DISSENTING STATEMENT OF COMMISSIONER GAIL HERIOT, WITH WHICH COMMISSIONERS PETER KIRSANOW AND TODD GAZIANO CONCUR

I. Background to the Report: A Twice-Told Tale Rather Than an Investigation

This report has been a disappointment—though its shortcomings can in no way be attributed to our staff. The responsibility must lie with the Commission itself. Switching topics at the last possible moment made it impossible for the report to be anything but an uncritical re-telling of the positions of the Department of Education and the Department of Justice—along with a very brief nod to a few of the objections to those positions.1 Nothing that can be dignified with the term “investigation” has occurred here. No useful new evidence is uncovered. No serious analysis has been engaged in.2

In the Commission’s charter, Congress requires us to produce at least one report each year critiquing the manner in which a federal agency enforces civil rights laws.3 It is for that reason that the Commission is frequently referred to as a “civil rights watchdog.”4 Our job is to be fair and independent critics.

1 The brief discussion of the objections to the policy is contained almost exclusively in the last chapter of the report.
2 I agree with my colleagues Commissioners Todd Gaziano and Peter Kirsanow that none of the empirical studies on bullying cited in the report is relevant to the issues before the Commission. See Joint Dissent and Rebuttal of Commissioners Gaziano and Kirsanow. These studies do not show that the kind of bullying for which school districts can be held legally accountable for is widespread. Moreover, they do not show that school districts are failing to respond to the problem. Some of these polls are unscientific internet questionnaires that are far from random samples of students. See GLSEN Survey 2009. One would have to expect that victims of bullies are more interested in visiting the GLSEN web site and responding to such polls. All appear to use definitions of bullying or harassment that are overbroad and include activity that would be protected under the First Amendment or that would more properly be classed as tactlessness. In some cases, eye-rolling or engaging in gossip is classed as bullying. See Report at 3. It would have been useful to analyze each of these studies and discuss exactly what they do or do not establish. But there was no time for such meticulous work. The first draft of the report had to be finished one week after the Commission held its first and only hearing on the matter on May 13, 2011. See Transcript of Commission Meeting 10 (August 12, 2011).
3 42 U.S.C. 1975(c)(1): “The Commission shall submit to the President and Congress at least one report annually that monitors Federal civil rights enforcement efforts in the United States.”
4 See Mary Frances Berry, Request for the U.S. Commission on Civil Rights, Hearing Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 103 Cong., 2d Sess. (February 9, 1994) (“We are a watchdog over the effectiveness of federal civil rights enforcement”); Mary Frances Berry Exits Civil Rights Commission; Gerald Reynolds Picked as New Chairman, Jet (December 27, 2004/January 3, 2005) (“Berry, who at times has been at odds with five presidents over civil rights issues since 1980, once reportedly said, ‘If we don’t have people irritated, we’re not doing our job .... We’re the watchdog that bites you on the leg, keeps tugging at you ....’”).
The annual enforcement report has traditionally been the most important project the Commission undertakes in any given year. It requires research and development that usually spans a year or more. This report was put together in less than a third of the usual time. Similarly, the length of time for individual commissioners to write their statements was reduced from 30 days to seven days from the date the report was adopted.\(^5\)

There is a backstory here: After considering several projects for several months over the summer of 2010, the Commission decided on October 8, 2010 that this year’s topic would be the Department of Justice Civil Rights Division’s use of the doctrine of “cy pres” in settling civil rights lawsuits brought on behalf of a class.\(^6\) That decision was already a little bit later in the year than usual. It was in part prompted by an article entitled *Justice Department Steers Money to Favored Groups*, which appeared in the Washington Examiner on August 5, 2010.\(^7\) The Commission set out to determine whether the concerns discussed in that article were justified.\(^8\) The article’s author, Byron York, outlined the policy at issue this way:

The Justice Department has found a new way to pursue civil rights lawsuits, using the power of the Civil Rights Division not just to win compensation for victims of alleged discrimination but also to direct large sums of money to activist groups that are not discrimination victims and not connected to a particular suit.

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5 Time for rebuttals was also reduced from the usual 30 days to 21 days. While it is understandable that Chairman Castro would be concerned about getting the final report out by end of the fiscal year, the hurry was purely a result of the Commission’s decision to switch topics halfway through the year.

6 The term “cy pres” comes from the French phrase “cy pres comme possible” or “as near as possible.” It traditionally referred to a doctrine in trusts and estates law. When a testator attempts to create a charitable trust that will provide funds to a non-profit entity that no longer exists or for a purpose that can no longer be carried out, a court may order or allow those funds to be applied to a similar non-profit entity or for a similar purpose instead. Edith L. Fisch, *The Cy Pres Doctrine in the United States* 1 (1950). More recently, the term has been used to describe the practice described by Byron York in *Justice Department Steers Money to Favored Groups* under which non-profit organizations are awarded any unclaimed settlement funds or court-ordered damages in a class action or similar proceeding. Another term sometimes used in this context is “fluid class remedies.”


8 The project was later expanded to include the Equal Employment Opportunity Commission (EEOC) and private civil rights class actions.
In the past, when the Civil Rights Division filed suit against, say, a bank or a landlord, alleging discrimination in lending or rentals, the cases were often settled by the defendant paying a fine to the U.S. Treasury and agreeing to put aside a sum of money to compensate the alleged discrimination victims. There was then a search for those victims—people who were actually denied a loan or an apartment—who stood to be compensated. After everyone who could be found was paid, there was often money left over. That money was returned to the defendant.

Now, Attorney Eric Holder and Civil Rights Division chief Thomas Perez have a new plan. Any unspent money will not go back to the defendant but will instead go to a “qualified organization” approved by the Justice Department. And if there is not enough unspent money—that will be determined by the Department—then the defendant might be required to come up with more money to give to the “qualified organization.”

The idea of directing unclaimed damage funds to non-profit groups whose interests are thought to be aligned with the unidentified victims’ is superficially appealing. Advocates of *cy pres* argue that it solves the problem of under-deterrence that occurs when the victims of the defendant’s wrongdoing fail to come forward and claim their share of the settlement made on their behalf. But as several respected legal scholars and practitioners have pointed out, it is also fraught with potential conflicts of interest. Northwestern University law professor Martin H. Redish and his co-authors have stated that the use of *cy pres* in the class action context “richly deserves” “scathing scholarly critique.”

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9 Another way to deal with the problem is to over-compensate those victims who do claim funds. For example, if 20,000 victims are expected, but only 10,000 actually present themselves, each one with an injury valued at $10, each could receive $20.


11 Redish, Julian and Zyontz, 62 Fla L. Rev. at 665.
The conflicts of interest are by no means unique to civil rights cases brought by the federal government on behalf of a class of victims. They are equally significant in private class actions. But they are nevertheless important in the governmental context: When the Civil Rights Division selects a non-profit organization to benefit from the settlement of a legal dispute, how does it make that selection? Are there safeguards in place to prevent organizations that are simply the personal favorites of Civil Rights Division officials or staff members from being selected? Have any of the organizations that have been selected in the past employed family or friends of Civil Rights Division employees (or former Civil Rights Division employees themselves)? Are non-profit organizations lobbying the Civil Rights Division to be included as fund recipients (as they are already lobbying courts in connection with private class actions)?

Is it appropriate for Civil Rights Division attorneys to be dispensers of political patronage on such a large scale? Has the Civil Rights Division come under pressure to bring the kind of legal action that is most likely to benefit these non-profit organizations rather than the kind of legal action that would best vindicate the national interest? Does the Civil Rights Division exert less effort to locate actual victims of wrongdoing when a favored non-profit group has been selected to receive any uncollected damages? All of these questions deserve answers.

Pursuant to the Commission’s decision, the Commission’s staff had researched the issue, prepared a discovery plan and drafted initial sets of interrogatories, which were then served on the Department of Justice. Everything was underway. The Commission had received a partial response from the Department of Justice and was expecting the remaining documents soon. But the terms of Chairman Gerald Reynolds and Commission Ashley Taylor, Jr.—both Bush appointees—expired at the end of 2010, and in early 2011 they were replaced by Chairman Martin Castro and Commissioner Roberta Achtenberg. At its first opportunity, the newly-constituted Commission voted to abort the cy pres report, thus letting

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12 Adam Liptak, Doling Out Other People’s Money, The New York Times (November 26, 2007) ( “‘[The use of the cy pres doctrine in private class actions] gives rise to this unbelievable world that I was shocked to learn about, and I’m not easily shocked in litigation,’ Professor [Samuel] Issacharoff [of New York University Law School] said. ‘Charities hire lawyers to go lobby the judge for the extra money.’”).

