

TESTIMONY OF KENNETH L. MARCUS

EXECUTIVE VICE PRESIDENT AND DIRECTOR OF THE ANTI-SEMITISM INITIATIVE,  
INSTITUTE FOR JEWISH & COMMUNITY RESEARCH

BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS

“RELIGIOUS HARASSMENT IN THE PUBLIC SCHOOLS”

MAY 13, 2011

CHAIRMAN CASTRO, VICE CHAIRMAN THERNSTROM, AND MEMBERS OF THE COMMISSION:

It is a pleasure to appear before you today. I have been asked to focus on the problem of student-on-student religious harassment and bullying in the public schools.<sup>1</sup> At the outset, let me commend the Commission for directing public attention to this pressing problem. Thirty-two years ago, when this Commission addressed religious bias in a landmark report, it entitled its work-product rather pointedly: RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE<sup>2</sup>. Five years ago, the Commission turned again to this understudied topic, in a widely lauded inquiry into anti-Semitism in higher education, Campus Anti-Semitism.<sup>3</sup> Today, by including student-on-student religious harassment within its examination of harassment and bullying, the Commission rightly recognizes that any comprehensive solution to harassment and bullying must extend protections to religious minorities which are equal to the treatment of other vulnerable groups. In this testimony, I will recommend that the Commission urge Congress to pass legislation banning religious harassment in federally funded educational programs and activities, just as the federal government does with discrimination on the basis of other suspect classifications.

Intuitively, one would expect children victimized by religious hate to enjoy the apex of protections afforded under our constitutional system. Structurally, they are victimized at the convergence of the First and Fourteenth Amendments, denied not only the Constitution's "first

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<sup>1</sup> This testimony draws from several previous articles, including Kenneth L. Marcus, *The New OCR Anti-Semitism Policy*, 2 JOURNAL FOR THE STUDY OF ANTISEMITISM 479 (2011), [http://www.jsantisemitism.org/pdf/jsa\\_2-2.pdf](http://www.jsantisemitism.org/pdf/jsa_2-2.pdf); Kenneth L. Marcus, *Privileging and Protecting Schoolhouse Religion*, 37 J. OF LAW & ED. 505 (Oct. 2008); Kenneth L. Marcus, *The Most Important right We Think We have but Don't: Freedom from Religious Discrimination in Education*, 7 NEVADA L. J. 171 (Fall 2006); and Kenneth L. Marcus, *Bullying as a Civil Rights Violation: The U.S. Department of Education's Approach to Harassment* (unpublished manuscript attached as Appendix A). The author requests that these articles be deemed incorporated into this testimony for purposes of the Commission and its staff's consideration as if fully set forth herein.

<sup>2</sup> U.S. COMM'N ON CIV. RTS., RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE (1979)

<sup>3</sup> U.S. COMM'N ON CIV. RTS., CAMPUS ANTI-SEMITISM (2006).

freedom”<sup>4</sup> but also the very interest in equal educational opportunity that has been constitutionally preeminent since *Brown v. Board of Education*.<sup>5</sup> Moreover, school-age children may be peculiarly vulnerable to the sting of hate and bias incidents, so it is especially important to provide them with the full extent of constitutional support.<sup>6</sup> Finally, we cannot ignore the psychological literature indicating that some terrorist incidents may be understood “as a traumatic reenactment” – with implications for the failure to address bullying which have been clear since Columbine and which are disturbingly relevant in the context of religious bullying.<sup>7</sup> In other words, severe religious bullying, if not properly addressed, can pose serious constitutional, psychological, and even homeland security ramifications. Nevertheless, students of faith have not always received a level of protection commensurate to the importance of the interests at stake.<sup>8</sup>

In today’s remarks, I will briefly illustrate the problem, identify an appropriate policy solution, explain why this solution is both justified and necessary, and suggest a few specific legislative vehicles by which the solution can be implemented.

