. Lauter.

6 MS. LAUTER: Thank you. Good afternoon.
7 I'm Deborah Lauter. I'm the Civil Rights Director of
8 the Anti-Defamation League.

9 Before giving my formal remarks, I just
10 was so moved by Ms. Aaberg's presentation. I just
11 want to offer my condolences and commend you for what
12 you're doing to raise your voice so that others won't
13 have to go through the same thing.

14 MS. AABERG: Thank you.

15 MS. LAUTER: The Commission needs to be
16 commended as well for addressing this important
17 subject of bullying, violence and harassment, and I
18 greatly appreciate the opportunity to testify here
19 today and with our written submission. It's been a
20 very long day.

21 And for those of us on this last panel,
22 we very much appreciate, Chairman Castro, your
23 attention to timing so that we can get out on time at
24 the end of the day. And I harken back to when you
25 said you hope that this provides a model for

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1 civility, and I think that's been very successful.
2 At least we haven't gotten to the questions on our
3 panel. But so far so good.

4 I hope that you're all familiar with
5 the Anti-Defamation League. We're one of the oldest
6 civil rights and human relations organizations in the
7 country. We were founded in 1913. And our goal and
8 our mission is to fight anti-Semitism and all forms
9 of hatred, prejudice and bigotry. And we advance
10 interfaith and intergroup relations.

11 Our strength is in our combination of
12 talented education and legal professionals. We're
13 headquartered in New York and we have 28 regional
14 offices around the country. Over the past 30 years,
15 we have emerged as one of the principal national
16 resources addressing prejudice and violent bigotry.

17 I'm actually here with my colleague,
18 Michael Lieberman, who is considered one of the
19 foremost experts on hate violence in America today.

20 Through our award-winning anti-bias
21 education programs known as a "A World of
22 Difference," we estimate we've impacted close to 37
23 million students and educators. And over the past
24 decade we have built upon our training initiatives to
25 craft innovative programs to address bullying and the

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1 pernicious new form of harassment affecting children
2 and students known as cyberbullying.

3 Working to create safe, inclusive
4 schools and communities is one of ADL's top
5 priorities. We take a very broad, holistic approach
6 to addressing the problem. We track the nature and
7 magnitude of the problem. We develop education and
8 training programs for students, for parents, for
9 educators. And we advocate at the state and the
10 federal level for policies and programs that we feel
11 can make a difference.

12 We believe the federal government, in
13 partnership with state and local public agencies,
14 nonprofits, community organizations, colleges and
15 universitie,s and media companies can all play a
16 critical role in ensuring that our schools and our
17 communities are safe places for all students. I know
18 there's been a lot of discussion about what's the
19 federal role. For us, the comprehensive approach is
20 what's best. We all have a stake in addressing this
21 problem.

22 Laws and appropriate inclusive school-
23 based policies can be a focal point for addressing
24 bullying. But education, training, and community
25 involvement are necessary complements to any

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1 effective response.

2 It's critical that government officials
3 and civic leaders ensure that schools help foster a
4 culture in which bias and bullying are not tolerated
5 and are safe places for our students. We're very
6 pleased that the Obama Administration has
7 demonstrated extraordinary commitment to addressing
8 bullying and cyberbullying in a comprehensive and
9 inclusive manner.

10 We believe the OCR's October 26th Dear
11 Colleague guidelines represent a significant step
12 forward in protecting students from bigotry and from
13 harassment. For us the guidance accomplished three
14 major things.

15 First, it provides an unprecedented,
16 inclusive description of the breadth of existing
17 federal anti-discrimination laws and their
18 application to both K-12 schools and to colleges and
19 universities.

20 They explicitly set out a school's duty
21 to address incidents of discriminatory harassment and
22 stress that it's not enough for the institution to
23 punish the student who is responsible. Instead the
24 school administration must address the environment
25 and the effect of the incident and take steps to

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1 ensure the harassment does not recur.

2 Second, the OCR guidance makes clear
3 that anti-Semitic harassment can be prohibited by
4 Title 6, as Mr. Marcus testified. And in March I
5 want you to know that the ADL, along with 12 other
6 national Jewish organizations, wrote to Secretary of
7 Education Duncan calling for this clarification and
8 that the guidance states that Title 6 protects Jewish
9 students from anti-Semitism "on the basis of actual
10 or perceived shared ancestry or ethnic
11 characteristics."

12 This clarification is particularly
13 welcome in conjunction with ADL's continuing work to
14 combat anti-Semitic bullying, harassment and bigotry
15 in schools and college campuses, including in some
16 instances anti-Semitic intimidation of pro-Israel
17 activists.

18 Third, the guidance underscored that
19 harassment based on sexual orientation and gender
20 identity in schools and on campus is prohibited by
21 federal civil rights law. According to the OCR
22 guidance, Title IX does protect all students
23 including lesbian, gay, bisexual and transgender
24 students from sex discrimination. This is a very
25 welcome development.

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1 The ADL responds to bias, bullying and
2 cyberbullying through a combination of education and
3 legislative advocacy. As I said, on the federal
4 level, on the state level and in schools, we do not
5 support the criminalization of bullying. Instead we
6 have promoted laws that require schools to adopt
7 policies that are inclusive and comprehensive —
8 balancing a school's duty to maintain a safe learning
9 environment with students' constitutional rights.

10 Two years ago, we developed a model
11 bullying prevention law for states. I have a pretty
12 copy here. I think we have a copy in your packets.
13 And we've been organizing and leading coalitions
14 advocating for its passage, with recent successes in
15 Florida, Massachusetts, and New Jersey.

16 The question was raised earlier, "Why
17 are we seeing this explosion?" And I think we
18 haven't really focused on this and I hope the
19 Commission will. I think we see the explosion of
20 what's happening in schools today for a combination
21 of reasons. Some are because of the whole nature of
22 social networking sites and the way kids are
23 communicating.

24 I think we can't discount what's
25 happening with cable, the change from TV stations and

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1 in the good old days when we had three stations and
2 they were pretty neutral. Today what kids are
3 witnessing on cable stations, either through reality
4 shows where civility is broken down, or shows like
5 South Park -- that was mentioned earlier -- that has
6 satirical humor that may not be appreciated by kids,
7 and the ones who even do the "Kick a Jew Day" which
8 is a problem and we have been dealing with it at ADL.

9 And also the news media. The news media
10 yelling over each other. Kids learn what they live
11 and I think these are areas.

12 For us, one of the key partnerships that
13 we need to engage with are these media companies.
14 We've been partnering with Cartoon Network, MTV,
15 Nickelodeon, Microsoft and AT&T. And we salute these
16 companies' dedication to this problem. They've
17 acknowledged it and they're trying to work with
18 groups such as ours to fix it.

19 We also led a recent effort to promote
20 the adoption of a thoughtful and inclusive American
21 Bar Association resolution and report on bullying.
22 They approved it in February and it basically put the
23 ABA on record for the first time in support of
24 federal and state policies and laws designed to
25 prevent bullying --

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1 CHAIRMAN CASTRO: Thank you, Ms. Lauter.

