UNITED STATES COMMISSION ON CIVIL RIGHTS

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The Honorable Thad Cochran, Chair, Senate Committee on Appropriations
The Honorable Roy Blunt, Chair, Subcommittee on Labor, Health and Human Services, Education and Related Agencies
The Honorable Hal Rogers, Chair, House of Representatives Committee on Appropriations
The Honorable Tom Cole, Chair, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

February 26, 2015

Dear Distinguished Members of Congress:

We write as two members of the eight-member U.S. Commission on Civil Rights ("the Commission"), and not on behalf of the Commission as a whole, to comment on a provision of the proposed Obama budget that would increase funding for the Department of Education's Office for Civil Rights ("OCR") by 31%.[1] We counsel against any such increase.

The Commission must "submit to the President and Congress at least one report annually that monitors Federal civil rights enforcement efforts in the United States."[2] The Commission has thus on several occasions in the last few years studied OCR's civil rights enforcement efforts. In this letter, we will discuss the two attached Commission reports about OCR – one titled School Discipline and Disparate Impact (2012) and another titled Peer-to-Peer Violence and Bullying: Examining the Federal Response (2011). We will also discuss a briefing that the Commission held last year that will serve as the basis for a third report – tentatively titled Enforcement of Sexual Harassment Policy at Educational Institutions by the U.S. Department of Education's Office for Civil Rights ("OCR") and the U.S. Department of Justice ("DOJ") – that we expect to see published within the year.

In our study of all three topics, we have noticed a disturbing pattern of disregard for the rule of law at OCR. That office has all-too-often been willing to define perfectly legal conduct as unlawful.[3] Though OCR may claim to be under-funded, its resources are stretched thin largely because it has so often chosen to address violations it has made up out of thin air. Increasing OCR's budget would in effect reward the agency for frequently over-stepping the law. It also would provide OCR with additional resources to undertake more ill-considered initiatives for which it lacks authority. We strongly encourage Congress to take into account this troubling pattern of overreach in deciding whether to support the President's proposed increases to OCR's budget.

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[1] This letter should not be interpreted as a comment on the desirability of the proposed Obama budget as a whole or on other provisions of the budget.

[2] 42 U.S.C. 1975(c)(1).

[3] For additional analysis along these lines, please see Hans Bader, Congress Should Reject Obama Budget Increase for Education Department Office for Civil Rights, available at https://cei.org/blog/congress-should-reject-obama-budget-increase-education-department-office-civil-rights.

1. OCR has turned many schools' imperfect efforts to handle ordinary incidents of schoolyard bullying into violations of federal law by issuing an expansive guidance on bullying and harassment.

In recent years, there has been considerable attention in the media and elsewhere given to the problem of bullying in K-12 schools. OCR's expansive effort to use its federal authority to bring the problem under control, however, has largely been misguided.

Part of the reason this initiative has been misguided is OCR's failure to appreciate that federal authority is too blunt an instrument to deal with some problems. As one of us (Heriot) stated in Peer-to-Peer Violence and Bullying: Examining the Federal Response:

> Remember when children used to say, "Don't make a federal case out of it"? In those days, even fourth graders understood that not every problem is best dealt with the federal level. These days, however, everything seems to be a federal case—even schoolyard bullies.
>
> The point is not that bullying is unimportant. Few things are as important as ensuring that all our nation's children can attend safe schools that are conducive to learning. But, in the absence of extraordinary circumstances, the problem can only be dealt with effectively at the local level. Individual teachers and principals backed up by active parents, school boards, school district officials, and students themselves must be in charge. It is their battle to win or lose. They are the heroes of this story, not the Department of Education.[4]

OCR's error is entirely unforced. No federal civil rights statute requires OCR to undertake such an expansive initiative. Insofar as there is statutory authority allowing OCR to regulate bullying at all, it is much more limited than OCR's initiative. Title IX of the Education Amendments Act of 1972 Pub. L. No. 92-318, 86 Stat. 235, 20 U.S.C. sec. 1681(a) (1972) states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance …." This provision has been interpreted by the Supreme Court to make schools civilly liable for failing to remedy student-on-student sex harassment but "*only where [the school districts] are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school.*"[5] By analogy, those who advocate federal intervention into bullying argue that a school district that is deliberately indifferent to bullying based on sexual orientation should be liable if the circumstances match those in *Davis*.