### *Examples*

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<sup>4</sup> See generally Michael W. McConnell, *Religion and Constitutional Rights: Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243 (2000) (discussing the concept of the Constitution's "first freedom").

<sup>5</sup> 347 U.S. 483 (1954).

<sup>6</sup> See generally *Nuxoll v. Indian Prairie Sch., Dist. # 204*, 523 F.3d 668, 671 (7th Cir. 2008) (finding research to be suggestive but not conclusive that school age children are particularly vulnerable to harassment); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (discussing parents’ strong interest in directing the religious education of their children free from persecution).

<sup>7</sup> See, e.g., CHRIS E. STOUT, *THE PSYCHOLOGY OF TERRORISM: A PUBLIC UNDERSTANDING* 19, 28 (2002).

<sup>8</sup> See Heather M. Good, Comment, *"The Forgotten Child of Our Constitution": The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Their Children*, 54 EMORY L. J. 641 (2005) (construing Robert P. George, Comm’r, U.S. Comm’n on Civil Rights, Statement on Free Exercise of Religion in Public Schools to U.S. Comm’n on Civil Rights (Spring 1999), at <http://www.fedsoc.org/Publications/practicegroupnewsletter/religious%20liberties/statement-religiousv3i1.htm> ("I encourage public school officials to take the right to free exercise of religion as seriously as they take other civil rights, and to no longer treat it as the forgotten child of our Constitution.")).

In my experience, the nature of this problem can best be explained with particular examples. The incident that first led me to address the problem of religious student-on-student harassment a few years ago involved A Sikh seventh-grader in New Jersey who faced serious and repeated harassment at his school.<sup>9</sup> This included taunts of “Osama” and a physical assault on school grounds that resulted in head injuries. According to a 2007 report, nearly one in five New York City Sikh students were harassed because they were misidentified as terrorists.<sup>10</sup> According to the same survey, two out of five New York Sikh schoolchildren who wear turbans (or patkas) are physically harassed.<sup>11</sup>

In another incident, a Muslim junior high school student reported being beaten until he bled at a Staten Island middle school. “They punched me,” the student reported, “They spit in my face. They tripped me on the floor. They kicked me with their feet and punched me.... And as they were kicking and laughing, they kept saying, ‘You f\_\_\_\_ing terrorist, f\_\_\_\_Muslim, you f\_\_\_\_ing terrorist.’”<sup>12</sup> This young man reported being kicked so hard in the groin that he bled in his urine. In another Staten Island incident, students allegedly yanked a 13-year-old Muslim girl’s head scarf and beat her. “They just attacked me,” the girl reportedly charged, “They called me ‘terrorist.’ They called me ‘Muslim.’ I’m afraid they might come back and beat me again.”<sup>13</sup>

Over the last few years, students at some schools have conducted “Kick a Jew Day” on school grounds during school hours. Some of these events may have been inspired by the 2005

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<sup>9</sup> See KENNETH L. MARCUS, *JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA* 26-27 (Cambridge 2010).

<sup>10</sup> SIKH COALITION, *HATRED IN THE HALLWAYS: PRELIMINARY REPORT ON BIAS AGAINST SIKH STUDENTS IN NEW YORK CITY’S PUBLIC SCHOOLS* 5 (Jun. 2007).

<sup>11</sup> *Id.*

<sup>12</sup> Ikimulisa Livingston and Leonard Greene, *Terrorized for being a Muslim*, N.Y. POST (Oct. 12, 2010) [http://www.nypost.com/p/news/local/staten\\_island/terrorized\\_for\\_being\\_muslim\\_8rQSU8Z5ibbMOeJnDGFOrO#ixzz1Kw0Zei1A](http://www.nypost.com/p/news/local/staten_island/terrorized_for_being_muslim_8rQSU8Z5ibbMOeJnDGFOrO#ixzz1Kw0Zei1A)

<sup>13</sup> Edgar Sandoval, Matthew Lysiak and Rich Shapiro, *Girl attacked for wearing a veil says 11-year-old bullied, beat her for months with another student*, N.Y. DAILY NEWS (Mar. 31, 2011), [http://articles.nydailynews.com/2011-03-31/news/29386377\\_1\\_hate-crime-charges-muslim-girl-head-scarf](http://articles.nydailynews.com/2011-03-31/news/29386377_1_hate-crime-charges-muslim-girl-head-scarf).