13 In addition, Commissioner Arlan Melendez was replaced by Dina Titus and the seat held by Commissioner Michael Yaki was briefly unoccupied. Both Melendez and Titus were appointed on the recommendation of Senate Democratic Leader Harry Reid. Michael Yaki was later re-appointed on the recommendation of House Democratic Leader Nancy Pelosi.
the Department of Justice off the hook in responding to the Commission’s interrogatories. The bullying topic addressed in this report—a favorite topic of the current Administration—was hurriedly substituted, and the Commission staff had to start from scratch.\footnote{See Statement of Chairman Martin R. Castro at 90 (quoting President Barack Obama at the White House Summit on Bullying Prevention on March 10, 2011).}

This looks very bad. The Byron York article in the Washington Examiner at least implied that the Civil Rights Division under the leadership of Obama appointees may have engaged in questionable activities. Prominent legal scholars had agreed that the use of the _cy pres_ doctrine in class actions creates a serious potential for conflicts of interest. The Commission’s report was designed, among other things, to allow the Division to demonstrate that its procedures are sufficient to guard against these potential conflicts of interest and that no cronyism had taken place in recent past. One would think under the circumstances the Civil Rights Division would prefer that the report be completed, rather than leave the question of conflicts of interest on its part dangling. Nevertheless, the investigation was shut down by a change in personnel on the Commission shifting the balance of power to Obama appointees.\footnote{The vote to terminate the investigation was 4 to 3. Voting in favor of termination were Chairman Castro (appointed by President Obama), Commissioner Roberta Achtenberg (appointed by President Obama), Commissioner Dina Titus (appointed upon recommendation of Senate Democratic Leader Reid) and Vice Chair Tbernstrom (appointed by President Bush, but who has caucused with Democrats for the past two years and votes with them except when it is clear her vote will not affect the outcome. I know of only one very minor exception to this rule since the Commission was re-constituted at the beginning of 2011). Voting against termination were Commissioner Peter Kirsanow (appointed by President Bush), Commissioner Todd Gaziano (appointed on recommendation of House Republican Leader Boehner), and me (appointed on recommendation of Senate Republican Leader McConnell).}

The newly-constituted Commission also cancelled two other on-going investigations—one into discrimination against women in higher education and the other into race-neutral enforcement of civil rights laws at the Department of Justice, a project which began as an investigation of the Department of Justice’s handling of a lawsuit against the New Black Panther Party for voter and poll worker intimidation. What all three projects had in common was each contained elements that were critical or potentially critical of the current Administration’s policies. Put differently, in each case, the Commission was fulfilling its mission to be a civil rights watchdog. See supra at n. 4. For a discussion of the termination of the sex discrimination investigation, see Gail Heriot & Alison Somin, Affirmative Action for Men?: Strange Silences and Strange Bed Fellows in the Public Debate Over Discrimination Against Women in College Admissions, Engage (2011) (forthcoming).

Believing that the Civil Rights Division might be eager to demonstrate that its staff members had never funneled funds to an organization with which they had some personal relationship, that it had not become lackadaisical about finding the real victims of civil rights violations, and that its procedures for selecting the recipients of funds were designed to avoid the potential for conflicts of interest, my special assistant, with my encouragement and cooperation, sent the Department of Justice a Freedom of Information Act request on June 10, 2010. DOJ acknowledged receipt of the request on June 21. No documents have been produced to date.
Meanwhile, given the late date at which the bullying topic was selected, there has been no opportunity for the Commission to root out useful new information about bullying or about the method by which the Department of Education enforces its bullying policy. I will therefore confine my remarks to a very general level.

II. The Federal Government is Ill-Suited to the Role of Controlling Schoolyard Bullies.

Remember when children used to say “Don’t make a federal case out of it”? In those days, even fourth graders understood that not every problem is best dealt with at the federal level. These days, however, everything seems to be a federal case—even schoolyard bullies.

The point is not that bullying is unimportant. Few things are as important as ensuring that all our nation’s children can attend safe schools that are conducive to learning. But, in the absence of extraordinary circumstances, the problem can only be dealt with effectively at the local level. Individual teachers and principals backed up by active parents, school boards, school district officials, and students themselves must be in charge. It is their battle to win or lose. They are the heroes in this story, not the Department of Education.

Dealing with bullies requires knowledge of particular personalities and situations. Only their teacher knows that when little Owen doesn’t want to go out to recess, it is likely because the bigger kids—Benjamin and Elijah—have been harassing him and that he is too embarrassed to say so. Only the teacher knows that when little Chloe claims she has been bullied by her playmates, she is probably telling a tall tale, as she has done many times.

A similar request was sent to the EEOC on June 10, 2011. An acknowledgment was sent on June 17. On August 17, my special assistant received a letter stating that the EEOC estimated that costs of searching for responsive documents would be over $5,000. She and I are waiting for a response to her request for a fee waiver.

16 Although Chapter 3 of the report purports to offer new information, what is there sheds no useful light on the question of whether the Department of Education is doing its job properly or on any other significant question. What it does is provide charts and counts for the sake of charts and counts. As my colleagues Commissioners Todd Gaziano and Peter Kirsanow point out in their Joint Dissent, it is unclear how many of the complaints counted in this chapter actually involve student to student harassment (as opposed to alleged harassment of a student by a teacher or other school official). There is also no attempt to assess how many of the voluntary resolution agreements discussed in that chapter were actually meritorious. See Joint Dissent of Commissioners Gaziano and Kirsanow at 132-33.
before. Teachers must act quickly and decisively at times, but they must also be careful and nuanced in dealing with their charges. In addition to knowing about the subjects they teach and how to teach them, they must possess the skills of both a psychologist and a police officer.

One could argue that any help in this regard should be welcome. But help from the 800-pound gorilla can be worse than no help at all. And that is what anything as large and powerful as the federal government inevitably is. The fact that it may be well-meaning is nice to know, but it shouldn’t make anyone want to trust it with a china tea set.

It is not that 800-pound gorillas are never useful. When it comes to fighting a war or building an interstate highway system, such a creature is perhaps the perfect ally. But helping school districts deal with discipline problems is a very different endeavor.

Local schools must do two things to satisfy the Department of Education: They must do the right thing in response to bullying motivated by race, sex, national origin or disability. Then they must be prepared to demonstrate with evidence that they have done the right thing. Sadly, in the real world, the latter task begins to overshadow the former. That is in the nature of bureaucracy. Teachers and principals must document the steps they have taken. Slowly, but unavoidably, the emphasis shifts from doing what the teacher and principal believe is the right thing to demonstrating that the school has done what the teacher and principal think some Department of Education official will think is the right thing. This is a shame. Their own judgment may have been imperfect—just like every other human being’s on the planet Earth—but it is better informed than the Department of Education’s and hence much more

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17 Certainly, there are times when coordination at the national level is crucial. But no such coordination is necessary for dealing with bullies. And even if it were necessary, the federal government is not offering it. Rather, it offers fragmentation. Federal law confers jurisdiction to act on the Department of Education only when bullying is a manifestation of race, sex, national origin, or disability discrimination. There are ways in which bullying on these grounds may differ from bullying on other grounds. But it is unclear why anyone would want a school to have one method for responding to a bully who is harassing his victim because the victim is nearsighted or his parents are from Ukraine and another one for when the bully is motivated by the fact that his victim is homely, nerdish or socially awkward.
likely to be on target. Like every other person in a position of authority, teachers and principals may need some supervision. But it is better for that supervision to come from someone closer to the situation than from the Department of Education.

For a sense of how policies like the Department of Education’s bullying policy have worked in the past, one need only look to its very similar sexual harassment policy and the zero tolerance rules that have evolved from it:18

18 While the Department of Education uses the word “bullying” in addition to “harassment” in describing its policy, the policy is essentially a harassment policy and draws on court decisions relating to sexual harassment for its justification. See Dear Colleague Letter of October 26, 2010 from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education.

A few words on how sexual harassment law in connection with Title VII has driven harassment law generally are in order: In 1964, when both Title VI (prohibiting race, color and national origin discrimination in federally-assisted programs) and Title VII (prohibiting race, color, sex, religion and national origin discrimination in public and private employment) were passed as part of the Civil Rights Act of 1964, the latter was considered much more significant. An entirely new federal agency—the EEOC—was created to administer the law, and it was clear from the beginning that a private cause of action would lie. Deputy Attorney General Nicholas deBelleville Katzenbach estimated in two letters to Emmanuel Cellar, Chairman of the Committee on the Judiciary of the House of Representatives, both dated February 6, 1964, that Title VI would require only three employees and a budget of $62,510. Title IV (school desegregation) on the other hand was estimated to require 150 employees and a budget of $10,752.560, while Title VII was expected to require 155 employees and a budget of $3,875,000. Title IX, part of the Educational Amendments Act of 1972, prohibiting sex discrimination by educational institutions receiving federal financial assistance, was passed eight years later.

In 1964, the kind of race and sex discrimination in employment that people most readily thought of was not subtle. Newspapers in the South routinely categorized their “Help Wanted” ads as “Help Wanted—White” and “Help Wanted – Colored,” and “Help Wanted—Male” and “Help Wanted—Female” ads were common almost everywhere. Nevertheless, Title VII’s text does not prohibit only gross discrimination; it prohibits discrimination. When confronted with the question of whether Title VII prohibits an employer from maintaining a working environment that is so hostile to a particular race (or to one sex) that few members of that group would be willing to expose themselves to it, the Supreme Court and other courts rightly ruled that it may. See Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)(sex); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)(race).