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[4] Statement of Gail Heriot in U.S. Commission on Civil Rights, Peer-to-Peer Violence and Bullying: Examining the Federal Response 186 (2011). The full report may be found online at http://www.usccr.gov/pubs/2011statutory.pdf.

[5] Davis v. Monroe County Board of Education, 526 U.S. 629, 650 (1999)(ital. added).

But OCR's Dear Colleague Letter of October 26, 2010 on harassment and bullying goes much further than that.[6] It reads Title IX and other civil rights provisions in a manner that would *greatly* expand the scope of school liability compared to the legal standard set forth in *Davis* (which we believe was already an expansive reading of Title IX).[7] In doing so, it creates a number of problems, including First Amendment problems. To start with, OCR changes the first prong of what constitutes prohibited harassment/bullying that schools are responsible for preventing from that which is "severe, pervasive, *and* objectively offensive" to that which is "severe, pervasive, *or* persistent" (ital. added).[8] *Davis* uses the conjunctive—and requires that all three conditions be met: that the conduct be severe, pervasive, and offensive to an objective person.[9]

The Supreme Court specifically stated that one incident cannot give rise to liability.[10] Yet under OCR's interpretation, schools can violate Title IX based on a single student act if the government believes it is sufficiently severe.[11]

OCR's formulation could also cover mild but persistent teasing by one student of another, thus literally "making a federal case" out of ordinary childhood misbehavior. OCR's interpretation might also leave a school liable for dozens of different playground comments by dozens of different children if these comments qualified as "pervasive." Thus, the intentional switch from the Supreme Court's conjunctive phrasing to OCR's disjunctive phrasing broadens schools' potential liability enormously.

Further, OCR omits the term "objectively offensive" from its formulation of the legal standard, potentially removing a reasonable person protection. The Foundation for Individual Rights in Education ("FIRE") warned in a public comment sent to the Commission:

> The loss of the crucial "reasonable person" standard means that a school's most sensitive students effectively determine what speech is prohibited. The "reasonable person" standard is a critical guard against punishing speech based solely on subjective (and possibly

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[6] Russlynn Ali, Assistant Secretary of Education, Office for Civil Rights, Department of Education, Dear Colleague Letter: Harassment and Bullying at 2 (Oct. 26, 2010)(hereinafter "The Harassment and Bullying Dear Colleague Letter), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[7] This section of our letter draws heavily on the Statement of Todd Gaziano and Peter Kirsanow in U.S. Commission on Civil Rights, Peer-to-Peer Violence and Bullying: Examining the Federal Response 128-80 (2011). Todd Gaziano is no longer a member of the Commission.

[8] The Harassment and Bullying Dear Colleague Letter, supra note 6, at 2.

[9] OCR takes the position that the *Davis* requirements should apply only to private citizens seeking money damages.

[10] *Davis*, 526 U.S. at 652-53 (unlikely that Congress intended that a single instance could be sufficiently severe to create liability); see also Written Testimony of Kenneth L. Marcus Before the U.S. Commission on Civil Rights at 22 (May 13, 2011) (OCR would face a steep challenge in defending its policy in federal court, given that the Supreme Court rejected the single-incident approach based not upon such issues as punitive damages or lawyers' fees but upon its assessment of congressional intent in drafting the relevant language), available at http://www.eusccr.com/15.%20Kenneth%20L.%20Marcus,%20Institute%20for%20Jewish%20&%20Community%20Research.pdf.

[11] The Harassment and Bullying Dear Colleague Letter, supra note 6, at 2 ("Harassment does not have to…involve repeated incidents").

unreasonable) listener reaction— something that courts have repeatedly held unconstitutional over the years.[12]

It is unclear why OCR omitted the "objectively offensive" factor, but it has not issued any further clarification since FIRE and Peer-to-Peer Violence and Bullying: Examining the Federal Response pointed out the problem.[13] In the second harassment prong, OCR replaces the Supreme Court's requirement that the harassment "deprive the victims of access to educational opportunities or benefits provided by the school" with the almost infinitely broad "interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."[14]

OCR also changes the notice requirement from "actual knowledge" to "knows or reasonably should have known."[15] The "actual knowledge" requirement recognizes that the anti-discrimination law is not directed at students but at schools, and schools without knowledge of the harassment cannot be said to have discriminated.[16]

These deviations from *Davis* have expanded school districts' legal obligations significantly. If OCR claims to be stretched thin, it has gotten itself there in part by imposing additional obligations on school districts across the country that lack a basis in law. Congress should question seriously whether it wants to reward and enable such empire-building by handing OCR additional funds.