“Kick a Ginger Day” episode of the South Park television program, which evolved into “Kick a Jew Day” through Facebook communications. This year nearly forty high school students have been accused of participating in this activity in Vestal, New York.<sup>14</sup> Similar incidents have been reported elsewhere, especially in the State of Florida.<sup>15</sup>

These incidents are sadly representative of a host of problems that we have seen facing students around the country. In some cases, school administrators or law enforcement officials take prompt and effective action. In other cases, they do not. In general, when these situations arise, the problem is not just the incident itself but the school setting in which hostile environments are allowed to develop and fester.

### *Legal Background*

There is a gap in the federal civil rights law which has allowed these incidents to occur, and this Commission can play an important role in closing it. To this day, Congress has never acted to prohibit religious discrimination in federally assisted programs and activities, such as public schools and colleges. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of "race, color, or national origin" in federally assisted programs or activities, including public schools.<sup>16</sup> Over the years, this set of classifications was expanded by legislation intended to eliminate discrimination on the basis of sex<sup>17</sup>, disability<sup>18</sup>, age<sup>19</sup>, and even membership in

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<sup>14</sup> George Basler, *Vestal Officials Investigating Incident at High School*, PRESSCONNECTS.COM (Jan. 20, 2011), <http://www.spme.net/cgi-bin/articles.cgi?ID=7616>.

<sup>15</sup> Katherine Albers, *10 North Naples Middle students suspended for taking part in “kick a Jew day”* (Nov. 23, 2009) NAPLESNEWS.COM, <http://www.naplesnews.com/news/2009/nov/23/north-naples-middle-suspended-kick-a-jew-day-email/>.

<sup>16</sup> 42 U.S.C. § 2000(d) (2000).

<sup>17</sup> Title IX of the Education Amendments Act of 1972, 20 U.S. C. §§ 1681-1688 (2000).

certain patriotic youth activities.<sup>20</sup> While federally-enforced statutes bar schoolhouse discrimination on the basis of race, color, national origin, age, disability, or membership in the Boy Scouts of America, they are silent as to religion. As a result, the federal administrative civil rights apparatus lacks jurisdiction to investigate religious discrimination claims in the public schools for cases involving student-on-student harassment or other forms of religious discrimination. By contrast, the U.S. Department of Education’s Office for Civil Rights (“OCR”), which I once led, would have jurisdiction in those same situations if the basis of the harassment claims were racial, ethnic or disability-related rather than religious.

### *The Russlynn Ali Dear Colleague Letter*

For every rule, there is an exception. Although OCR does not have jurisdiction to investigate religious discrimination, a more complex question arises with respect to discrimination against ethno-religious groups. For example, until 2004, OCR typically refused to investigate anti-Semitism complaints on the grounds that Jews are a religious group, not a racial or national origin group. In 2004, late in my tenure as head of OCR, I issued a series of policy statements announcing that OCR would henceforth investigate complaints alleging membership in groups that have both religious and also ethnic or ancestral characteristics to the extent that they implicate ethnic or ancestral bias (the “2004 Policy”).<sup>21</sup>

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<sup>18</sup> § 504 of the Rehabilitation Act of 1972, 29 U.S.C. § 794(a); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 (2000).

<sup>19</sup> The Age Discrimination Act of 1975, 42 U.S.C. § 6101-6107 (2000).

<sup>20</sup> 20 U.S.C.A. § 7905 (2006).