This did not result in an immediate explosion of cases. At the time, Title VII plaintiffs could sue for back pay or for an injunction requiring that the offending conduct stop. But they could not sue for emotional distress damages. As a result, an employee who had been harassed would be unlikely to sue unless things were so bad that she had quit or the employer refused to rectify something that mattered to her enough to get an injunction. Small grievances—both valid and invalid—were more likely to be left to the ordinary give and take of the workplace. All this changed in 1991 when Title VII was amended to allow money damages (instead of just back pay) and punitive damages. Changes in remedies frequently lead to profound changes in the way the substantive law is interpreted and applied. It was in 1991 that journalists (and even comedians) began to make fun of some of the comparatively trivial cases that employers had to contend with. See, e.g., Nat Hentoff, Sexually Harassed by Francisco Goya, Wash. Post. (Dec. 27, 1991)(copy of Goya’s Naked Maja removed from classroom where it had hung for years after professor said it harassed her).

Meanwhile, as sexual harassment prevention was becoming part of the zeitgeist, cases brought under Title IX, which covers educational institutions receiving federal funds, began to be filed too. See Franklin v. Gwinnett
• Two middle school students—Cory M. and Ryan C., both 13, were arrested and charged with a crime at Patton Middle School in McMinnville, Oregon for slapping girls’ posteriors in an exuberant greeting in February of 2007.\(^\text{19}\)

• Seven-year-old Randy C. saw another child hitting a fellow first-grader’s buttocks, so he did it too at Potomac View Elementary School in Woodbridge, Maryland in February of 2009. The principal called the police on him.\(^\text{20}\)

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\(^\text{19}\) Scott Michels, Boys Face Sex Trial for Slapping Girls’ Posteriors, ABC News (July 24, 2007).

A five-year-old Hagerstown, Maryland boy was written up for sexual harassment for pinching girls’ rear ends in the hallway at Lincolnshire Elementary School. Indeed, 28 kindergarteners were suspended for sex offenses, including 15 cases of sexual harassment in the 2005-2006 school year.\textsuperscript{21}

In December of 2006, a 4-year-old Waco, Texas boy was suspended for hugging a teacher’s aide and rubbing his face in her chest.\textsuperscript{22}

At Downey Elementary School in Brockton, Massachusetts, a 6-year-old was suspended for three days after he put two fingers inside a fellow first-grader’s waist band. He told his mother that the girl had touched him first.\textsuperscript{23}

A 6-year-old in Greer, South Carolina was accused of sexually harassing his kindergarten teacher, because he told one of his classmates that he liked looking at her behind.\textsuperscript{24}

According to the Maryland Department of Education, 166 elementary school students were suspended in the 2007-2008 school year for sexual harassment, including three pre-schoolers, 16 kindergarteners and 22 first graders. In Virginia, 255 elementary students were suspended for offensive sexual touching in that same year.\textsuperscript{25}

One could argue that these school districts have simply misinterpreted what the Department of Education requires. But that is no answer. It is in the nature of distant bureaucracies that their edicts will be misinterpreted. One can argue that schools shouldn’t make such mistakes, but that is no more useful than King Canute’s command that the tides recede. The fact is that people make fewer mistakes when they rely upon their own common

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\item \textsuperscript{21} Yvonne Bynoe, Is that 4-Year-Old Really a Sex Offender?. The Washington Post (Oct. 21, 2007). According to the article, school spokeswoman Carol Mowen said, “‘It’s important to understand a child may not realize that what he or she is doing may be considered sexual harassment, but if it fits under the definition, then it is, under the state’s guidelines.’” These state guidelines were promulgated in an effort to comply with federal civil rights law.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Gitika Ahuja, First-Grader Suspended for Sexual Harassment: Boy’s Mother Says He’s Too Young to Even Understand the Accusation, ABC News (February 9, 2006). The article reports: “In a statement, Brockton Superintendent of Schools Basan Nembirkow said the district takes ‘all allegations of sexual harassment very seriously. An investigation is always conducted when reports of sexual harassment arise. Principals are trained to handle these difficult situations and they are assisted, as needed, by the district’s sexual harassment officer in handling each situation.’”
\item \textsuperscript{24} 6-Year-Old Boy Accused of Sexual Harassment, WSPA-7-On-Your-Side (April 4, 2008).
\item \textsuperscript{25} JuJu Chang, Alisha Davis, Cole Kazdin and Olivia Sterns, First-Grader Labeled a Sexual Harasser: Has Zero-Tolerance for Sexual Harassment in Schools Gone Too Far?, ABC News (Feb. 19, 2009).
\end{itemize}
sense than when they try to please some distant bureaucracy. Indeed, that is part of why it is not a good idea to make everything a federal issue.

The problem is structural. If a school district attracts the attention of the Department of Education and is forced to submit to an investigation, it is going to cost it enormous resources. Lawyers will have to be consulted, and considerable staff time will have to be devoted to dealing with an investigation. The object of the game therefore is to avoid such attention. It is natural for a school district to implement a policy that leans over backwards to avoid trouble.

A policy that leans over backwards to avoid one kind of risk will inevitably pay insufficient heed to a countervailing consideration. In the case of sexual harassment policies, young children who cannot even spell “sexual harassment” have been needlessly traumatized. Their educations have been interrupted by uncalled-for suspensions. And these well-publicized cases involving kindergartners and first graders are unlikely to show the full extent of the problem. There are likely lots of cases that are not quite as perfect for media ridicule as the tiny tot cases, but in which an injustice was nevertheless done.26 In the end, the greatest casualty of the Department of Education’s war may turn out to be the easy-going relations between the sexes that have been characteristic of American culture for a long time. When young people have to be careful about what they say or do around the opposite sex, the result is likely to be that they say and do less.

In the case of the bullying policy, the neglected countervailing consideration may turn out to be the First Amendment. As then-judge Samuel Alito stated in Saxe v. State College Area School District:27

There is no categorical “harassment exception” to the First Amendment’s free speech clause.

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There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs.

To be sure, First Amendment protections operate a little differently in school settings than they do in the marketplace. But they operate nonetheless—especially in this case, given, as Professor Eugene Volokh pointed out in his written testimony, that the Department of Education’s Dear Colleague Letter appears to cover certain off-campus speech as well as on-campus speech.28 There is, however, no federal agency that actively protects students’ First Amendment rights.29 As a result, the incentive is for schools to give these rights a lower priority.

Anyone who has followed higher education over the last couple of decades knows that college campuses have been home to serious controversies over First Amendment rights.30 It is one of life’s crueler ironies that colleges and universities—the very institutions that should hold freedom of expression most dear—have instead led the charge against those rights.31 In his testimony, Professor Volokh recounted many illustrative incidents; many

28 Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. School Dist., 398 U.S. 503 (1969); Saxe v. State College Area School Dist., 240 F.3d 200 (3d Cir. 2001). Commissioner Yaki’s Statement is devoted almost exclusively to the proposition that the Constitution sometimes permits and indeed sometimes requires that children be treated differently from adults. No one denies this—although the cases he cites for that proposition do not always stand for it. See, e.g. Jacobson v. Massachusetts, 197 U.S. 11 (1905)(upholding Massachusetts’ compulsory vaccination law against an adult plaintiff). By the same token, however, no serious student of the law can deny that while the Supreme Court has recognized limits on the application of the First Amendment to school children, it has also recognized that school children have First Amendment rights at school and outside of school in the same cases. See Tinker, 393 U.S. at 506 (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”). Commissioner Yaki’s Statement does not deal with this at all. Nor does it deal with the question of whether the Department of Education has or should exercise the authority to regulate public or private schools in the manner it purports to do in its Dear Colleague Letter.
29 The only organization I know of that specializes in protecting the First Amendment and academic freedom rights of faculty and students on college and university campuses is the Foundation for Individual Rights in Education (FIRE). Although some of the cases that FIRE litigate may lead to judicial decisions that affect K-12 public schools, FIRE works primarily on safeguarding the individual rights of university students rather than on defending those of younger students. Sadly, its staff is also tiny. But see William Shakespeare, Henry V, act iv, scene iii (c. 1598).
more could be told. The Department of Education’s Dear Colleague letter is likely to push K through 12 education a little further down the path that higher education has recently followed.  

Bureaucratic solutions are not the answer to every problem. The power of the federal government is a tool like any tool and should be used only in the right situation. For example, more than forty years ago the Department of Health, Education and Welfare (predecessor to the current Department of Education) performed an invaluable service in conjunction with the Department of Justice in coercing recalcitrant schools districts into desegregating. It had been a decade since Brown v. Board of Education, and many schools were just as segregated as they had been before that decision. Armed with Titles IV and VI of the Civil Rights Act of 1964, they indeed came down on these school districts like the proverbial 800-pound gorilla. Such a solution was necessary and altogether appropriate under the circumstances.

Higher education is not the only place where serious First Amendment controversies have erupted in the last decade. Professor David E. Bernstein has written about the use of federal employment discrimination law to limit free expression in the workplace. See David E. Bernstein, You Can’t Say That!: The Growing Threat to Civil Liberties from Anti-Discrimination Laws (2003) (discussing sexual harassment law’s effect upon the workplace).