2. <u>OCR's school discipline policy has encouraged districts across the country to adopt racial quotas in discipline.</u>

In April of 2012, the Commission published a report, *School Discipline and Disparate Impact*, which examined OCR's enforcement policies in this area. That report was based on a nearly daylong briefing held at the Commission's offices, at which five public school teachers, seven administrators, and one OCR official presented written and oral testimony. The Commission also solicited letters from fifteen different school districts asking about how (if at all) they have modified disciplinary policies in response to OCR's discipline policy; all responses received are included in the report. Although the report was published before the release of OCR's formalized policy, OCR's policy of aggressive enforcement of disparate impact liability in the school discipline context was already apparent.

On January 8, 2014, OCR and the Civil Rights Division of the Department of Justice released their joint Dear Colleague letter about race and school discipline and accompanying

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[12] Public Comment Submitted to the U.S. Commission on Civil Rights by FIRE at 3 (May 26, 2011), available at http://www.thefire.org/pdfs/6aefda8e736cc0f8d633980f9549eeae.pdf.

[13] U.S. Commission on Civil Rights: Peer-to-Peer Violence and Bullying: Examining the Federal Response at 67, n.328.

[14] The Harassment and Bullying Dear Colleague Letter, supra note 6, at 2.

[15] *Id*.

[16] *Davis*, 546 U.S. at 644 (a school not engaging directly in harassment can only be liable if its "deliberate indifference subjects its students to harassment") (internal quotation marks and brackets omitted).

materials ("the School Discipline Guidance").[17] In it, they stated that schools may be liable for "disparate impact" race discrimination if different racial groups are disciplined at different rates, even if these disparities do not result from intentional race discrimination.

The potential danger from applying disparate impact to school discipline should be obvious: What if an important reason African-American students were being disciplined more often than white or Asian students is that more African-American students were misbehaving? And what if the cost of failing to discipline those students primarily falls on their fellow African-American students who are trying to learn amid classroom disorder? Will unleashing OCR and its army of lawyers cause those schools to eliminate only that portion of the discipline gap (if any) that was the result of race discrimination? Or will schools react more heavy-handedly by tolerating more classroom disorder, thus making it more difficult for students who share the classroom with unruly students to learn?[18]

The School Discipline Guidance has significant problems from a legal perspective too.[19] Relying primarily on Title VI of the Civil Rights Act of 1964 for its authority, it purports to prohibit both actual discrimination and disparate impact in school discipline.[20] But Title VI prohibits only actual discrimination, not neutral policies that have a disparate impact. See, e.g., *Alexander v. Sandoval*: "It is similarly beyond dispute – and no party disagrees – that [Title VI] prohibits only intentional discrimination."[21] The School Discipline Guidance is thus at odds with the statute.[22]

In *Sandoval*, the Court did not address whether agencies with rule-making power under Title VI may rely on disparate impact theory in issuing discrete prophylactic rules designed to

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[17] Catherine E. Lhamon, Assistant Secretary, Office for Civil Rights, Department of Education, and Jocelyn Samuels, Acting Assistant Attorney General, Civil Rights Division, Department of Justice, Joint Dear Colleague letter (January 8, 2014), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html.

[18] Statement of Gail Heriot in U.S. Commission on Civil Rights, School Discipline and Disparate Impact 97-98 (2012). If one credits the research that shows children reared in fatherless homes are more likely to have discipline problems, then one would have to expect African-American children to have more discipline problems than Asian-American children, with white children and Hispanic children falling somewhere in between. Id. at 99.

[19] We made this point in a letter to Secretary Duncan and Attorney General Holder on February 18, 2014. Our letter may be found at http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/03/2.17.14-School-Discipline-Guidance-Comment.pdf.