2 As I promised, our first question will
3 go to Commissioner Heriot. I take it you have a
4 question.

5 COMMISSIONER HERIOT: I do. Thank you.

6 CHAIRMAN CASTRO: Okay. And will be
7 followed by Commissioner Yaki, Commissioner Kirsanow,
8 and Commissioner Achtenberg.

9 COMMISSIONER HERIOT: First, I want to
10 offer my condolences.

11 MS. AABERG: Thank you.

12 COMMISSIONER HERIOT: I want to thank
13 all the panelists for their presentations. This is
14 very helpful.

15 My question, however, is specifically
16 for Mr. Negron. When the Department of Education
17 explains its bullying policies, and when other
18 advocates explain those policies, I've heard two
19 different characterizations that I think are very
20 much in contention. On the one hand, we've heard the
21 Department of Education's actions are historic and
22 important and they are addressing the crisis and one
23 that has been allowed to get out of hand. And on the
24 other hand, at times we've been told the Department
25 of Education's actions really haven't changed

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1 anything. They are basically just reiterating what
2 they said in the past. And the law is just the same.

3 I understand why folks might be looking
4 at it both ways. And on the one hand, while the
5 Department has authority to issue regulations under
6 Title IX and under Title VI when they do that they
7 have to get Presidential approval. And that's a real
8 cumbersome procedure for them. So I can see why
9 they're not big on doing it.

10 On the other hand, everybody likes to
11 think that what they're doing is important. And
12 bullying certainly is an important issue. My
13 question for you, Mr. Negron, is to your members,
14 that is, school boards all over the country, I
15 assume. Is that right?

16 MR. NEGRON: That is correct. Yes.

17 COMMISSIONER HERIOT: Do they feel that
18 they have a good handle on what the Department of
19 Education is asking them to do?

20 MR. NEGRON: First, let me tell you
21 that, in addition to the school board members, we
22 also represent 3,000 school lawyers across the
23 country through the Council of School Attorneys who
24 joined in our response to the Dear Colleague Letter.
25 I think the concerns that the school lawyers have and

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1 that the school board members have and that NSBA has
2 really arise from the implementation side of what
3 OCR's letter has done.

4 One of the things that I spoke about
5 very briefly was the whole question of a chilling
6 effect on educators to institute the least intrusive
7 approach to solving a question. And one of the
8 things that the OCR has done that is just slightly
9 different is set out a variety of examples that are
10 meant to be instructive to school districts about
11 what they can and can't do.

12 Just to illustrate, one example is the
13 whole approach they use around gender discrimination.
14 And what the Department seems to be suggesting, even
15 though they very clearly state that, for instance,
16 sexual orientation discrimination is not covered
17 under Title IX, we know that some courts have said
18 that it is, depending on the circumstances. But
19 their enforcement standard is very clear.

20 And what we think is a problem is that a
21 school district may adopt, for instance, a more
22 strict enforcement standard following the guidelines
23 and then somehow adopt for itself some sort of legal
24 liability. So, for instance, if a school district
25 decides that it's going to use the enforcement

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1 standard and include sexual orientation as a
2 protected classification -- and by the way, most
3 school districts already have that as a protected
4 classification - but if they go that one step further
5 and then equate that with gender discrimination, are
6 they somehow now waiving a potential dispense under
7 Title IX lawsuit, for instance?

8 So these are the kinds of difficulties,
9 from a legal perspective, that school districts have.

10 COMMISSIONER HERIOT: Thank you.

11 CHAIRMAN CASTRO: Commissioner Yaki.

12 COMMISSIONER YAKI: Thank you very much,
13 Mr. Chair. This question, first of all, I want to
14 say, Ms. Aaberg, thank you very much for coming here.
15 Thank you for your courage, for sharing the pictures
16 of your son with us, which paints a face to what
17 we're talking about here today. My question is for
18 Mr. Negrón, but if you have anything you want to add
19 I want you to feel free to join in.

20 Mr. Negrón, I'm going to be as civil as
21 I possibly can. But it just seemed to me very
22 difficult for me to listen to your testimony talking
23 about the fear of lawsuits and plaintiffs' lawyers,
24 when you're talking about sitting next to someone who
25 lost their son because of a loss of leadership at the

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1 local level. Here you have a situation where the
2 local school board/school district failed. They
3 failed in protecting. They failed in notifying.
4 They utterly failed when it came to her.

5 And to talk about plaintiffs' lawyers
6 and whatever is essentially saying, "Well, you know
7 there's a price we have to pay and there's some cost
8 benefit analysis that we have to do when it comes to
9 how much a child's life is." At least that's the way
10 it came to me. I know that's not what you meant, but
11 certainly the way it came out.

12 So my question to you is, you talk about
13 the fact that there should be no federal mandates
14 because there should be local leadership. How do you
15 explain to Ms. Aaberg? How do you explain to others?
16 And how do you explain, five years from now when the
17 school district has changed, when new leadership has
18 come in and this just may be a memory to them? How
19 do you explain to them what happened to Ms. Aaberg
20 and why there shouldn't be any federal mandates?

21 MR. NEGRON: Sure. And thank you for
22 the opportunity to clarify that. Certainly my
23 remarks aren't meant in any fashion to disrespect the
24 personal tragedy of Ms. Aaberg.

25 School districts are concerned about

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1 bullying. They're concerned about the tragic loss of
2 students. And so my condolences to Ms. Aaberg.

3 But I would tell you that school
4 districts do have a responsibility to educate all
5 students. And I think it's important that this
6 Commission understand that litigation defense dollars
7 are important. It may seem callous in the light of
8 the realities and tragedies that happen.

9 But every dollar, by and large, that is
10 spent on litigation generally comes from general
11 revenue dollars. And general revenue dollars are
12 classroom dollars. So, depending on the size of the
13 district, we're talking about dollars that could be
14 spent in the classroom to educate all of our
15 students.

16 One of the missions of school boards and
17 school districts is to ensure that the environments
18 in which students learn are safe. But those
19 environments could not exist without funds.

20 So it's not meant disrespectfully,
21 Commissioner. It's meant as a very real recognition
22 of the realities that face our school.

23 COMMISSIONER YAKI: Answer my question
24 about the loss of leadership in this instance.

25 MR. NEGRON: I don't represent that

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1 school district individually and I can't respond to
2 the loss.

3 COMMISSIONER YAKI: But you are
4 representing the school district. You're saying that
5 you want local leadership. But they failed here.

6 MR. NEGRON: Right.

7 COMMISSIONER YAKI: So why do you want
8 local leadership?

9 MR. NEGRON: I think that, by and large,
10 I mean there's always an exception to every case.
11 And, by and large, school districts care about what
12 happens to their students. Just because there may
13 have been a particular lack of leadership in one
14 situation or a policy that didn't work, doesn't mean
15 that we should therefore assume from that that all
16 school boards are without leadership. That's the way
17 that democracy functions, sir.