<sup>21</sup> See, e.g., Kenneth L. Marcus, Deputy Assistant Sec’y of Educ. for Enforcement, Delegated the Auth. Of Assistant Sec’y of Educ. For Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter, *Title VI and Title IX Religious Discrimination in Schools and Colleges* (Sep. 13, 2004); Kenneth L. Marcus, Delegated the Auth. Of Assistant Sec’y of Educ. For Civil Rights, U.S. Dep’t of Educ., to Sidney Groeneman, Ph.D., Senior Research Assoc., Inst. For Jewish & Cmty. Research.

Over the following six years, my OCR successors generally did not adhere to these policy statements, despite admonitions from this Commission that they do so.<sup>22</sup> During this period, The Anti-Semitism Initiative at the Institute for Jewish and Community Research (IJCR) joined with a dozen other organizations, as well as dozens of members of Congress, in urging OCR to return to the 2004 Policy.

On October 26, 2010, the Obama Justice Department released an opinion letter confirming the legal correctness of the 2004 policy. This letter, written by Assistant Attorney General Thomas Perez to Assistant Secretary of Education for Civil Rights Russlynn Ali, quotes the key section of the 2004 Policy and concludes simply, “We agree with that analysis.”<sup>23</sup> The relevant portion of the 2004 Policy, which now carries the imprimatur of the Obama Justice Department, reads as follows:

Groups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith. Similarly, the existence of facts indicative of religious discrimination does not divest OCR of jurisdiction to investigate and remedy allegations of race or ethnic discrimination. OCR will exercise its jurisdiction to enforce the Title VI prohibition against national origin discrimination, regardless of whether the groups targeted for discrimination also exhibit religious characteristics. Thus, for example, OCR aggressively investigates alleged race or ethnic harassment against Arab Muslim, Sikh, and Jewish students.<sup>24</sup>

Simultaneously, Assistant Secretary Ali accepted IJCR’s recommendation and affirmed the 2004 Policy in a guidance letter directed to recipients of federal education funding (the “Ali Policy”).<sup>25</sup> Since this policy statement was buried deeply within a longer policy on bullying in public schools, and since it was phrased as a policy “clarification,” some readers did not immediately grasp that OCR had effected a sea change in the government’s policy approach to campus anti-Semitism.

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<sup>22</sup> See Kenneth L. Marcus, *JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA* 44-48 (Cambridge 2010).

<sup>23</sup> Thomas E. Perez, Assistant Attorney General for Civil Rights, Letter to Russlynn H. Ali, Assistant Secretary of Education for Civil Rights, dated Sep. 8, 2010, [http://www.justice.gov/crt/cor/title\\_vi\\_letter\\_to\\_ed\\_2010-09-08.pdf](http://www.justice.gov/crt/cor/title_vi_letter_to_ed_2010-09-08.pdf).

<sup>24</sup> Marcus, *Title VI and Title IX Religious Discrimination*.

<sup>25</sup> Russlynn Ali, Dear Colleague Letter dated Oct. 26, 2010, [http://www.jewishresearch.org/v2/Letter\\_OCR.htm](http://www.jewishresearch.org/v2/Letter_OCR.htm).

Like the Perez letter, the Ali Policy adopts the 2004 Policy, but Assistant Secretary Ali also provides some important embellishments: “While Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith.”<sup>26</sup> Assistant Secretary Ali’s policy is a marvelous step forward, but it does not fully encompass the forms of religious harassment that students still face in the public schools for the simple reason that her agency lacks the authority to do so without further legislation.

### *The Problem of Student-on-Student Religious Harassment and Bullying*

The current OCR policy is still an informal policy guidance, and it may not endure. Worse, since it does not cover religious discrimination, it contains a loophole wide enough that some perpetrators may evade enforcement. Ultimately, Congress must act to protect all religious minorities – not just ethno-religious groups such as Jews and Sikhs – from harassment at federally funded secular institutions of higher learning. There are numerous reasons why Congress should pass a religious freedom in education act. The following are a few of the most salient.