State anti-bullying initiatives may also have this effect. See Jonathan Saltzman, Antibully Law May Face Free Speech Challenges, The Boston Globe (May 4, 2010). That article stated:

> [S]ome aspects of the law are so general that civil rights lawyers are concerned about how schools will apply it. The law, for example, defines one form of bullying as “repeated use” of a written, verbal, or physical act that “causes physical or emotional harm to the victim.”

By that standard, said Gavi Wolfe, legislative counsel for the American Civil Liberties Union of Massachusetts, a student who calls another student “loser” twice on the school bus and hurts the youngster’s feelings could qualify as a bully. A bus driver who heard the remarks would have to report them to school officials, who would then have to contact the parents of both children and take appropriate disciplinary action.

Harvey A. Silverglate, a well-known Boston civil rights lawyer, said, “School authorities are going to overreact, and we’re going to have a firestorm of administrative actions against kids for saying this that are merely slightly unpleasant but do not qualify as bullying or harassment or any such thing.”

It has its costs, of course. Once such a bureaucracy is put in place, it is very difficult to dispense with it, even if the need for it diminishes. Such are the consequences of history.
This is not 1964. There is no credible evidence that any school district in the nation is pro-bully. Mistakes happen; teachers and principals have not always done the right thing. But these mistakes are not less likely to happen with vigorous federal oversight. Indeed, I believe they are more likely to happen. Under the circumstances, a lighter touch that the Department of Education’s Dear Colleague Letter offers is called for.


Chairman Castro rightly states in his Statement that “each of us, regardless of our Party affiliation or our political ideology, wants to have communities and schools that are safe for our children, regardless of their race, national origin, sex, religion, disability status or sexual orientation. Where we may differ is how to accomplish that goal.” But he draws very different conclusions from that statement than I do. To me, the fact that we all agree we want safe schools for our children means that the aggressive federal oversight represented by the Department of Education’s Dear Colleague Letter is unnecessary and will likely be counterproductive. Different school districts, indeed different teachers and principals, should take different approaches to the problem, and they should learn from each other’s successes and failures. Meanwhile, creating media events like our May 13, 2011 briefing for the sake of media events is a job that can and should be left to the politicians.

34 The case in South Philadelphia described at our briefing by Helen Gym of Asian Americans United may well be an example.
35 Statement of Chairman Martin R. Castro at 90. It is useful to note that forty seven years ago, Chairman Castro could not have made a similar statement about the education issue of the day. It was not true that everyone wanted to ensure that African American students had the right to attend the same schools as their peers, regardless of race. That is why federal intervention was useful: The Fourteenth Amendment was being flouted. There is nothing remotely analogous to the massive resistance to Brown v. Board of Education today. There have many disagreements about education policy, but there are no adults outside homes for the criminally insane who don’t want all the nation’s children to have a safe place to learn.
36 Everyone’s heart goes out to Ms. Aaberg, the mother of Justin Aaberg, the 15-year-old student from the Anoka High School in Anoka, Minnesota, who took his own life on July 9, 2010 during the summer vacation between his freshman and sophomore years. But when bereaved relatives testify before a commission about their grief, care must be taken to prevent the proceedings from degenerating into political theater. In our case one of our Commission members used Ms. Aaberg’s testimony as a club to attempt to discourage one of our other witnesses—Francisco M. Negron, Jr., general counsel to the National School Boards Association—from testifying candidly. Mr. Negron was kind enough to inform us of the kinds of problems school boards face in trying to satisfy the federal mandate on bullying. Commissioner Yaki responded this way:
I’m going to be as civil as I possibly can. But it just seemed to me very difficult for me to listen to your testimony talking about the fear of lawsuits and plaintiffs’ lawyers when you’re talking about sitting next to someone who lost their son ….

And to talk about plaintiffs’ lawyers and whatever is essentially saying, ‘Well you know there’s a price we have to pay and there’s some cost benefit analysis that we have to do when it comes to how much a child’s life is.’ At least that’s the way it came to me. I know that’s not what you meant, but certainly the way it came out.

So my question to you is, you talk about the fact that there should be no federal mandates, because there should be local leadership. How do you explain that to Ms. Aaberg?

Tr. at 275-76.

This was not fair. Mr. Negron was given a difficult task—giving testimony directly after a mother had offered her story of the loss of her young son—and he fulfilled that task with tact and grace. Mr. Negron and the National School Boards Association are at least as concerned about the safety and welfare of children as Commission Yaki and the other members of the Commission. But among other things, Mr. Negron has a duty to try to ensure that school resources are not spent on unproductive bureaucratic red tape rather than on actual teaching and learning. Moreover, as Commissioner Yaki must surely know, the job of preventing suicide is not as easy as it was made to seem at our staged media event—complete with poster-sized photographs of smiling suicide victims on easels. Increased federal oversight is unlikely to do the trick. The next suicide in the Anoka-Hennepin School District may not be the victim of an anti-gay bully. Next time it may be a child who was wrongly accused of being a bully instead. Perhaps it will be a child who never did anything at all, but whom the true bullies accuse of wrongdoing just for the fun of it. Or perhaps it will be a child reared in a religious tradition that disapproves of homosexuality, but who has done nothing but decline to endorse it. History never repeats itself exactly. The next time might not be a suicide at all; instead it may be a fatal accident because some school district somewhere had its budget strained by the kind of litigation that Commissioner Yaki seems unconcerned about and hence was not able to keep its school buses properly maintained. It is a complicated world. And it will not be made better or less complicated by a federal bureaucracy attempting to accomplish through federal mandate that which cannot be accomplished that way.

Justin Aaberg’s tragic suicide is very much part of that complicated world. Members of the Commission seem to assume that it was a direct result of school bullying. But immediately after his death, which occurred in July, between school sessions, WCCO, the CBS affiliate in Minnesota, reported that his friends told Ms. Aaberg that he ―had recently broken up with his boyfriend.‖

http://minnesota.cbslocal.com/health/glt仔een.suicide.2.1910636.html. To be sure, they also reported to her that he had sometimes been bullied. But there is nothing in the article to link the suicide to either the break up or the bullying, and given that the suicide took place in the middle of the summer, it seems doubtful that the link between it and any bullying at school was direct and immediate. At best, it may have had an indirect link.

In her testimony, Ms. Aaberg related the two incidents that she knew of. First, more than a year prior to his death, two other students grabbed at his genitals in the hallway and taunted him saying, “You like that, don’t you?” This incident had left young Justin crying, and his friends reported the incident to the school counselor. There is nothing in the Commission’s record that makes it clear what, if anything, the counselor did about it. Ms. Aaberg was inclined to be critical of the counselor for failing to inform her of what happened. But what if she had? Would that have made things better for Justin? Or worse? Many children prefer that their personal humiliations not be brought to the attention of their parents, and given that Justin did not tell his parents himself, he may well have fallen into that category on this occasion at least. Sometimes in the exercise of good judgment, school counselors must overrule the wishes of their charges on such matters. But sometimes good judgment requires that the child’s wishes be respected. In what respect does oversight from the Department of Education increase the likelihood that the right decision will be made?
What disturbs me is the lack of real discussion in the Statements. Nowhere is an effort made to explain why the federal jurisdiction over these issues is making things better. The point is taken for granted. The Statements contain no recognition of the fact that entrusting an issue—especially an important issue—to the federal bureaucracy has costs.

I wish I could fully explain the modern tendency toward an ever-larger and more powerful centralized government. Part of it is obvious, of course: It is a one-way ratchet. Once a bureaucracy is created, it requires extraordinary political will to shrink it, and hence it hardly ever happens. As the bureaucracy grows, so too does the class of persons who service it from the outside—lobbyists, lawyers, and professional political activists. Such persons, like government employees themselves, are likely to see government action as the solution to every problem—especially when an important by-product of every new federal initiative is to provide white-collar jobs to people like them.37

The other incident Ms. Aaberg reported was indeed communicated to her by her son. She testified that two months prior to his death he confided that a “kid” had once told him that because he was gay he was going to hell. Ms. Aaberg did not testify whether she knew where or when this conversation involving her son and the other young person occurred, the tone of voice with which the student spoke, whether the teachers, counselors or principal knew about it or had reason to know about it. She simply gave her opinion that the First Amendment should not cover such speech. Tr. at 296.

Despite knowing of this incident, Ms. Aaberg testified before the Commission that up until his suicide “he always looked so happy and I honestly thought he had the perfect life.” He had many friends, and according to her testimony, he evidently did not wish to bother them with his problems any more than he wanted to bother his family. Statement of Tammy Aaberg at 1. No one realized that he was about to take his own life. All of this is perfectly understandable and my sympathy goes out to Ms. Aaberg and her son’s family and friends. But it may well be that he looked happy to his teachers and counselor too. They may also have mistakenly thought he had the perfect life.

Life teaches us that human beings are not always what they appear to be on the surface. But no one has ever suggested that the problems of navigating the human soul can be made easier with more aggressive federal oversight.