18 MS. AABERG: I want to add that locally
19 speaking of which, I grew up in Minneapolis and there
20 wasn't a whole lot of problems with diversity — I
21 grew up, I was used to it and everything. And right
22 now Minneapolis has the best bullying policy that I
23 can even think of.

24 I also just moved over one school
25 district over. I have an eight-year-old. And this

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1 school district, when I'm asking for -- I had been
2 asking Anoka-Hennepin for eight months now to please
3 offer training to their staff. And they said they
4 did provide training to their staff.

5 I said, "Well, I would like to know what
6 you did." And they mailed me a 12-page PowerPoint.

7 Whereas, just five miles away the school
8 district I'm in now, so far this year they've already
9 had, every other month they provide four hours of
10 teacher training in different aspects of bullying. I
11 went to one when they did the LGBT. And the lawyer
12 even described to all the staff what the policy
13 meant.

14 So for local involvement, a couple years
15 ago Governor Pawlenty was going to sign a bill of
16 Safe Schools for All. There were -- I guess there
17 was a lot of suicides back then. Well, the suicides
18 slowed down and even though other people that were
19 trying to pass the bill changed so many things about
20 it he ended up denying it or vetoing it. And now how
21 many more kids have died. I wonder, if this Safe
22 Schools for All in Minnesota bill would have passed
23 for the whole state, would my son still be here
24 today.

25 So in Minnesota, and I know down in

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1 Texas and over in California, there are so many — I
2 mean, with all the kids around the country coming to
3 me and telling me what's going on in their district,
4 obviously local involvement is not working.

5 CHAIRMAN CASTRO: The Chair recognizes
6 Commissioner Kirsanow.

7 COMMISSIONER KIRSANOW: Thank you, Mr.
8 Chairman. And thank you to all the panelists. It's
9 been very educational. And my condolences to Ms.
10 Aaberg. My question is for, I think, Mr. Negron. I
11 was going to -- Mr. Trump can jump in if he wants to.

12 An earlier panel and I don't know if you
13 were in the room, Ms. Gym testified about the South
14 Philly school district. It was an extraordinary
15 situation that the Commission has been very
16 interested in for a while. And many of the incidents
17 there were incidents that I considered to be criminal
18 conduct. Yet, at least according to Ms. Gym, there
19 was no discipline of any staff members. Maybe she
20 doesn't know all of the circumstances. But no
21 counselor, no principal, no vice principal, no
22 superintendent, no one was disciplined, not even a
23 written warning maybe.

24 Then she testified also that a complaint
25 was filed with OCR -- I'm sorry -- with the

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1 Department of Justice on January 19th. And then at
2 the end of February the Department of Justice showed
3 up.

4 And they have rules. And there should
5 be certain rules. But it strikes me that those rules
6 would be ineffective in that interim six-week period
7 where kids were getting beat up, heads beaten, hair
8 pulled and people being dragged down stairs. Yet no
9 one was disciplined.

10 And I'm wondering. You know, here we
11 are in Washington, and a right to write rules and get
12 the lawyers involved, and those things are
13 appropriate. But in terms of the immediate
14 prevention of this kind of conduct, it strikes me
15 that that's something that a principal, a teacher, a
16 counselor, a security guard should be involved in.
17 What are the things that constrain schools from
18 taking immediate action, exercising some form of
19 accountability at those principal actors right there,
20 on the ground as they say, who can prevent the
21 conduct in the first instance?

22 MR. NEGRON: Thank you for the question.
23 I wasn't in the room when that conversation was had.
24 So I'm just going to speak from a theoretical
25 approach. But my guess is that part of the reason

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1 that you don't know if any employees or any staffers
2 were disciplined is because there might be a
3 collective bargaining agreement in place. There
4 might be some sort of public service laws that keep
5 employee discipline matters private or confidential
6 at least until there's the end of that proceeding.
7 And that may be what the district is undergoing now.

8 So I would be speculating that those
9 collective bargaining agreements or that those rules
10 that might exist might have prevented some sort of
11 employee action. I would hope that that is not the
12 case.

13 Part of what we are concerned at the
14 National School Boards Association is that educators
15 be able to act when they need to act. If a policy is
16 not a good policy -- and I'm not familiar with the
17 neutrality policy that was discussed earlier -- but
18 that policy didn't seem to work, did it?

19 And so I think the first thing we need
20 to do is make sure that our policies empower
21 educators, that educators know that they have the
22 ability to act, to correct whatever situation comes
23 before them, whether it's bullying or harassment.
24 But also we need to not chill their ability to do
25 that. We need teachers not to believe that there

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1 will be an impending federal lawsuit if they do not
2 treat a specific set of circumstances as a federal
3 civil rights violation.

4 Courts have said -- a court out of the
5 6th Circuit, for instance, to use the scenario that
6 has been discussed about sexual orientation, that
7 sometimes adolescents simply engage in harassing
8 behavior that doesn't necessarily equate, for
9 instance, to a protected category under federal civil
10 rights legislation. And so therefore teachers need
11 the ability -- educators, principals, as you
12 mentioned, need the ability to make those decisions
13 on the ground, resolve it as least intrusively as
14 possible if that's what's called for.

15 CHAIRMAN CASTRO: The Chair recognizes
16 Commissioner Achtenberg.

17 VICE CHAIR THERNSTROM: I think Mr.
18 Trump wants to respond.

19 CHAIRMAN CASTRO: I'm sorry.

20 MR. TRUMP: I'll keep it brief.

21 CHAIRMAN CASTRO: I'm sorry.

22 MR. TRUMP: Thank you. I did hear Ms.
23 Gym's response and I heard that a lot of the things
24 that Justice ordered including training and various
25 mediation and components for students and staff. I

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1 would be curious, and I don't know the answer to this
2 in that case. Did they also address the issue of why
3 the school district or whoever did not make a
4 complaint for assault? We heard assault. And if
5 not, I'm just curious as to how a federal
6 intervention by the Justice Department could bypass
7 what you raised earlier about the lack of engagement
8 of law enforcement on the criminal end on the
9 assault.

10 CHAIRMAN CASTRO: All right. Now we'll
11 move on to Commissioner Achtenberg, who will be
12 followed by Commissioners Titus, Gaziano, Chair
13 Castro and Commissioner Heriot.

14 COMMISSIONER ACHTENBERG: [inaudible
15 portion] Thank you, Mr. Chairman.

16 Ms. Aaberg, as a mother of a dearly
17 beloved son myself, I can only thank you for offering
18 your wisdom to this body as we discuss this very
19 important national issue as it pertains to all
20 children.

21 My question is directed at Ms. Lauter.
22 I want to preface it by saying I have enormous
23 respect for the ongoing and many-decades-long work of
24 the Anti-Defamation League on combating bias in every
25 form. And I understand you have a great deal of

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1 expertise in that regard, your organization, that
2 you've been willing to share with many communities.
3 And I want to thank you for that.