[20] The School Discipline Guidance's citation to Title IV appears to be intended as a makeweight. That provision is about efforts to desegregate schools following the massive resistance to Brown v. Bd. of Educ., 347 U.S. 483 (1954), which have little or no bearing on the issues here. This is not a case about a school district attempting to maintain a dual-track school system—one for African Americans and one for whites. The statute allows the Attorney General to act only after a finding that an action will "materially further the orderly achievement of desegregation in public education." 42 U.S.C. 2000c-6(a). Moreover, Title IV authorizes DOJ only to remedy unconstitutional failures of equal protection and cases in which an individual has been "denied admission to or not permitted to continue *in a public college* by reason of race, sex, color, or national origin." 42 U.S.C. 2000c-6(a)(2) (ital. added.) The latter clause does not authorize federal action in cases concerning discipline of K-12 students, and regarding the former, the Constitution does not ban state action that merely has a disparate impact. See Village of Arlington Heights vs. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). See also Washington v. Davis, 429 U.S. 229 (1976) (Fifth Amendment due process case rejecting disparate impact liability.)

[21] 532 U.S. 275, 280 (2001).

[22] One federal circuit court has also found that racial discipline quotas are unconstitutional. See People Who Care v. Rockford, 111 F. 3d 528 (7th Cir. 1997).

ensure that actual discrimination in specific problem areas does not slip by undetected.[23] But even assuming Title VI would permit a limited use of disparate impact theory in prophylactic rules in this context, the School Discipline Guidance is not a rule. It is a mere interpretation or general statement of policy concerning how an agency intends to exercise its discretionary authority in enforcing the underlying statute. It merely interprets or tells regulated persons which kinds of cases the agency is most likely to pursue. Rules must be subject to notice and comment and must comply with a number of other procedural requirements, while an interpretation or a general statement of policy need not. But an interpretation or a general statement of policy cannot impose new duties on regulated persons.[24]. Making up new duties not contained in the statute itself is not part of an agency's discretionary authority.[25]

By purporting to apply disparate impact liability to school districts, however, the School Discipline Guidance is doing exactly that—making up new duties. In this case, the overreach is particularly egregious, because it conflicts with explicit Supreme Court authority. It is therefore invalid. We again urge Congress to think seriously about whether it wants to reward large budgetary increases to agencies that stretch the law.

3. <u>OCR misstates applicable law on sexual assault and harassment on campus, encourages unfair treatment for some accused students, and gives colleges and universities a green light to trammel students' First Amendment rights.</u>

We hate to pile on here. But when members of the law faculties of both Harvard University[26] and the University of Pennsylvania[27]—hardly bastions of conservative thought—express deep misgivings over the sexual harassment policies adopted under pressure from OCR by their respective institutions, it is clear that something is wrong.

OCR has pushed past the limits of its legal authority in addressing sexual assault and harassment on college and university campuses. This letter has already addressed the expansive and problematic definition of harassment found in OCR's October 26, 2010 Dear Colleague letter on harassment and bullying, which discusses harassment/bullying in both K-12 public

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[23] We note that some, most notably Supreme Court Justice Antonin Scalia, have suggested that disparate impact liability is unconstitutional altogether. Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring.)

[24]See, e.g., Chamber of Commerce v. Dept. of Labor, 147 F.3d 206 (D.C. Cir. 1999*).*

[25] In addition, OCR, by failing to provide a method by which a school district that absolves itself from accusations of actual discrimination can get out from under liability for disparate impact, has clearly has gone beyond any possible permissible use of disparate impact as prophylaxis even if its policy had been expressed as a discrete rule and made subject to notice and comment (which it was not).

[26] See Rethink Harvard's Sexual Harassment Policy, Boston Globe (October 15, 2015)(letter signed by 28 members of Harvard law faculty)(noting that "large amounts of federal funding may ultimately be at stake," the signatories nevertheless took the position that "Harvard University is positioned as well as any academic institution in the country to stand up for principle in the face of funding threats" and should do so), available at http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

[27] See Open Letter from Members of the Penn Law School Faculty, Wall Street Journal Online (February 17, 2014) (letter signed by 16 members of University of Pennsylvania law faculty) ("Although we appreciate the efforts by Penn and other universities to implement fair procedures, particularly in light of the financial sanctions threatened by OCR, we believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness"), available at http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf.

schools and on college and university campuses. In addition to that letter, OCR has released an important Dear Colleague Letter on Sexual Violence on April 4, 2011.[28] In addition, it published documents titled "Questions and Answers on Title IX and Sexual Violence" (April 29, 2014) [29] and "Know Your Rights: Title IX Requires Your School to Address Sexual Violence" (April 29, 2014.) OCR also published a highly burdensome settlement agreement with the University of Montana ("Montana Agreement")[30] that it labelled as a "blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault."[31] OCR has since sometimes backed away from its characterization of this document as a national model, although its signals to regulated universities about the Montana Agreement's intended effect have been mixed.[32]

To be crystal clear: we think sexual violence is deplorable. The question is not whether it should be tolerated on campus. There is no question that it should not be. The only public policy question relevant here is "What does (or should) *federal* law require colleges and universities to do to prevent it?" Much of the task of keeping women (and men) safe on campus must be done by local police and prosecutors. If OCR has a role, it is merely to supplement that important work.