37 It is worth noting that a significant by-product of the Department of Education’s Dear Colleague Letter of October 26, 2010 is to increase the demand for anti-bullying seminars and education programs—and not just by a little bit. In the Letter, Assistant Secretary Russlynn Ali makes it clear that “school administrators should look beyond simply disciplining the perpetrators [i.e. bullies].” “While disciplining the perpetrators is likely a necessary step, it often is insufficient.” Instead, she repeatedly urges “training faculty on constructive responses to racial conflict,” “[p]roviding faculty with training to recognize and address anti-Semitic incidents,” and “crea[t]ing an age-appropriate program to educate its students about the history and dangers of anti-Semitism.” In response to one hypothetical featuring sexual name-calling and rumor mongering, Assistant Secretary Ali states “The school should have trained its employees on the type of misconduct that constitutes sexual harassment.” She again makes it clear the “responding to individual incidents of misconduct on an ad hoc basis only” is insufficient.” In connection with a hypothetical involving the bullying of a disabled student, she states
It is easy to overlook the structural conflicts of interest that separate lobbyists, lawyers and professional activists from the people they purport (and indeed usually in good faith are attempting) to represent. But a wise policymaker will never lose sight of those conflicts: A lawyer or lobbyist benefits from complex and ever-changing law; his clients usually benefit from clear and stable law. A professional political activist needs political victories in the form of legislation passed or favorable administrative action; without such victories he cannot raise money. It is less important that these victories ultimately actually benefit anyone, much less those who thought they would be benefited. The professional political activist surely has no interest in examining past victories to find out whether they provided the promised benefits.

The primary political organizations that have supported the Department of Education’s bullying policies have been civil rights organizations specializing in the concerns of sexual minorities. Sometimes their efforts have been part of broader efforts at the local level to combat bullying, and sometimes they have been part of efforts in the national media to assure sexual minority students who feel isolated that there are lots of Americans who wish them well. I believe these very different aspects of the anti-bullying that the proper response should “at least” have included (among other things) “special training for staff on recognizing and effectively responding to harassment of students with disabilities.”

By the end of the 10-page letter, only a fool would have failed to note that the best way to avoid liability—perhaps the only way—is to engage lots of trainers.

Training is obviously not always a bad thing. But when schools undertake such training in response to what they perceive to be a government mandate, they are overwhelmingly likely to just go through the motions.

Approximately twenty years ago, see n.18, supra, employers seeking to avoid Title VII sexual harassment lawsuits for monetary damages began to hire outside consultants to train their employees on proper workplace decorum. In doing so, some hoped their employees would learn to avoid conduct that could be construed as sexual harassment. More important, however, they hoped these training courses would provide them with some immunity against punitive damages. Consequently, it didn’t matter whether an employer thought its employees needed sexual harassment training or not; they were going to get it.

In California, where I live, the businesses providing these training courses became powerful enough to secure a state law requiring all supervisory employees at all workplaces, both public and private, to take such a course every other year. See Cal. Gov. Code § 12950.1 (2011).

It seems overwhelmingly likely that the advocacy groups and private businesses that provide bullying training have received a special stimulus from the Department of Education’s Dear Colleague Letter. A representative of one of them, the Gay, Lesbian and Straight Education Network (“GLSEN”), testified at our briefing in favor of the Department of Education’s policy.
movement may run together in the minds of its supporters. But they need to be considered and evaluated separately. I question whether increased power in the hands of the Department of Education will, in the long run, be in the interest of sexual minority students in particular. If the stereotypes of sexual minority members as particularly likely to be artistic and creative are even partly true, it is not clear that a national policy of deadening bureaucracy in the schools is in their interest.\(^{38}\)

**IV. Some of the Literature Cited in Commissioners’ Statements and in the Report Needs at Minimum to be Put in Perspective.**

Given the very short period of time allocated to put together this Report (and the Commissioners’ statements), it has been impossible to do anything approaching an adequate analysis of the many social science articles, advocacy pieces masquerading as social science


One expert, Cornell University professor of human development Ritch Savin-Williams, has expressed concern that current scholarship on gay, lesbian and bisexual youth tends to be “doom-and-gloom” and that scholarship “[a]ccentuating the assets, resiliency, and complexity of same-sex oriented youth as creative, artistic, versatile, assertive, stylish, witty, sensitive, and athletic does not exist.” Ritch C. Savin-Williams, Then and Now: Recruitment, Definition, Diversity, and Positive Attributes of Same-Sex Populations, 44 Developmental Psychology 135, 137 (2008). Alas, the political system tends to reward those who can claim to be disadvantaged, particularly if they can claim to have been victimized.

Savin-Williams also points out what he calls a “perplexing contradiction” in the social science literature on sexual minorities:

> Although gay youth are purported to be severely disturbed, once adulthood is reached, they somehow become good partners and parents. How can it be that young lesbians, who reportedly have high levels of nearly every risk behavior imaginable, grow up to be such good partners and parents? One pessimistic perspective is that disturbed lesbian youth are eliminated through their pathology, with suicide being the most obvious. Alternatively, as they age, broader and more representative subgroups of same-sex attracted women come out, establish relationships, and identify some aspect of their same-sex sexuality on research surveys. Another explanation is political in nature. Highlighting ‘bad’ gay youth and ‘good’ gay adults garners resources: community support services and school-based gay/straight alliances for youth and legal rights in legal same-sex parenting and marriage court cases for adults.

Id. at 137. See also Ritch C. Savin-Williams, The New Gay Teenager (2005)(arguing that the image of sexual minority teenagers as depressed and suicidal may be exaggerated).
and straight advocacy pieces cited in the Report and in the draft Statements. Nor has there been time to canvass the literature to determine what was left out of the Report. Nevertheless, I have tried to read through a sampling of the articles cited in Commissioner Achtenberg’s statement.40 What follows are notes on some of the issues I spotted.

**Bullying of Disabled Students:** I have no trouble believing that some kinds of disabled students are bullied more often than other students—at least in environments where non-disabled students are left unsupervised in the presence of these disabled students. That is the nature of bullying; it is the abuse of the weak by the strong. But we should not pretend that we have useful data on in-school bullying of disabled students.

For example, Commissioner Achtenberg quotes from the Report this way:

“[i]n a 2009 study of parents of children with Asperger Syndrome, 94 percent reported that their children had been bullied. [citation omitted.] Additionally, 65 percent reported that their children had been victimized by peers within the past year, while 50 percent reported that their children were scared by their peers.”41

Actually it was a 2002 study—*Middle Class Mothers’ Perceptions of Peer and Sibling Victimization among Children with Asperger’s Syndrome and Nonverbal Learning Disorders*—that found the 94% rate.42 The 2009 study referenced in the Report—*Bullying of Students with Asperger Syndrome*—merely cites the 2002 study for that point.43 The 94% figure is for mothers who responded more than zero to any of the following questions:

How often in the last year your child was hit by peers or siblings at home or schools or out in the community?

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39 It is the practice of the Commission for Commissioners to share their Statements and to then allow 30 days for Commissioners to add rebuttal material to their Statements or to draft a separate Rebuttal Statement. My citations are to the draft Statements, which did not contain rebuttal material at the time I had access to them.

40 This is a random sampling of the articles, and not an effort to find the most troubling case in each category. There has been insufficient time for anything else.

41 Commissioner Roberta Achtenberg at 103 (quoting Report at 14-15)(citation were omitted in the Achtenberg version).


What is the number of times your child has been physically attacked by a gang or group of kids?

What is the number of times your child has been kicked or hurt in his/her private parts (nonsexual genital assaults)?

How many times did any kids, including sisters and brothers, pick on your child by chasing him or her, trying to scare him or her, grabbing your child’s hair or clothes, or making your child go somewhere or do something he or she did not want to (bullying)?

How often did your child “get scared, sick or feel really bad because of being called names, saying mean things, or told that they didn’t want him or her around anymore (emotional bullying)?

A few things are worthy of note about the 2002 study. First, the 411 families who participated in the study were not randomly selected. Rather, they were volunteers who responded to an internet invitation to the parents of a child with Asperger’s Syndrome or another nonverbal learning disorder to complete an anonymous questionnaire that would be mailed to their home. Given that they appeared to be looking around the internet for information about their child’s disorder, volunteers are probably more likely to report problems than non-volunteers.

Much more important, the study did not even purport to be limited to bullying at school. It included abuse by siblings or peers in any situation. I am forced to conclude from this that at least 6% of the Asperger’s Syndrome children studied were only children. Otherwise the figure would almost certainly have been 100% at least with the families that I am familiar with, not just with disabled children, but with all children Schools cannot control what siblings do at home and have little control over what peers do to peers at shopping malls and street corners. Consequently, this study has little application to the issues before the Commission.

The 2009 study cited by Commissioner Achtenberg asked essentially the same questions to the parents of only 34 children who had been diagnosed with Asperger’s

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44 Little at 47-48.
Syndrome. Like the earlier study, it used a nonrandom sample. The parents had been “recruited online, in clinics and at autism conferences.”