4 I have in front of me more than 75
5 letters and declarations from parents and students
6 about the misery that sometimes led to enormous
7 physical violence, sometimes led to suicides in some
8 cases, often led to deteriorating physical condition
9 or mental health that emanated from pervasive
10 harassment and bullying. In some cases as young
11 people, people were spit on, taunted, punched, hair
12 pulled, genitals grabbed. Vicious assaults and
13 vicious taunting were leveled in many cases.

14 Does that description surprise you?
15 Does it comport with some of the things that you and
16 your organization are seeing as you undertake this
17 effort to combat bullying and discrimination in
18 various forms? Or does it seem sort of out of whack
19 with what you're seeing on the ground?

20 MS. LAUTER: Yes, sadly I have to say it
21 comports with what we're seeing. And it affects --
22 It's not confined to any geographic region in the
23 country. It's not confined to schools that are
24 having diversity issues in itself. The bullying
25 issue can happen almost in any school including

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1 private schools that you would think are free of
2 bigotry or whatnot.

3 We get reports from — I got an email
4 from a friend in Atlanta whose daughter attends a
5 private Christian school, one of the best in the
6 Atlanta area, sharing the cyberbully messages she was
7 getting because she was Jewish. So it's everywhere,
8 unfortunately.

9 If you don't mind, I want to comment and
10 follow up on Ms. Aaberg's comments about the
11 standards in a state. In our testimony we present
12 this, and I hope you do take a look at it, we charted
13 all the state anti-bullying statutes. We've been
14 referring all day to the 45 states that have it. And
15 we think this is a good thing.

16 But what we did is we charted exactly
17 what is in each of those states. So as she was
18 commenting, I looked up what Minnesota's state law is
19 and these are elements that we would look for and we
20 put into our model statute, what we'd like to see in
21 a comprehensive state.

22 In Minnesota they do have a district
23 policy. They do not have a model policy. They do
24 not have a -- Oh, I take that back. They do have
25 cyberbullying mentioned in their policy. They don't

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1 have enumerated categories. So there is no clear
2 signal of what is covered.

3 They do not have any procedures for
4 reporting. They do not have any notification
5 processes for parents. So parents won't even know
6 that there's a policy there. There is no requirement
7 for training. So administrators, educators, don't
8 have to do it. And there's no accountability or
9 reporting, which is a key component for us. How do
10 we know that what's happening is being reported? How
11 can this body do a better job? We need data
12 collection. We need an analysis of how widespread.

13 And so that's why for us this
14 combination of having state laws as well as the
15 federal government doing the big picture would be
16 enormously helpful to advance this. Thank you.

17 CHAIRMAN CASTRO: The Chair recognizes
18 Commissioner Titus.

19 COMMISSIONER TITUS: Thank you, Mr.
20 Chairman. Since this is our last panel and our last
21 chance to speak, I'm going to just sum up a couple of
22 things.

23 I heard a lot of references to we don't
24 need the federal government. We need to leave it at
25 the local level. And yet that ignores the testimony

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1 we heard this morning from the Justice Department,
2 where they said and showed evidence of how to solve
3 this problem. They work with local school districts.
4 It's not something imposed, but something that comes
5 about collaboratively.

6 I've also heard we don't need the
7 federal government. We should leave it to the local
8 government to set their own policy. And yet there's
9 been no mention of any mechanism of enforcement. You
10 can set a policy. But then if you don't carry it out
11 what good is it? If you don't have some hammer
12 coming down, perhaps from the federal government,
13 nobody said what else you're going to have as an
14 alternative.

15 Third, I've heard a lot about the
16 chilling effect of having a policy from the federal
17 level. And I think you, Mr. Negron, said that school
18 teachers or principals are reluctant to enforce it
19 because I think your quote was "they don't want to
20 see themselves on the front page of the paper."
21 Well, better on the front page than on the obituary
22 page.

23 Finally, a question I have for the
24 professor. You talk a lot about the Dear Colleague
25 Letter and how that's made this more of a First

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1 Amendment issue, 24/7, all kinds of speech. But you
2 don't mention the *Morse v. Frederick* case and how
3 that might have some implications for this because
4 it's more restrictive of speech school than the
5 *Tinker* case. Would you elaborate on that for us?

6 MR. VOLOKH: Sure. So *Morse v.*
7 *Frederick* was a decision several years ago, five-four
8 with a very important concurring opinion, that dealt
9 with speech that the Court interpreted -- probably
10 correctly -- as pro-drug speech at a school function.
11 And what the Court said is, in addition to the
12 exceptions that are recognized for speech -- an
13 exception for vulgarities in *Frasier* and an exception
14 for speech where there was a substantial likelihood
15 of material disruption in the *Tinker* case -- there's
16 another exception for advocacy of drugs at school.

17 It's not clear whether that's the right
18 answer, but that is the majority ruling that was
19 substantially -- that two Justices, Justices Alito
20 and Kennedy, made clear was narrow and limited to
21 speech that did not have a political dimension. They
22 interpreted that particular statement as being
23 entirely apolitical.

24 So *Morse v. Frederick* does -- I mean
25 what we do know is, when it comes to speech that

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1 essentially advocates illegal conduct or is seen as
2 advocating illegal conduct (which is to say drug use)
3 at school, and that is not political, that forms
4 another First Amendment exception.

5 I'm not sure that supports the Dear
6 Colleague Letter much. If the Dear Colleague Letter
7 had been limited, for example, to speech that
8 advocates violence at school in a nonpolitical
9 context, then perhaps the analogy would be quite
10 close.

11 But it is not limited to either of those
12 respects. The Dear Colleague Letter sets up a
13 standard that is by no means limited to advocacy of
14 violence or drugs and the like. It includes just
15 insulting speech and such. It is not limited to
16 speech that is at school. Nor does it have any
17 exception for speech that might have a political or
18 religious dimension. Just doesn't mention that at
19 all.

20 So I think *Fraser* and *Tinker* are
21 potentially relevant more broadly. But *Morse v.*
22 *Frederick*, I think, has very narrow relevance in the
23 material.

24 COMMISSIONER TITUS: But harassment is
25 illegal and it does also mention restricting off-

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1 campus speech, I do recall. But that's all right. I
2 would just conclude by saying I think you're very
3 brave. And I think your son would be very proud of
4 you.

5 MR. VOLOKH: Thank you. I'm sorry. If
6 I could just respond. Harassment, you say harassment
7 is illegal. Justice Alito -- then Judge Alito --
8 made clear there's no harassment exception of the
9 First Amendment. Speech cannot be made illegal, and
10 therefore stripped from constitutional protection, by
11 simply having a statute or having interpretative
12 regulations. What was going on in *Morse v. Frederick*
13 was advocacy of conduct -- not of speech that is
14 illegal, but of conduct that is illegal. And the
15 Court said that that is actually -- I don't think
16 that that helps much to support or challenge a
17 restriction of harassment.