Religious nondiscrimination provisions are necessary to protect students from the peculiar harms created by religious bigotry. As with the other forms of discrimination, religious discrimination demeans historically disadvantaged minority groups. Beyond the immediate sting of discriminatory actions, hate and bias incidents may have long-term psychological impacts on both victim and perpetrator. For example, the American Psychological Association’s

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<sup>26</sup> *Id.*



“Resolution on Anti-Semitic and Anti-Jewish Prejudice” has recognized that such bigotry “creates a climate of fear, anxiety and insecurity, both for the individual and the community” and exposes victims “to suffering the feelings of vulnerability, anger, depression and other *sequelae* of victimization.”<sup>27</sup> Some research indicates that these problems are particularly acute in the case of school-age victims. Adolescence in particular is a period of heightened conflict and change, when perceptions of inequitable treatment can have a particularly severe psychological impact.<sup>28</sup> Interestingly, these harms are not limited to the victim. The APA also acknowledges that religious hate and bias “also harm the perpetrators by desensitizing them to violence, and raise concerns about their generalizing such acts to other groups.”<sup>29</sup> To this extent, religious discrimination should be combated as vigorously as other forms of bigotry.

More broadly, legislation is needed to effectuate the principal intent underlying Title VI, *i.e.*, to ensure that federal moneys are not being used to fund activities prohibited under the Constitution. In other words, Congress must prohibit religious discrimination in the public schools if religious students are to enjoy the equal educational opportunity guaranteed by the Equal Protection Clause of the Fourteenth Amendment and the full range of religious freedoms protected under the Free Exercise Clause of the First Amendment.<sup>30</sup> The significance of constitutional protection is easy enough to grasp. To paraphrase Martin Luther King, Jr., constitutional rights constitute a promissory note which can only be redeemed by legislative

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<sup>27</sup> APA Council of Representatives [APA], “Resolution on Anti-Semitic and Anti-Jewish Prejudice” (August 2005/Amended August 2007) (citing C.S. Crandall & A. Eshleman, *A Justification-Suppression Model of the Expression and Experience of prejudice*, *PSYCHOLOGICAL BULLETIN* at 414–446 (2003); P. VALENT, *CHILD SURVIVORS OF THE HOLOCAUST* (2002)), <http://www.apa.org/about/governance/council/policy/anti-semitic.pdf>.

<sup>28</sup> *Id.* at 258.

<sup>29</sup> APA, “Resolution on Anti-Semitic and Anti-Jewish Prejudice.”

<sup>30</sup> For a discussion of the relationship between civil rights statutes and their constitutional antecedents, see Marcus, *Anti-Zionism as Racism*, at 866-867.

codification, regulatory implementation, and administrative enforcement.<sup>31</sup> Providing equal educational opportunities to vulnerable minorities has historically required the federally-legislated tripartite structure of private-party litigation, judicial enforcement, and agency administrative enforcement.<sup>32</sup>

The first two arguments establish the need to protect religious minorities, which is manifestly the purpose of religious freedom legislation. The absence of religious freedom legislation has adverse effects that extend beyond religious minorities. To begin with, religious discrimination should be policed because it is so closely inter-related with racial and ethnic discrimination. A religious exception to our anti-discrimination rules allows racial discriminators to escape sanction when acting under the guise of religious bigotry. This point has been demonstrated convincingly in the context of jury selection.<sup>33</sup> The problem is that many people face both racial and religious prejudice. To the extent that racial bias is policed but religious bias is not, discriminators can evade enforcement by feigning that their actions are motivated only by religious animus. Thus, for example, in “hybrid” or “intersectional” cases, those who choose to use racially motivated jury strikes have been able to camouflage their bias as a religious discrimination, thus avoiding censure. In the same way, where racial discrimination is banned but religious discrimination is not, intersectional discrimination can evade enforcement. Creating incentives for government actors to engage in or to feign religious bias is a significant negative externality of the legislative decision to exclude religion from the reach of civil rights law.