The results showed high rates of incidents, though not nearly as high as in the 2002 study it is modeled after. The 2009 study found that 64% of parents report some sort of bullying or harassment and 50% said his or her child had been scared by peers or siblings. Again, this includes bullying or harassment anywhere, not just in school. In addition, 11.8% reported that the child at issue had not been invited to any other child’s birthday that year, 5.9% said that he or she was routinely chosen last or near last for sports teams and 2.9% said he or she sat alone at lunch everyday.

A few additional points may be also useful here:

- Asperger’s Syndrome children are sometimes characterized by aggression themselves, so insofar as they are more likely to be in the company of other Asperger’s Syndrome children, this may tend to elevate levels of violence. It is also possible that some of the incidents reported by parents were actions taken by non-Asperger’s children who, rightly or wrongly, perceived themselves to be acting in self-defense.

- Asperger’s Syndrome children are sometimes characterized by unwarranted or inappropriate fears, so the notion that 50% of these children were said to experience fear of their peers may be less informative than it appears on the surface.

- One of the most well-known characteristics of Asperger’s Syndrome children is an inability to judge nonverbal social cues—including facial expressions to voice inflections. As a result, insofar as parents are relying on their child’s report of an incident that occurred outside their field of vision, they may receive an inaccurate account of what happened.

The bottom line is that we have not begun to quantify how much more likely a child with Asperger’s Syndrome is to be bullied in school by other students—although it is easy to believe that they are. But even if we could quantify it, it would be insufficient to justify

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45 Carter at 148.
46 Carter at 150 (only 18 respondents, those with children ages 4-14 were asked the questions on social shunning).
federal efforts to influence local bullying policy. Nothing in either of these studies shows that local authorities are not addressing the matter in the best way they know how or that more federal supervision would be a useful improvement.\textsuperscript{48}

\textit{Bullying on the Basis of the Victim’s Religion:} Commissioner Achtenberg also draws our attention to two surveys by the Sikh Coalition—one in the San Francisco Bay Area in 2010 and one in New York City in 2007—on the subject of religious based discrimination. Of these, I have been able to locate and examine one—the New York City survey.

The fact that a survey had been conducted by an advocacy organization should ordinarily cause a critical reader to scrutinize it a bit more carefully than usual.\textsuperscript{49} In this case, however, the survey does not require particularly careful scrutiny to reveal its problems.

The report has the tendentious title \textit{Hatred in the Hallways: A Preliminary Report on Bias Against Sikh Students in New York City’s Public Schools}.\textsuperscript{50} It reports the results of a poll of 205 Sikh children in New York, primarily in the borough of Queens (where most New York Sikhs reside). Two things are crucial to understanding the results obtained in it:

Because the report states that 77.5\% of Sikh boys and 58.4\% of Sikh students generally report being teased or harassed on account of their Sikh religion, the word \textit{“teased”} must be emphasized. The Free Dictionary defines “tease” this way:

1. To annoy or pester; vex.
2. To make fun of; mock playfully.

Despite the Sikh Coalition’s assertion that its findings are “shocking by any standard,” it is never shocking to find that children tease each other. Children always tease

\textsuperscript{48} It should be noted that these very useful studies were not written for the purpose of justifying a federal bullying policy. Rather they were intended to provide information to pediatric nurses and other health professionals that would take them a step beyond their own clinical observations. In the absence of this evidence, these professionals would have even less to go on.

\textsuperscript{49} On the other hand, this can be carried too far. Sometimes advocacy organizations are in the best position to bring problems to public attention that might otherwise be neglected.

\textsuperscript{50} The Sikh Coalition, \textit{Hatred in the Hallways: A Preliminary Report on Bias Against Sikh Students in New York City’s Public Schools} (June 2007).
each other. It would be shocking if they didn’t. Indeed, all but the most humorless adults I know indulge in it now and then too. Sometimes children take it too far; indeed, sometimes adults take it too far. But there is nothing in the report to separate friendly but impish teasing from something worthy of discipline, much less worthy of federal intervention. There may well be a problem, but this report has not uncovered it.

It should also be noted that unlike the authors of some of the other studies cited in the Report, the Sikh Coalition evidently interviewed a number of quite young students.\(^{51}\) That puts the report’s finding that “[t]wo out of five Sikh children who wear turbans or patkas [religious head coverings for younger boys] are physically harassed—beaten or touched on the head”—in a different light. Beaten or touched on the head does not mean beaten. Among the younger children, I would expect the number who have been “touched” to be extremely high. Younger children touch each other. They roll in the grass with each other, they blow spit balls at each other, and they put chewing gum in each other’s hair. They are especially likely to want to touch a schoolmate if they see something that in their ignorance appears to be a funny hat. Children’s ignorance, with proper treatment, goes away. Federal bureaucracies created to solve a problem that is best solved locally do not.

I am confident that the Sikh Coalition is correct that some Sikh children have been harassed on account of some other children’s misperceptions that they are terrorists.\(^{53}\) In that

\(^{51}\) This is clear because the summary of the results repeatedly refers to students who wear “patkas,” which are head coverings worn by young boys before they are old enough to wear turbans. A Sikh Coalition video also features a photograph of a quite young boy being interviewed for the survey. See Sikh Coalition, Sikh Coalition NYC Civil Rights Survey (May 11, 2007), available at http://www.youtube.com/watch?v=j61q1LTaN-8.

\(^{52}\) It is worth pointing out that the high rates of teasing and/or harassing on account of religion for Sikh children seems to be confined to boys—likely for the obvious reason that they are ones who wear turbans or patkas. The study stated that “77.5% of Sikh boys we surveyed who go to school in the borough of Queens report being teased or harassed on account of their Sikh identity.” In contrast, “58.4 percent of Sikh students report being teased or harassed at school on account of their Sikh identity. For reasons that are not discussed in its report, the Sikh Coalition interviewed approximately twice as many boys as girls (65.4% vs. 34.6%) in its study. Given the turban/patka issue, this, of course, artificially inflates the numbers of children who have been teased and/or harassed.

\(^{53}\) If it is any consolation, I grew up during the Cold War, and I was accused by another child of being a spy for what was then commonly called “Red China.” Just as Sikhs are not Muslim, I am not Asian. I do have dark, straight hair, or at least I did. And even if I were Asian, I am not a spy. The little girl who accused me of this later became a close friend. I am not trying to make light of all accusations suffered by Sikhs. Some are obviously more serious than others. For example, in the days directly after September 11, 2001, Frank Silva Roque, a man with serious mental problems, killed Balbir Singh Sodhi, a Sikh gas station owner in Arizona, believing him to be a Muslim terrorist. Roque was convicted and sentenced to death, but the Arizona Supreme
respect the survey may provide a useful reminder for teachers, guidance counsellors and principals: Children can be ignorant hellions. They need to be taught (1) Sikhs are not Muslims; and (2) Even if they were Muslims, that does not make them terrorists. A good course in world religions would work wonders on both counts, and it is likely to be quite a bit more effective than federal laws that require more training for teachers on how to prevent harassment.

Unfortunately, there is one more point that needs to be put out in the open with regard to *Hatred in the Hallways*. When the Sikh Coalition undertook the study (along with a similar study of adult Sikhs), it placed a promotional video on the internet explaining the motives and methods for conducting the survey. In that video, Mehtab Kaur, who is identified as a community advocate with the Sikh Coalition, states that the purpose of the survey was “to get statistics to approach government agencies and say, you know, X number of people in our community have experienced this, or you know, 45 out of 50 students surveyed say that have problems with discrimination and bullying at New York City schools. Let’s do something.” But then she said something disturbing: “While administering the survey on Survey Day, I think most of us were surprised by the fact that, you know, some people said they hadn’t experienced any discrimination and but when pressed further, you know, we—uh—one of the questions in the survey asks, ‘Has anyone ever called you bin Laden or a terrorist?’ and people had become so used to being called, you know, such derogatory names that they didn’t really consider it harassment anymore.”

It is hard to avoid the conclusion that Ms. Kaur is not opposed to coaching survey subjects. She seems to believe that if the survey subject tells you that he or she hasn’t been

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54 These statements were made before the project was completed. She also stated in the video, “Our goal is to have 1000 surveys completed by the end of the project, and our larger goal is to take these numbers and present them to government agencies who can help our community in different ways....”

discriminated against or hasn’t been bullied, the thing to do is press further. Under the circumstances, relying on such a survey seems inappropriate.\textsuperscript{56}

**Bullying on the Basis of the Victim’s Sex:** Commissioner Achtenberg’s Statement points out that “a 2001 study … found that 81 percent of students in grades 8 to 11 reported experiencing sexual harassment, including 83 percent of girls and 79 percent of boys.”\textsuperscript{57}

This too needs to be put into perspective. Only about 14\% of students said that there is “a lot” of sexual harassment going on in their school. Almost as many—9\%—said that there was not any.\textsuperscript{58} Overwhelmingly, students answered “Some but not a lot” or “Only a little.”