To study all this, the Commission convened a nearly daylong briefing on July 25, 2014 that featured testimony from 11 different expert witnesses from government, academia, and non-profits. The testimony that we heard and our own study of the matter has led us to be concerned that OCR has unfortunately over-stepped its authority again.

OCR's guidance documents raise serious concerns. The 2011 Dear Colleague letter on sexual violence required many universities to change the burden of proof used in sexual harassment disciplinary proceedings.[33] Before that, many universities used the "clear and convincing" standard instead of the "preponderance of the evidence" standard that OCR now

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[28]Russlynn Ali, Assistant Secretary of Education, Office for Civil Rights, Department of Education, Dear Colleague Letter—Sexual Violence (April 4, 2011)(the "Sexual Violence Dear Colleague Letter"), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

[29] Available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf .

[30] Resolution Agreement among the University of Montana-Missoula, the U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section and the U.S. Department of Education, Office for Civil Rights (May 2013), available at http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf.

[31] Letter of May 9, 2013 from Anurima Bhargava, Chief, Educational Opportunities Section, Civil Rights Division, Department of Justice and Gary Jackson, Seattle Office Regional Director, Office for Civil Rights, Department of Education to Royce Engstrom, President, and Lucy France, University Counsel, University of Montana at 1, available at http://www.thefire.org/department-of-justice-and-department-of-educations-office-for-civil-rights-joint-findings-letter-to-the-university-of-montana/.

[32] After months of national criticism of this document, Assistant Secretary for Civil Rights Catherine Lhamon said in a letter to FIRE that "the agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy." Letter from Catherine E. Lhamon, to Greg Lukianoff, President, Foundation for Individual Rights in Education, Nov. 14, 2013, available at http://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistant-secretary-catherine-e-lhamon-to-fire. But a few months after that, at a June 2, 2014 roundtable on sexual assault hosted by Senator Claire McCaskill, Acting Assistant Attorney General for Civil Rights Jocelyn Samuels repeatedly offered the terms of the University of Montana resolution agreement as a national model. Written Testimony of Greg Lukianoff Before the U.S. Commission on Civil Rights at 8 (July 25, 2014).

[33] Sexual Violence Dear Colleague Letter, supra n. 28 at 11.

requires.[34] Yet nowhere in the text of Title IX or in earlier OCR regulations can such a requirement be found, and given the importance of safeguarding the rights of accused students, the "clear and convincing" standard would seem to be the more appropriate one in at least some situations.[35] Further, "Questions and Answers on Title IX and Sexual Violence" strongly discourages cross-examination of accused students by their accusers.[36] Yet one federal district court has held that cross-examination is constitutionally required on due-process grounds when an accuser's credibility is an important issue in a disciplinary proceeding.[37]

First Amendment issues loom large in this area. Defining "sexual harassment," as OCR's official materials do, to include students' "telling sexual or dirty jokes," spreading "sexual rumors" (without any limitation to false rumors), "circulating or showing e-mails or Web sites of a sexual nature," or "displaying or distributing sexually explicit drawings, pictures, or written materials"[38] can easily cover speech protected by the First Amendment, according to testimony of UCLA law professor Eugene Volokh presented at the Commission briefing.[39] Nonetheless, risk-averse colleges and universities have jumped to adopt the vague harassment standards set forth by OCR.[40]

There are more problems—too many to detail in this letter. Since the Commission's report on this topic is still in preparation, we attached the following documents, each of which in its own way is very revealing: (1) the Montana Agreement; (2) the Letter of May 9, 2013 from Anurima Bhargava, Chief, Educational Opportunities Section, Civil Rights Division, Department of Justice and Gary Jackson, Seattle Office Regional Director, Office for Civil Rights, Department of Education to Royce Engstrom, President, and Lucy France, University Counsel, University of Montana (referred to by some as the "Findings Letter"); (3) the Written Testimony of Eugene Volokh, Professor of Law, UCLA Law School, Before the Commission (July 25, 2014); (4) the Written Testimony of Kenneth Marcus, President and General Counsel of the Louis D. Brandeis Center for Human Rights Under Law, Before the Commission (July 25, 2014) and (5) the Written Testimony of Greg Lukianoff, President of FIRE, Before the Commission (July 25, 2014).