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<sup>31</sup> MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 219 (James M. Washington ed., 1996).

<sup>32</sup> For a discussion of this tripartite structure, emphasizing the importance of the administrative process, see Marcus, *Anti-Zionism as Racism*, at 856-58.

<sup>33</sup> Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 *BUFF. CRIM. L. REV.* 139, 169-173 (2005).

Race and religion are so closely associated that neither can be entirely eliminated without banning the other as well. The continuities between race and religion have led many social scientists to refer to “ethno-religious groups.”<sup>34</sup> Discriminatory animus is commonly directed at an undifferentiated amalgam of minority group characteristics, such as ethnicity, religion, and race. Some examples of this phenomenon are the mid-century mistreatment of Japanese Americans; the more recent forms of discrimination against Arab and Muslim Americans and Sikhs;<sup>35</sup> and the racially charged historical American mistreatment of Indians.<sup>36</sup> In other words, religion is frequently a material constituent in the construction of racial otherness.<sup>37</sup>

In some cases, ethnic, racial and religious discrimination are so closely intertwined as to be indistinguishable.<sup>38</sup> Consider, for example, Supreme Court precedent holding Jews to be a “race” within the meaning of the Civil Rights Act of 1866, and U.S. Department of Education regulatory guidance holding anti-Semitism to be a form of prohibited racial discrimination under Title VI of the Civil Rights Act of 1964.<sup>39</sup> In both cases, the determinations were necessary in order to conclude that certain forms of anti-Semitic discrimination are actionable under these respective statutes.<sup>40</sup>

By banning ethnic discrimination without also banning religious discrimination, Title VI anomalously extends greater protections to members of religious groups that share ethnic or

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<sup>34</sup> *Id.*

<sup>35</sup> Margaret Chon and Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROB. 215, 221-222 (Spring 2005).

<sup>36</sup> Kenneth Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335, 340, 343 (December 1994).

<sup>37</sup> Chon and Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROB. at 225.

<sup>38</sup> Hinkle, at 169, 172; Marcus, *Anti-Zionism as Racism*, at 862, 872-877.

<sup>39</sup> *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987); See Letter from Kenneth L. Marcus, Deputy Assistant Sec'y for Enforcement, Delegated the Auth. of Assistant Sec'y of Educ. for Civil Rights, U.S. Dep't of Educ., to Colleague, Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), available at <http://www.ed.gov/print/about/offices/list/ocr/religious-rights2004.html> [hereinafter 2004 OCR Dear Colleague Letter].

<sup>40</sup> Marcus, *Anti-Zionism as Racism*, at 840, 887-888.

ancestral characteristics than to groups that do not. After all, the Ali Policy (like the 2004 Policy before it) announced that OCR would enforce Title VI's race and national origin provisions to protect students who are members of groups exhibiting both religious and racial or ethnic characteristics, such as Jewish and Sikh students.<sup>41</sup> OCR's reason is that, to the extent that these groups are "races" under the "ethnic or ancestral heritage" standard in *St. Francis College v. Al-Khazraji*<sup>42</sup> and *Shaare Tefila Congregation v. Cobb*,<sup>43</sup> they are also covered under Title VI. It would therefore be inequitable and arguably a denial of Equal Protection to deny such groups administrative enforcement on the ground that they also share religious characteristics.<sup>44</sup> At the same time, the question arises as to whether extending protections to those religious groups that are also ethnic or ancestral groups but not extending protections to those that are only religious groups may in turn create the appearance of inequity.