Students were given the following broad definition of harassment: “Sexual harassment is unwanted and unwelcome sexual behavior that interferes with your life. Sexual harassment is not behaviors that you like or want (for example wanted kissing, touching or flirting).” Examples given to students included “Made sexual comments, jokes, gestures, or looks,” “Spread sexual rumors about you,” “Flashed or ‘mooned’ you,” and “Said you were gay or lesbian” and “Wrote sexual messages/graffiti about you on bathroom walls, in locker rooms, etc.” The categories that drew the most affirmative responses were “made sexual comments, jokes, gestures, or looks (71\%),” “Spread sexual rumors about them (61\%), and “Said they were gay or lesbian” (61\%).

Students were also invited to define sexual harassment themselves. Among the responses they gave were the extraordinarily broad “Any unwanted attention,” “When someone invades your personal body space or privacy,” and “Someone making advances towards me and saying things that make me feel very uncomfortable.” A few students

\textsuperscript{56} I note that unlike in most scholarly articles (and I surely do not wish to imply here that scholarly studies are not also subject to political bias), in *Hatred in the Hallways*, the reader is not told how the questions to the survey subjects were worded.

\textsuperscript{57} AAUW Educational Foundation, Hostile Hallways: Bullying, Teasing and Sexual Harassment in School (2001).

\textsuperscript{58} Id. at 12, Figures 3 & 4.
seemed exasperated with the concept: “Feminist-politically correct language for saying things like ‘hello good-looking.’”

For a sense of how important the students themselves regarded this conduct, one may look at how they responded to the particular harassment they experienced. Only 20% of students said they had told a teacher or other school employee about an incident of sexual harassment. The study produced the following list of responses to the question, “Why didn’t you tell anyone?” I quote the list in the study in full:

**Boys**

“I don’t know. Thought it was normal kid stuff.” (eighth-grader)

“Because I didn’t really care, it was not a big deal.” (ninth-grader)

“Because I’m a guy and I don’t care. I’m not so insecure that someone saying I’m gay is gonna bother me. I’m not, so who cares?” (ninth-grader)

“I could handle it myself.” (11th-grader)

**Girls**

“I don’t know. I just didn’t feel it necessary.” (ninth-grader)

“I liked it.” (10th-grader).

“… make a mountain out of a molehill. I handled the situation myself, or then eventually went away.” (10th-grader)

“I didn’t want to be a tattletale.” (11th-grader)

“It wasn’t anything that bothered me, and I knew that it would stop. And it did.” (11th-grader)

This study was clearly written to highlight sexual harassment as a serious issue. If the study’s authors had received more troubling answers to the question of why a student had

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59 Id. at 29.
60 Id. at 27.
failed to draw a harassment incident to the attention of a teacher or other school official—such as “I was afraid to”—it is unthinkable that they would have failed to report it.

In the end, this study proves neither that further federal action is needed nor that past federal action has produced beneficial results.

Bullying on the Basis of the Victim’s Race: In her Statement, Commissioner Achtenberg quotes from the Report’s discussion of the California Healthy Kids Survey for her belief that “[u]p to one-quarter of racial and ethnic minority students are targeted for peer-to-peer bullying, harassment, and violence:

“[t]he California Healthy Kids Survey conducted in 2007-2009 found that when youth in California were bullied or harassed on school property, the most common specific reason cited was because of their race or national origin, with about 18 percent of students in grades 7, 9, and 11 reporting at least one bullying incident in the past year for this reason. … When results for 9th and 11th grade students are broken down by race and ethnicity, African-American students reported being bullied or harassed due to their race or ethnicity at the highest rate—23 percent. Twenty-two percent of Asian-American students, 22 percent of Native Hawaiian or Pacific Islanders students and 20 percent of Native American students reported being harassed due to their race, ethnicity, or national origin as well.”

I should add the rate for non-Hispanic white students was 13% and for Hispanic or Latino/Latina students it was 17%.

All these figures can be somewhat misleading. It is not always possible to know why one is being harassed or bullied. A certain number of times an individual will surmise from the circumstances that he is being targeted on account of his race given that the bully/harasser is of another race, and a certain number of times he will be wrong. If all encounters with bullies and harassers were random and none were racially motivated, members of racial minorities may nonetheless more frequently conclude that they have been

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61 The question propounded to students was, “During the past 12 months, how many times on school property were you harassed or bullied for any of the following reasons?” Among the reasons listed was “Race, Ethnicity or National Origin.” Anyone who answered more than never would have been included in the tally.
racially targeted simply because a larger percentage of their encounters with bullies or harassers will be with members of another race.

A useful check on the conclusion that African Americans and Asians are more likely to be the target of racially motivated bullying than whites or Hispanics is the Health Behaviour of School-Aged Children survey. In “Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment,” Dr. Tonjah Nansel et al. analyzed the data collected in that massive survey and found that black students report that they have been bullied less often than white or Hispanic students.62 Their research showed that 29.9 percent of black students reported that they had been bullied during the current school term; in contrast 43.7 percent of white students reported bullying. The figure for Hispanics is 40.6 percent; no figures were given for other races.63 To be sure, these figures are for bullying of any kind, not specifically for bullying based on race or ethnicity. Still, it would be odd to find that while black students are subjected to more bullying based on race or ethnicity, they were correspondingly bullied so much less on other bases that it nets out in favour of less bullying overall.

The HBSC also sheds useful light on the CHKS’s finding that “the most common specific reason cited” for bullying is “race or national origin.”64 In fact, the CHKS only asked about what it calls “Hate-Crimes Reasons” for bullying—“race, ethnicity or national origin,” “religion,” “gender,” “sexual orientation,” and “physical/mental disability.” In contrast, the HBSC asked students whether they had been “belittled about religion or race,” “belittled about looks or speech,” “subjects of rumors,” or “subjects of sexual comments or gestures.”

Not surprisingly to anyone who has attended high school, “belittled about looks or speech” came in first, followed closely by “subjects of rumors.” “Belittled about religion or race” was not just last, it was dead last. All the other categories were more than twice as

63 The difference between white and Hispanic was not statistically significant. Id. at 2097, Table 2. Similarly, 8.8% of white students, 6.7% of black students and 8.1% of Hispanic students reported that they were bullied on a weekly basis. These differences, however, were not statistically significant.
64 Statement of Commissioner Achtenberg at 101 (quoting Report at 12).
common. This is not to suggest that bullying on the basis of race or ethnicity is not deserving of attention by teachers and principals. It simply needs to be seen in context. Also not surprisingly, the serious differences in bullying levels were not between races, but between genders and age groups. While females are more likely to be the subject of “sexual comments or gestures,” males are much more likely to be “hit, slapped or pushed.” Sixth graders are about three times more likely to report being bullied on a weekly basis than 10th graders. A full majority of 6th graders report having been bullied in one way or another; by 10th grade that number is very nearly cut in half. This latter fact is actually good news. It shows that eventually the lessons of civility are learned by most students, though not as early as might be hoped for. It does indeed get better.

**Bullying Based on the Victim’s Sexual Orientation:** Everyone agrees that “‘[c]ompared with students who are not sexual minorities, a disproportionate number of sexual minority students engage in a wide range of health-risk behaviors.’” For example, according to the Center for Disease Control and Prevention, approximately 6.4% of self-identified heterosexual high school students report that they have attempted suicide, while 25.8% of self-identified gay or lesbian high school students have and 28.0% of self-identified bisexual high school students.

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65 Nansel at 2097. The rates among students who reported that they had ever been bullied were as follows: “Belittled about religion or race” (25.8%), “Belittled about looks or speech” (61.6%), “Hit, slapped, or pushed” (55.9%), “Subjects of rumors” (55.6%), Subjects of sexual comments or gestures” (52.0%).
66 Id. at 2097
67 The “It Gets Better” Project was founded by Dan Savage and Terry Miller in response to suicides of gay teenagers. Its purpose is to urge them to hang in there; life as an adult will be better. This message strikes me as important for all pre-teens and teenagers, straight or gay, bullied or non-bullied. Few teenagers find growing up easy. Adults who tell adolescents that “These are the best years of your life” are frequently well meaning, but their words are not very comforting and (mercifully) usually inaccurate.
69 These figures are medians of the results of 13 state-wide and local surveys. The figures for reported attempted suicides broken down by actual sexual contacts (rather than reported sexual orientation) were 8.4% (opposite sex sexual contacts only), 19.7% (same sex sexual contacts only) and 29.8% (sexual contact with both sexes). Students were asked about their conduct for the 12 month period immediately preceding the point during which they filled out the questionnaire.
The tendency to engage in high-risk behaviors is not confined to suicide attempts. According to the Center for Disease Control and Prevention, about 7.6% of heterosexual students report smoking cigarettes daily, while 23.4% of gay or lesbian students and 24.8% of bisexual students do. Similarly, 4.3% of heterosexual students report that they currently drink alcohol on school property, while much larger numbers of gay or lesbian students and bisexual students do—11.8% and 13.8% respectively. Drug use figures are similarly skewed.

This tendency includes activity that one would not necessarily associate with troubled youth. Only about 12.3% of heterosexual high school students report that they rarely or never wear a seatbelt when riding in a car with someone else. By contrast, the figures for gay or lesbian students and for bisexual students were 21.0% and 20.4% respectively. Nevertheless, the Center for Disease Control and Prevention data do not show that gay or lesbian and bisexual youth always score higher on unsafe behaviors than heterosexual youth. Among gay or lesbian students, 22.5% and among bisexual students 16.5% reported eating vegetables three or more times a day. The figure for heterosexual students was only 11.3%.