18 COMMISSIONER TITUS: Thank you.

19 CHAIRMAN CASTRO: The Chair recognizes
20 Commissioner Gaziano.

21 COMMISSIONER GAZIANO: Thank you and I
22 thank all the panel again. But I have to choose and
23 I choose Professor Volokh on this instance. And I
24 wanted to -- Earlier my earlier questions were
25 related to why I thought that federal government's

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1 expansion into the type of student teasing and
2 harassment might not work well for the intended
3 result. But I said I have legal concerns.

4 So now I'm going to raise the legal
5 concern. And you mention one in your written
6 testimony and that is the conversion of the standard.
7 Let me tell you about -- you probably know. The
8 *Morgan v. Swanson* case pending in the 5th Circuit en
9 banc right now involves a group of situations of the
10 schools where one situation parents attending the
11 winter party were not allowed to pass out their
12 child's goody bag to the other parents because it
13 contained religious material. Was instructed that
14 religious materials were prohibited on the school.
15 Their defense in the 5th Circuit en banc -- and they
16 lost all the way up and down and it's now just on
17 damages -- is that students have no First Amendment
18 rights whatsoever. It's breathtaking to me.

19 Clearly these schools need to be
20 educated on true tolerance and respecting First
21 Amendment rights. I think there's a serious problem.
22 So does the OCR help in this regard or hurt? The
23 legal standard by the Supreme Court is severe,
24 pervasive and objectively offensive. So it must be
25 both severe and that's conjunctive.

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1 The OCR in education of these
2 miseducated schools is severe, pervasive or
3 persistent. So if a child very politely but
4 persistently insists that "Jesus saves" once a week.
5 In one such case the child was overheard praying over
6 her lunch and was prohibited from doing that. What
7 are we to take of whether the OCR's guidance about
8 what the First Amendment requires? Is that helpful
9 or is that hurtful?

10 MR. VOLOKH: I think on the merits the
11 OCR's guidance is mistaken in adopting severe,
12 pervasive or persistent standard as opposed to the
13 Supreme Court's standard in *Davis* severe, pervasive
14 and objectively offensive. But I think there's a
15 broader point that's maybe what you're trying to get
16 at.

17 It's that the -- one thing that troubles
18 me about a lot of this discussion including the Dear
19 Colleague Letter is the sense that there's sort of
20 denial going on. That there really isn't any speech
21 issue in play. Sometimes the claim is 'this is
22 conduct, not speech,' even though the conduct
23 consists of verbal acts which is another way of
24 saying speech. Sometimes the claim is 'it's
25 harassment and not speech,' even though if you label

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1 speech sedition or harassment or intentional
2 infliction of emotional distress, that doesn't strip
3 it of constitutional protection.

4 Now, to be sure, the Dear Colleague
5 Letter has a footnote that says, "There's a First
6 Amendment issue and we don't mean to trench on the
7 First Amendment." But that's not terribly helpful to
8 school districts, where they need to know what
9 exactly it is that they should be protecting under
10 the First Amendment. They're generally not lawyers.
11 Here they have this long letter with all of these
12 examples of mostly conduct, physical violence, that
13 needs to be restricted but also with statements,
14 well, yes, analogous kinds of speech should be
15 restricted, too, and occasional general references to
16 things posted on websites and so on and so forth.
17 Really no meaningful examples of "Here are things
18 that you shouldn't be restricting" or "Here are
19 things that whether or not you should be restricting
20 we don't mean to cover." "Here are the kinds of
21 political or religious or social or personal
22 commentary on campus or off campus that should be
23 protected." It just is not offering any real
24 guidance to the school districts.

25 I don't want to overstate the concern

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1 about chilling effects. The fact is we have laws to
2 deter people from doing bad things and sometimes we
3 want people to be chilled from failing to properly
4 protect those in their charge and so on and so forth.

5 But what you have to understand that
6 when there's a very big hammer out there, the threat
7 of federal investigation, then that has a
8 disproportionate impact -- as opposed to perhaps a
9 threat of a civil lawsuit for vindication of First
10 Amendment rights. So my worry is that with letters
11 like this, approaches like this, that do not really
12 acknowledge the First Amendment issue and don't chart
13 out examples and specific exclusions of what kind of
14 speech should be protected, the inevitable effect is
15 that there will be substantial deterrence of
16 constitutionally protected speech.

17 MS. AABERG: May I respond to that?

18 CHAIRMAN CASTRO: Yes, go ahead.

19 MS. AABERG: There's been so much talk
20 today about freedom of speech. And I honestly don't
21 think -- Maybe I don't know. Maybe I should make --
22 about or ask for an amendment to the First Amendment
23 saying that it can't apply so much to students. I
24 mean their brains aren't even developed. I mean they
25 shouldn't have free speech to be able to harm other

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1 people. Yes, they should be able to pray at school
2 or just things that aren't harmful or their beliefs.

3 My son told me two months before he died
4 that a kid told him he was going to go hell because
5 he was gay. So according to the First Amendment,
6 that kid has the right to tell my kid that, when all
7 these churches actually had the kids, the church
8 kids, go to the school, wear shirts and tell, my son
9 was like the only out kid in his grade. So I'm sure
10 he got a lot of it that day.

11 I just don't see where the First
12 Amendment -- I mean for students especially it should
13 be if it's harmful I mean that should be it. I mean
14 it shouldn't be allowed. I mean your opinion whether
15 I don't agree with your religion or I don't agree
16 with -- You know, my religion doesn't accept gay
17 people. Stuff like that, it's fine. That's your
18 belief. But to go up and tell someone they're going
19 to go to hell or call them all kinds of names, I
20 don't think that should be freedom of speech.

21 CHAIRMAN CASTRO: I'm going to ask a
22 question and then we'll go to Commissioner Heriot and
23 Commissioner Yaki. We hear about the neutrality
24 policy, and on its face the word neutrality seems so
25 benign. Yet we've heard from you, Ms. Aaberg, how

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1 malignant it has been. And you've mentioned that for
2 the last eight months you've been interfacing with
3 the school district trying to get them to undo that
4 and they haven't. And as you indicated last night,
5 although I don't know that we know all the
6 circumstances, another child committed suicide.

7 What are the stated reasons that the
8 school district is giving you for not addressing the
9 neutrality issue? And conversely what do we see in
10 the various states as it relates to the neutrality
11 policy's impact, if Ms. Lauter could answer that
12 part?

13 MS. AABERG: What we're finding out is
14 that there is a group, a local group, called the
15 Parent Action League. They're called PAL. And it
16 seems like whatever they request they seem to get.
17 We found out that the board seems -- they have a
18 relation with the Minnesota Family Council as well
19 and who knows if they're going as far as Focus on
20 Family. I don't know.

21 So it seems so much more involved that
22 outside groups on that aspect are coming in. They
23 say they don't want their kid to be mentioned about
24 gay people. But I don't understand why kids can't
25 know that they exist anyway. And we're not even

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1 asking right now for curriculum or anything. We're
2 asking just that these kids have rights and that they
3 should be protected.

4 So with this neutrality thing, that's
5 what's mostly happening is they keep saying that
6 these parents have rights to not have their child
7 hear about gay people. But I don't -- I asked the
8 board, "Well, what are my rights about my son being
9 able to learn that gay people exist?" And they
10 couldn't answer that question for me.