This problem is complicated by the fact that religious discrimination has an undeniable disparate impact on certain ethnic groups. For example, religious discrimination motivated by anti-Jewish animus has a disparate impact on persons of Jewish ethnic or ancestral heritage. OCR has jurisdiction over anti-Semitic discrimination because such discrimination is based on ethnicity or race, not because it is based partly upon the tenets of the Jewish faith.<sup>45</sup> That exception may be difficult to square with OCR's disparate impact regulations. On the other

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<sup>41</sup> See Marcus, Title VI and Title IX Religious Discrimination in Schools and Colleges; Letter from Kenneth L. Marcus, Delegated the Auth. Of Assistant Sec'y of Educ. For Civil Rights, U.S. Dep't of Educ., Sidney Groeneman, Ph.D., Senior Research Assoc., Inst. For Jewish & Cmty. Research, *available at* <http://www.eusccr.com/letterforcampus.pdf>. This position was subsequently adopted by this Commission. See CAMPUS ANTI-SEMITISM (2006), *available at* <http://www.usccr.gov/pubs/081506campusantibrief07.pdf>; Jennifer Jacobson, *Civil-Rights Panel Urges Federal Monitoring of Campus Anti-Semitism*, CHRON. OF HIGHER EDUC., Apr. 14, 2006, at A27.

<sup>42</sup> 481 U.S. 604 (1987).

<sup>43</sup> 481 U.S. 615 (1987).

<sup>44</sup> Marcus, *Dear Colleague*; Marcus, *Campus Anti-Semitism*, at 862.

<sup>45</sup> Marcus, *Title VI and Title IX Religious Discrimination*.

hand, if OCR did not recognize such an exception, it could be charged with *ultra vires* action to the extent that religious discrimination *per se* is not within its jurisdiction.

Finally, OCR's adherence to its own guidance has been questionable at best over the last few years.<sup>46</sup> Indeed, its failure to enforce the 2004 Policy between 2005 and 2010 suggests that more formal action is required to save the Ali Policy from the same non-enforcement that its predecessor had faced. Legislation would send a strong signal that the U.S. Department of Education must ensure equal opportunity for all students at federally funded institutions.

### *Legislative Options*

If the Civil Rights Commission is serious about addressing student-on-student religious bullying and harassment, it should urge Congress to pass legislation which would ban religious harassment in federally funded educational programs and activities. This could be done in several different ways. Some legislators have already proposed legislation that would effect this change as part of a broader ban on religious discrimination in such programs and activities. Alternatively, this measure could be appended to a broader legislative vehicle such as reauthorization of No Child Left Behind ("NCLB"), the Tyler Clementi Act, the Safe Schools Improvement Act or reauthorization of the Higher Education Act.

### *Federal Anti-Bullying Bills*

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<sup>46</sup> See, e.g., Meghan Clyne, *Education Department Backs Away from Anti-Semitism Safeguards*, N.Y. SUN. Mar. 29, 2006.

As Congress approaches reauthorization of the Elementary and Secondary Education Act (“ESEA”) and NCLB, this is an auspicious time to urge legislation to address bullying and harassment in educational institutions. Similar opportunities may arise during the upcoming reauthorization of the Higher Education Act, but the ESEA reauthorization process is an obvious place to begin.

In one sense, the work has already begun. This can be seen, for example, in the Safe Schools Improvement Act, introduced by Rep. Sanchez in the House of Representatives and by Senators Bob Casey and Mark Kirk.<sup>47</sup> That bill, which may be included in NCLB reauthorization, requires various forms of data-gathering, reporting, and policy-development with respect to bullying and harassment of various minority students. Significantly, religious harassment is included in this bill together with various other forms of prohibited discrimination.

This is an important inclusion, regardless of one’s views of other provisions of the legislation, and would be a useful step forward. In order to be really useful, though, this bill should be amended to include a straightforward statutory bar on religious harassment accompanied by OCR enforcement. The same can be said of analogous provisions of the Tyler Clementi Higher Education Anti-Harassment Act (H.R. 1048/S 540), which would provide similar anti-bullying provisions with respect to higher education.<sup>48</sup> NCLB reauthorization will provide a very important opportunity for Congress to ban religious harassment and bullying in the public schools – and this opportunity should not be squandered.