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[34] At the Commission briefing on July 25, 2014, Ada Meloy of the American Council of Education that in her experience, the clear and convincing standard was much more common than the preponderance of the evidence standard. Sexual Harassment Briefing Transcript at 202, available at http://www.usccr.gov/calendar/trnscrpt/CommissionBriefingTranscript_July-25-2014_%20final.pdf.

[35] See Hans Bader, "Education Department Changes Burden of Proof in Sexual Harassment Cases Under Title IX," April 11, 2011, *available at* https://cei.org/blog/education-department-changes-burden-proof-sexual-harassment-cases-under-title-ix.

[36] Questions and Answers on Title IX and Sexual Violence at 38, available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[37] *Donohue v. Baker*, 976 F. Supp. 137 (N.D.N.Y. 1997); see also Hans Bader, White House Task Force Attacks Due Process and Cross-Examination Rights on Campus, Washington Examiner, May 1, 2014, available at http://www.examiner.com/article/white-house-task-force-attacks-cross-examination-due-process-rights-on-campus.

[38] OCR, *Sexual Harassment: It's Not Academic*, http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html; OCR, *Dear Colleague Letter*, Oct. 26, 2010, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[39] Written Testimony of Eugene Volokh Before the U.S. Commission on Civil Rights at 1 (July 25, 2014)(attached to this letter).

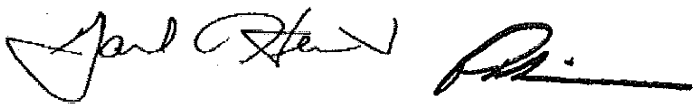
[40] Sexual Harassment Briefing Transcript at 182 (Ada Meloy, a representative from the American Council on Education, testified that the colleges and universities are redoubling their efforts to prevent sexual harassment and assault in response to OCR's flurry of activity), available at http://www.usccr.gov/calendar/trnscrpt/CommissionBriefingTranscript_July-25-2014_%20final.pdf.

Why Congressional Intervention is Necessary

It is difficult for school districts, universities, and private citizens to combat OCR's unsound policies. One of OCR's frequently-used tactics is to launch an investigation of a school that it has reason to believe is out of compliance with its announced policies. Federal agencies claim that investigations are a less severe action than suing an institution outright. Although this is true up to a point, it is important to understand that OCR often takes years to conduct an investigation. The investigations are thus a punishment in and of themselves. The institution must hire attorneys, make staff and students available for interviews, and produce voluminous records for OCR.[41] The institution suffers the reputational harm of being branded as having engaged in or tolerated racial discrimination or sexual harassment. When OCR finally offers the institution a settlement in lieu of going to court, the institution frequently has no alternative but to accept. But this means that OCR is almost never seriously challenged, and the courts never have the opportunity to rule OCR's guidance out of bounds. Individual students who are disadvantaged by OCR's policies either would not have standing to challenge them or would not have the resources and grit to endure being dragged through the courts for years. Congress, using the power of the purse, is the institution that is best able to check OCR's overreach.

Thank you for our attentions to concerns about overreach at OCR. We would be happy to discuss further our thoughts on these matters; you may contact us directly at gheriot@usccr.gov or at pkirsanow@usccr.gov. You may also reach us via our respective special assistants, Alison Schmauch Somin, at aschmauch@usccr.gov or 202-376-7671, and Carissa Mulder at cmulder@usccr.gov or 202-376-7626.

Sincerely,



Gail Heriot
Member

Peter Kirsanow
Member

[41] *See*, *e.g.*, Letter from Thomas J. Hibino, Regional Director, U.S. Department of Education, Office of Civil Rights, to Dr. Debra J. Livingston, Superintendent of Manchester School District, Re: Case No. 01-11-5003 Manchester School District (April 9, 2014). This letter pertains to a claim of disparate impact in resource allocation at a high school, but the investigation process is similar regardless of the subject of the complaint.