11 That's basically all the evidence that
12 we've found and articles locally have a lot to do
13 with the local Christian groups which -- I don't
14 know. I'm a Christian. But they told my son when he
15 told me is God loves everybody. So for them to even
16 use it's like they're using hate in their religion to
17 harm other people. That's kind of how it's winning
18 out with the neutrality policy in Anoka-Hennepin.

19 MS. LAUTER: I mean, the neutrality
20 policies unfortunately result in avoidance of an
21 issue. I was very struck by Commissioner Thernstrom
22 earlier talking about what makes a good school. You
23 know, it takes leadership and it takes some top-down
24 leadership from the principal and teachers who are
25 the leaders in their classrooms to be able to address

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1 issues in a way that doesn't promote, advance any
2 kind of religious beliefs but at the same time is
3 able to talk about respect for others.

4 The word tolerance was used earlier. In
5 ADL's curriculum, we talk about respect for
6 differences. But you don't have to exactly address
7 it and that's why it's so important to enact these
8 laws. When we do training, we talk about all the
9 different kind of classes. So it's not any kind of
10 promulgation of one ideology over another. It's a
11 respect for human beings and for individual
12 differences.

13 CHAIRMAN CASTRO: Commissioner Heriot.

14 COMMISSIONER HERIOT: Thank you. Mr.
15 Negron, by my count at least, you've had somewhat
16 more than -- a somewhat disproportionate share of the
17 questions at least towards the beginning of the
18 panel. But I want to throw one more your way. I
19 want to ask you a question that is a follow-up to
20 Commissioner Yaki's question a few minutes ago. I
21 think it's a quick one and we can go on to other
22 questions here.

23 I suspect, and you can correct me if I'm
24 wrong, that one of the things that your members have
25 to look out for is the possibility of the next

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1 suicide case. The next case coming down the pike
2 could be a suicide by a student who was wrongly or
3 maybe even rightly accused of bullying and not the
4 bullying victim. Am I right that your members have
5 to balance a lot of considerations when they set
6 discipline policy and it's not always easy to know
7 what the right thing to do is and that sometimes
8 tragic mistakes are made?

9 MR. NEGRON: I think you certainly are
10 correct that educators sometimes make the wrong
11 decisions for the best intentioned reasons. Most
12 educators act in good faith. Most school boards act
13 in good faith. And sometimes mistakes are made.

14 I think that what's important about your
15 question is to understand that school boards need to
16 have policies in place, but balance the interests of
17 students. And I'm actually really gratified that the
18 conversation has involved such a large First
19 Amendment component because, although we are talking
20 almost exclusively about the tragedies that surround
21 students in terms of violence and death, and that is
22 very pointed, we also need to understand that school
23 districts and educators have to make those balanced
24 choices between First Amendment choices, the rights
25 of students and the rights to a safe learning

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1 environment.

2 COMMISSIONER HERIOT: And I assume
3 suicide on both sides of the equation can occur.

4 MR. NEGRON: I imagine that that
5 happens. I think it's -- I don't know that that's
6 necessarily present in anybody's mind. But it does
7 bring to mind that these are very tough choices for
8 educators to make on the ground.

9 COMMISSIONER HERIOT: Thank you.

10 CHAIRMAN CASTRO: The Chair recognizes
11 Commissioner Yaki.

12 COMMISSIONER YAKI: Thank you very much
13 Mr. Chair.

14 My mind is kind of boggled by some of
15 what was last said because I'm not too sure how you
16 balance rights when it comes to protected classes of
17 individuals who deserve and need treatment and
18 deserve protection under the Constitution.

19 But my question is for Mr. Volokh. And
20 I'm going to ask you to be helpful.

21 MR. VOLOKH: I try.

22 COMMISSIONER YAKI: And I think you can
23 do that. You -- and I think as I said to one of the
24 previous speakers, I'm very much a big First
25 Amendment close to absolutist in many ways, the way I

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1 taught and brought up. But I also understand that
2 there are limitations, that when you're in a crowded
3 theater someone yelling "Fire" or falsely claiming
4 fire in a crowded theater that can cause imminent
5 chaos, death, is something that is not protected.

6 So I'm going to ask you this because, to
7 me, certainly there are analogs in criminal law.
8 There are certainly some analogs in other parts of
9 First Amendment jurisprudence where the Supreme Court
10 has held that, for example, the Free Exercise clause
11 may not protect parents from certain acts involving
12 their children, *Prince v. Massachusetts*, *Jacobsen v.*
13 *Mass.* You're familiar with those.

14 So the question is, having heard
15 testimony earlier today from -- and believe me, as
16 Commissioner Achtenberg said, we have stacks of
17 testimony about how in the situation of, say, an LGBT
18 child or unit, the kind of possibility, the
19 vulnerability, the disparity in terms of how they
20 perceive themselves, how they believe others perceive
21 them and how it leads to certain actions by them in
22 terms of suicides, depression, those kinds of things,
23 is there some line, is there some threshold, where
24 someone essentially, I would say, lights the match
25 but is engaged in kind of nonphysical but

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1 psychological wordplay, verbal harassment ongoing
2 that to you for a child, for a young person, someone
3 whose brain is not as fully developed, doesn't have
4 the mental shields that all of us have so we can
5 engage in these kinds of colloquys without feeling
6 like we're being picked on or what have you. Maybe
7 we do. But for a young person for whom the Supreme
8 Court has said there are some different
9 constitutional observations in terms of their ability
10 to deal with certain things, help me. And if there's
11 a way that we can, that Department of Ed or Justice,
12 could come up with some kind of a standard that says
13 "You don't have to punch them in the face, but if you
14 deliver the equivalent of a punch in the face to
15 someone that verbally through other kinds of actions
16 that sends that person into a potentially dangerous
17 area where we have to worry about another situation
18 with another young person hanging themselves, doing
19 harm to themselves or what have you" help me. Where
20 can we draw that line if you can?

21 MR. VOLOKH: So it's a very interesting
22 and difficult question. I should note the Free
23 Exercise cases are quite different. The Supreme
24 Court has seen the Free Exercise Clause as
25 essentially being a nondiscrimination rule and not a

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1 substantive right. Even during the 30 years when it
2 saw it as a substantive right, it was a right that
3 was much more weakly protected than free speech
4 rights.

5 COMMISSIONER YAKI: That's right.
6 You're a professor.

7 MR. VOLOKH: But the other thing I
8 should say is that it's not the equivalent of a
9 punch. Speech can be bad. It can be extremely
10 distressing, but it's not the equivalent of a punch.
11 And I think it's important to distinguish the two.

12 The other thing I should say --

13 COMMISSIONER YAKI: Just let me -- Why
14 isn't it the equivalent of a punch? Let's take for
15 example. I saw in your bio that you also do
16 criminal.