In view of this, it does not seem surprising to me that sexual minority students are more likely to “‘receive punishment from schools, police or courts.’” See Statement of Commissioner Roberta Achtenberg at 111 (quoting Institute of Medicine of the National Academies, The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding 159 (2011). Commissioner Achtenberg cites the Institute of Medicine report for the proposition that this disproportionate discipline was somehow unmerited. In fact, however, the reference she cites is merely a citation to another article. It is not an endorsement of that other article’s findings. See Kathryn E.W. Himmelstein and Hannah Brickner, Criminal-Justice and School Sanctions Against Non-Heterosexual Youth: A National Longitudinal Study, 127 Pediatrics 49 (January 2011). Two days after the internet version of the article was published, a letter dated December 8, 2010 from Donald J. Harris, Ph.D. sent to Pediatrics stated: “There is a sharp disconnect between the statistical findings presented in this report and the authors’ conclusion that ‘nonheterosexual youth suffer disproportionate educational and criminal-justice punishments that are not explained by greater engagement in illegal or transgressive behaviors.’… [T]he categorical language of the authors’ conclusion is based almost entirely on a pattern of findings that did not reach the stated criterion of statistical significance.” See Replies to Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study, Pediatrics website. If this Report were not put together so hurriedly, perhaps we would have had time to figure out who is right.

70 Olsen et al, at 75, Table 26. Again, these figures are medians of 13 state and local studies. The figures are for any 30-day period, and do not necessarily imply that a student was currently smoking daily.
71 Id. at 89, Table 40.
72 Id. at 90-102, Tables 41-53. For example, 4.6% of heterosexual, 22.9% of gay or lesbian and 20.4% of bisexual students report using the drug ecstasy. Id. at 97, Table 48.

73 Id. at 115, Table 66. There is, however, research that finds that eating disorders are more common among gay, lesbian and bisexual students than they are among heterosexual students. S. Austin, N.J. Ziyadeh, H.L.
Commissioner Achtenberg argues that “the extra pressure created by structural stigma is responsible for such disparate outcomes to the extent that they appear to exist.” She defines “structural stigma” to mean “the collective process by which majority class members give permission to the society as a whole to victimize minority class members.”

It is perfectly plausible that the increased victimization can lead to an increase in what social scientists like to call (with bureaucratic blandness) “negative outcomes.” But there is no way to draw the conclusion that increased victimization is the sole or even a primary cause of the increased tendency towards self-destructive conduct based on the available evidence. One simply has to take it on faith.


There may indeed be external structural issues that are contributing factors to the high rates of high-risk behavior on the part of gay, lesbian and bisexual youth. But they do not all relate to victimization. For example, since sexual minorities are minorities, the search for love may be a little harder. They are less likely to find a soul mate or even a reasonably compatible mate within a short distance from their home. As a result, they may be less likely to form satisfactory romantic relationships while still in school. A failed relationship may be a greater problem, since the common adage that there are “plenty of fish in the sea” may not apply. Another external structural issue relates to family structure. Through genetic inheritance, white parents tend to give birth to white children, while Asian parents tend to give birth to Asian children. Through cultural inheritance, Roman Catholic parents tend to have Roman Catholic children and Buddhist parents have Buddhist children. But most gay, lesbian or bisexual children are being reared by their own biological, heterosexual parents or parent. (Gay, lesbian and bisexual adults sometimes have biological or adopted children, but those children are usually heterosexual, thus creating the problem in reverse.) No doubt the pressures of parental disapproval can be a problem for sexual minority children. But even in the absence of disapproval, anything that makes a child different from his or her parents places some element of stress on the relationship. Sexual orientation is just one more such potential difference. Sympathetic parents, for example, may wish to provide advice on romantic relationships, but feel inadequate to the task, since their experience is dissimilar. Or their children may perceive them to be inadequate to the task, when in fact they are quite able to help, but their advice is not sought. She later states her point more modestly (and much more defensibly): “The reasons that sexual minority youth may experience suicidal ideation and/or acts in response to victimization are not entirely clear. Nevertheless, social stigma may well drive some number of these experiences.” Statement of Commissioner Roberta Achtenberg at 111-12.

See Ritch C. Savin-Williams, Then and Now: Recruitment, Definition, Diversity, and Positive Attributes of Same Sex Populations, 44 Developmental Psych. 135 (2008) (internal citations omitted). In that article, Dr. Savin-Williams writes intriguingly about the issue: “[M]ost researchers assume that it is not same-sex sexuality per se that impacts development but the victimization, discrimination, and stigmatization that it engenders. If so, what is it about sexual prejudice that is developmentally more deleterious to the recipients than other forms of social ostracism to their recipients, such as that meted out to women, ethnic minorities, the poor, the unattractive, the overweight, or the disabled? Alternatively, one might argue (but few do) that because of their possibly altered hormonal and anatomical constitution, same-sex attracted individuals navigate a unique developmental instability or fluctuation across a range of personal attributes (sex object choice, cognitive skills, physical features, hobbies, career choices). The sex atypicality of same-sex populations suggests that some same-sex attracted individuals have a different brain structure, physiology, or hormonal status than others of their biological sex. Whether these potential biological differences make same-sex oriented individuals unique, and if so, to what degree are unknown, largely because the biologic data are so preliminary that few direct or indirect pathways have been established.”
For one thing, there are many groups with high rates of suicide whose behavior is unlikely to be the result of external victimization or social stigma. According to data from the World Health Organization, Lithuania, South Korea, Kazakhstan, Belarus, Japan and Russia were the top nations for suicide. The United States ranked 39th with a rate of suicide roughly one third of Lithuania’s. Jamaica has one of the lowest suicide rates in the world. Yet somebody is victimizing somebody there; it has one of the highest murder rates.

In the United States, the Centers for Disease Control and Prevention report that American Indians/Alaska natives have the highest rates of suicide. They are followed closely by non-Hispanic whites. Other races and ethnicities—Asians/Pacific Islanders, Hispanics and non-Hispanic blacks—were a distant third, fourth or fifth. Although obese persons receive far more than their share of bullying, social stigma and victimization and have high rates of depression, suicide rates among them are very low.

There have been efforts to prove that the high risk behavior of gay, lesbian and bisexual students is the result of victimization of one sort or another. But research that is said to prove it is usually measuring something quite different from what advocates suppose. And even when most people can agree on what is being measured, causation cannot be established. Consider, for example, Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay and Bisexual Young Adults, a 2009 study by Caitlin Ryan, David Huebner, Rafael M. Diaz and Jorge Sanchez. In it, the authors argue that they have established “a clear link between specific parental and caregiver rejecting behavior and negative health problems in young lesbian, gay and bisexual adults.” But are the authors

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77 Asian/Pacific Islander females had the third highest rate of suicide among females, followed by Hispanics and non-Hispanic blacks. Among males, non-Hispanic blacks had the third highest rate, with Hispanic males at a very close fourth and Asian/Pacific Islander males with the fifth-highest rate. Rates were age-adjusted. See Centers for Disease Control and Prevention, National Suicide Statistics at a Glance (2002-2006).
79 Caitlin Ryan, David Huebner, Rafael M. Diaz, & Jorge Sanchez, Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults, 123 Pediatrics 346 (Jan. 2009).
80 Id. at 346. For example, 19.7% of those classed as having “low rejection scores” reported suicide attempts, while 35.1% of those with moderate rejection scores and 67.6% of those with high rejection scores did.
measuring actual rejection or just perceptions of rejection? In the study, 224 white and Latino gay, lesbian and bisexual young adults were asked to recall whether their parents or caregivers blamed them for any anti-gay mistreatment they might have suffered, how often their parents or caregivers made disparaging remarks about gays, lesbians or bisexuals and how often they were excluded from family activities, and similar questions.

The authors found that those with higher family rejection scores tended to have higher rates of suicidal ideation and of attempted suicide, higher rates of drug use and higher rates of unprotected sex. But are they really finding an association between family rejection and (for example) depression? Or are they finding that depressed people are more likely to remember, believe or report that they suffered rejection? Even if the reports of all 224 participants were 100% accurate, were the parents excluding them from family activities because of their sexual orientation? Or was it because of their illegal drug use, depression or suicide attempts?

Perhaps one day we will have better insight into what causes high-risk conduct among gay, lesbian and bisexual teenagers. But we need not wait for that day to ensure that their rights and the rights of all students are respected in the schools. In my opinion, the best way to do that is allow teachers, principals and local school districts to do their jobs. Nothing in this Report has persuaded me otherwise.

Similarly, 22.4% of those with low rejection scores, 44.6% of those with moderate rejection scores, and 63.5% of those with high rejection scores reported depression. Id at 350, Table 4.

81 The data on the relationship of family rejection with heavy drinking and with sexually transmissible disease diagnosis were not statistically significant. Id. at 350, Table 4.