17 MR. VOLOKH: Yes.

18 COMMISSIONER YAKI: I mean let's take
19 for example. So you would believe that, say for
20 example, in a defense in criminal case of battered
21 woman syndrome if the spouse was not physically
22 touched but was subjected to intense emotional
23 cruelty, those actions, that's a First Amendment
24 protected action.

25 MR. VOLOKH: It's not a criminal law to

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1 the extent -- by battered woman syndrome, you mean a
2 woman claiming self defense.

3 COMMISSIONER YAKI: Exactly.

4 MR. VOLOKH: It's black letter criminal
5 law that you cannot claim self-defense rights because
6 you're defending against insult. A threat is a
7 different matter, when we're talking about threat of
8 violence. That is punishable and it's treated as not
9 quite the equivalence of violence but some would like
10 that.

11 But the example you gave, no. If
12 somebody said "Well, he was very cruel to me, so
13 that's why I shot him" you may not even get to
14 voluntary manslaughter, much less a self-defense
15 defense.

16 COMMISSIONER YAKI: Okay.

17 MR. VOLOKH: So I think the law quite
18 rightly does not treat insulting things as the
19 equivalent of violence.

20 COMMISSIONER YAKI: But for children?

21 MR. VOLOKH: Pardon?

22 COMMISSIONER YAKI: How about for
23 children?

24 CHAIRMAN CASTRO: Commissioner, try to
25 keep that one question.

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1 MR. VOLOKH: If you're asking for
2 analogies to other laws, no. It doesn't, I think,
3 treat them as equivalent. And I think it's important
4 to keep them different.

5 Now you might say, despite the fact that
6 they're different, nonetheless certain kinds of
7 insulting things can be restricted. I should say
8 also inside school a good deal could be restricted,
9 partly under the *Frasier* Doctrine, if it's actually
10 vulgarities. It could be restricted. And face-to-
11 face insults might be in the fighting words category.

12 But to take an example that's on
13 everybody's mind, cyberbullying, if somebody says
14 mean things about somebody on their Facebook page,
15 Student A doesn't like Student B for whatever reason
16 and says, "I think Student B is bad for whatever
17 reason. His religion is idiotic. He is gay and
18 that's bad. Or she's pregnant and that's bad" or
19 whatever else, I don't think that the analogy would
20 be sound even when we're talking about children. And
21 usually it will be teenagers or close to it. Suicide
22 certainly is a tragedy. But fortunately a relatively
23 small fraction of all insults lead to them. But
24 because of that we're going to be able to have
25 restrictions on insulting things that people say on

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1 their web pages? I don't think I would say that.

2 I should also say suicide is immensely
3 tragic. But there are many causes to suicide.
4 Romantic problems occasionally cause suicide. We
5 don't go out there and start pervasively regulating
6 romance because of that danger including a danger to
7 teenagers.

8 I think that we certainly want to try to
9 stop the violence, needless to say. We may very well
10 be able to do a lot of things within schools to help
11 with suicide. But to start to come up with a
12 pervasive kind of code of regulations of what can be
13 said on Facebook pages because somebody who is
14 insulted, even deliberately insulted, on Facebook
15 might commit suicide, I think that would be
16 unacceptable.

17 CHAIRMAN CASTRO: The Chair recognizes
18 Commissioner Gaziano.

19 COMMISSIONER GAZIANO: Thank you. Mr.
20 Trump, since you've been here I think almost all day,
21 you know that whenever Commissioner Kirsanow asked
22 for data on bullying, when it started, whether the
23 same questions were asked, the progression, there's
24 been crickets. No one knows. You were the first
25 person I think to admit that there are serious gaps

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1 in the data.

2 So I'm going to ask you to elaborate in
3 two respects. What data exists? Where does it
4 exist that shows incidences of bullying that can be
5 actually traced over time in some consistent manner?

6 And then more important to my interest,
7 if you could also answer what data is there, if it
8 exists anywhere, of school systems' indifference or
9 animosity or encouragement of that kind of bullying
10 because that seems to me, that second category of
11 data, seems to be more relevant to when the federal
12 government should get involved with this issue and
13 swoop in in a real case of physical indifference or
14 whether they should act in a much more systematic and
15 universal way?

16 MR. TRUMP: To answer the first part of
17 the question, there is no historical data on
18 bullying, to my knowledge, especially at the federal
19 level for an extended period of time. In fact, the
20 Department of Education Safe and Drug Free Schools
21 office now is trying to start collecting that for one
22 of the first times through what they refer to as
23 School Climate Surveys. And there are a number of
24 issues associated with that.

25 We do not even have accurate federal

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1 data on a number of crimes and violence in school
2 because there is no incident-based data on K-12
3 schools, such as what is required under the Clery Act
4 in colleges and universities. There is no such law
5 for K-12 schools. So we don't know how many crimes,
6 assaults and other incidents that are criminal are in
7 school, much less the other offenses and lower-level
8 aggressions, bullying.

9 The second part of the question is I
10 have found -- and we heard the phrase "zero
11 tolerance" used a lot today. And in my 25+ years in
12 schools, most school administrators strive for firm,
13 fair and consistent discipline applied with good
14 common sense. Sadly and unfortunately, we do have
15 those anecdotal cases -- more than one is one too
16 many -- where that latter part, common sense, is not
17 there.

18 But I found that by and large school
19 administrators err on the side of giving children a
20 break in situations to give them the benefit of the
21 doubt. I don't think that there's a mass conspiracy
22 called Zero Tolerance.

23 And to go back to Commissioner Titus'
24 comment and to I believe Mr. Negron, I think he took
25 an unintentional hit of getting credit for my comment

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1 about the principal who said being in the newspaper.
2 I will own up to that on the record. But what I also
3 said when I used that example, I followed at the end
4 of that by saying that the concern was, his concern
5 and mine, that fear of the newspaper would not be in
6 a lawsuit. It would be from overreacting because
7 they feel that there's a political pressure on them
8 and feel that the threat of a federal investigation
9 would actually force them to overreact, not to
10 underreact.

11 CHAIRMAN CASTRO: I've been informed by
12 my Acting Staff Director that we actually started ten
13 minutes early. So we can go to 4:15 p.m. without
14 being unfair to the other panels.

15 I've got Commissioner Achtenberg who has
16 asked for a question. Nobody else on this side?

17 (No verbal response.)

18 Okay. So Commissioner Achtenberg and
19 then I'll use Chair's discretion and ask the last
20 question before we end for the day.

21 COMMISSIONER ACHTENBERG: Well, first
22 with regard to the Dear Colleague Letter, let me say
23 that it is standard practice among federal agencies
24 to offer guidance within the realm of their
25 expertise. I did it when I was Fair Housing

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1 Assistant Secretary without complaint. No one said
2 that it was ultra vires for me do that. Far from it.

3 And the Courts do give great deference
4 to the expressions of expertise of federal agencies.
5 Mr. Marcus did it when he was the Acting Assistant
6 Secretary of OCR in the Department of Education. The
7 same thing that Ms. Russlyn Ali did in her letter.

8 So the letter per se, I understand you
9 have other quarrels with the breadth of the letter.
10 But let me just say to Mr. Negron's assertion that
11 somehow courts giving deference to guidance being
12 offered by federal departments clearly within their
13 mandate and their area of expertise is not only
14 nothing unusual, it's an agreed-upon construction of
15 federal law that is almost universally respected by
16 federal courts.

17 But back to the seriousness and
18 pervasiveness of the issue at hand. And let me also
19 say I respect, Professor Volokh, your efforts to
20 answer in good faith Commissioner Yaki's question. I
21 think these are difficult questions to deal with.
22 The line does have to be drawn somewhere when we're
23 talking about federal rights. And it's not always
24 easy to tell where the line should be drawn.

25 However, given the conclusions of the

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1 National Crime Victim Survey that points out that one
2 in four Latinos reports being severely harassed,
3 given the fact that we are told that almost 100
4 percent of young people with disabilities report
5 being harassed or severely harassed, given that 80
6 percent of students report that they experienced,
7 have experienced, at least one of the many forms of
8 sex discrimination in schools, given the fact that
9 sexual minority youth, eight in ten say that at some
10 point they have been harassed or severely harassed, I
11 think this is an issue that is important, that we
12 need to take cognisance of.

13 That doesn't mean necessarily that there
14 has to be a federal remedy for this. But in this
15 particular case there is well-recognized federal
16 authority that is being invoked in this case, at
17 least to my mind. And we heard a number of
18 concurrences from those who work every day in the
19 field.

20 I'd like to ask Ms. Lauter. The need
21 for a federal response, would you articulate again
22 why the grid of 45 state responses and the hundreds
23 and hundreds of trainings that you yourself and your
24 organization have done throughout the country isn't
25 sufficient to address this pervasive issue?

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1 MS. LAUTER: Right. Because there are
2 so many elements that need to be addressed. To have
3 a federal response is important for a number of
4 reasons: (1) that they can set out guidelines that
5 would be what a district can have in order to be
6 effective; but it also -- and since this is the wind-
7 up of the session -- just critically important for
8 the attention at the federal level for this subject.
9 The very fact that this Commission is addressing this
10 issue is fantastic because it's going to shine more
11 light on what the problems are and what the
12 challenges are.

13 This is an enormously difficult subject.
14 And so you've all seen that in just this one day.
15 And for those of us who struggle with it every day it
16 needs from the highest level down. And again we
17 commend the Obama Administration because they did the
18 White House Summit. They've recognized the problem.
19 They shine a light on it. And now it's up to the
20 rest of us to work together to -- I don't think we'll
21 ever fix it completely, but we can certainly make a
22 difference.

23 CHAIRMAN CASTRO: I'll ask the last
24 question. We've heard throughout the day today about
25 how the system is so terribly broken. And part of

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1 what we want to do with this report is to put out
2 some best practices and show some success stories of
3 how this can be done right.

4 I know, Ms. Lauter, you've got that
5 overview. I know, Mr. Negron, from the perch that
6 you sit. Can you tell us some success stories of
7 some districts that have done this right, so that we
8 could propose and disseminate those best practices to
9 prevent more of our children from taking their lives
10 or being forced to take their lives.

11 MS. LAUTER: Yes. We would be happy to
12 give you some. Maybe in writing might be a better
13 way to do it. Unfortunately sometimes the best
14 practices that I would be able to share with you are
15 ones that come out of something that started bad,
16 woke up the community, then they addressed it and
17 went on, which we like to see.

18 But there are other systems that have
19 come up with good policies that do all those things
20 we'd like to see in terms of reporting, training and
21 accountability. So I'd be happy to submit that
22 later.

23 CHAIRMAN CASTRO: Please do.

24 Mr. Negron.

25 MR. NEGRON: Mr. Chair, I appreciate the

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1 invitation because state associations of school
2 boards across the country do have a variety of
3 training, some more intensive than others for school
4 boards. And we'd be happy to share that with the
5 Commission.

6 I should point out, and I think school
7 board members would probably not like the fact that
8 I'm pointing out, a specific piece of legislation.
9 But an example of one that the jury is still out on
10 is we don't know its effects because it just went
11 into effect in January, signed in New Jersey, is a
12 very comprehensive model of what state laws can do.
13 They require all kinds of training with definitions
14 about bullying, what to look for. They encompass a
15 plethora of scenarios for school districts and have
16 in similar fashion to the IDEA, the Special Ed law,
17 have timelines in which school officials have to
18 report what they see to the next level of authority
19 all the way to the school board and then requiring
20 some sort of action. They also in New Jersey require
21 training by school board members on the different
22 kinds of harassment.

23 So there are states that are -- that's I
24 think the most comprehensive statute in the country.
25 It's certainly just one model. And there are others.

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1 We'd be happy to share that with you.

2 CHAIRMAN CASTRO: Thank you. We
3 appreciate it.

4 MS. AABERG: May I comment?

5 CHAIRMAN CASTRO: Ms. Aaberg.

6 MS. AABERG: I think what might be a
7 good compromise I guess is if the federal government
8 be more inclusive on Title IX for sexual orientation,
9 gender identity and maybe even appearance, people
10 being called fat and tall or whatever. And set
11 things in place. Like make each state accountable.
12 Set more guidelines. Like have the states follow up
13 on it and have reports submitted to them.

14 And then let the states follow through
15 and maybe then submit based on the problems that they
16 get like reports to the DOE, DOJ if it's very
17 worrisome. That would take a little off of the
18 DOJ/DOE in a sense. And give them the best -- I
19 mean, the incidences that really require attention.
20 So that way the states kind of have control, but yet
21 they do have guidelines.

22 CHAIRMAN CASTRO: Thank you.

23 On behalf of the Commission, we want to
24 thank each and every one of you that are here with us
25 this afternoon and all the panelists that were with

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1 us today.

2 I also want to make sure that I publicly
3 thank the Commission staff for their Herculean
4 efforts to prepare this hearing, this briefing, for
5 today. Many of them were working day and night to do
6 the work that is normally done in a year in half the
7 time. So we very much appreciate that in working
8 very hard to make sure we meet our statutory report
9 deadline.

10 Particularly I would like to highlight
11 Commission staff members, Dave Snyder, Lenore
12 Ostrowsky. I know they're here in the room or around
13 here. So wave your hand. Pam Dunston, Lillian
14 Dunlap, Audrey Wright. And of course our Acting
15 Staff Director and Acting General Counsel Kimberly
16 Tolhurst.

17 Lastly, the record for this Enforcement
18 Report is going to remain open for the next 15 days.
19 If panelists or members of the public or anyone
20 watching this on television would like to submit
21 materials to us in writing they can mail them to the
22 U.S. Commission on Civil Rights, Office of the
23 General Counsel, 624 9th Street, N.W., Washington,
24 D.C. 20425.

25 It is now 4:19. This meeting of the

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1 U.S. Commission on Civil Rights is hereby adjourned.

2 Thank you.

3 (Whereupon, at 4:19 p.m., the above-
4 referenced matter was concluded.)

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