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<sup>47</sup> See Appendix D.

<sup>48</sup> See Appendix C.

### *Religious Freedom in Education Act*

Alternatively, Congress could pass a free-standing bill which would amend Title VI to prohibit religious discrimination in federally funded educational programs and activities, subject to certain carefully drawn exceptions. During the last Congress, Senator Arlen Specter and Rep. Brad Sherman introduced precisely this sort of legislation (the “Specter/Sherman Bill” or H.R. 6216, attached hereto as Appendix B).<sup>49</sup> The Specter/Sherman Bill is interesting, because it is not limited to banning religious harassment; instead, it also would bar other forms of religious discrimination.

The Specter/Sherman Bill’s key provision is as follows: “No person in the United States shall, on the ground of religion, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, an educational program or activity receiving Federal financial assistance.”

In its current form, this bill contains three key exceptions to the general nondiscrimination principle that it establishes. First, it would not apply to religiously oriented institutions. This is an important but delicate exception, particularly in the higher education context. In my experience, there is widespread support both for the general rule that religious discrimination should be banned in federally funded education and for the need to create some kind of exception for religious institutions. Unfortunately, there seems to be little consensus at this juncture with respect to the proper scope of such an exception. That is to say, there is agreement that there should be such an exception but not as to how broad it should be.

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<sup>49</sup> See, generally, Morton A. Klein and Susan Tuchman, *Legislation to Protect Students from Anti-Semitic Harassment*, JEWISH EXPONENT (Oct. 7, 2010).

Second, the Specter/Sherman Bill would not require educational institutions to provide reasonable accommodations to students on the basis of religion, although such requirements may already exist as a matter of constitutional, state or local law or internal education law. The question of accommodations is an important one, and it may be argued that Congress should address the issue at some point. This issue appears to be outside the scope of the Commission's current inquiry, so I will only observe that it appears to be outside the scope of Specter/Sherman too, although one could imagine a legislative option that would reach this issue.

Third, the Specter/Sherman Bill contains an express provision that would prevent it from being used to protect the ability of religious student organizations to choose members or officers in ways that might conflict with institutional nondiscrimination policies. This carve-out provision was drafted prior to the Supreme Court's decision in *Christian Legal Society v. Martinez*.<sup>50</sup> The purpose of this provision is to avoid taking a position, one way or another, on this contentious issue. The provision is not intended to "overrule" *Martinez* in any respect, nor would that be a likely result if the bill were to be passed.

The Specter/Sherman Bill has provided an invaluable service by stimulating public discussion about how best to statutorily bar religious harassment in federal taxpayer-supported schools. During this early phase of the legislative process, the particular legislative language provided in the current draft should be considered only a useful basis for beginning discussion.

### *Conclusion*

Student-on-student religious harassment remains a serious problem in many public schools across the country. The federal government has done too little to address it. As a legal

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<sup>50</sup> 561 U.S. \_\_\_, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010)



matter, the basic stumbling block facing federal civil rights enforcement is Congress' continuing failure to prohibit religious harassment in federally funded educational programs and activities. Russlynn Ali, the Obama administration's assistant secretary of education for civil rights, should be commended for her outstanding work in clarifying that OCR will protect religious minority students against ethnic or ancestral discrimination. Nevertheless, more must be done, and only Congress has the power to do it. The policy solution to this problem must include a statutory bar on religious harassment in federally funded educational programs and activities, which should be enforced analogously to OCR's enforcement of Title VI race and national origin cases. Congress should have done this many years ago. This Commission can provide a necessary service to the country by urging Congress to do it now.

## APPENDIX A

### Bullying as a Civil Rights Violation:

#### The U.S. Department of Education's Approach to Harassment

Kenneth L. Marcus<sup>51</sup>

The Obama administration recently mounted a high-profile campaign against bullying in public schools, staging a White House conference on bullying prevention, featuring the President and first lady; creating a White House anti-bullying Web site, [stopbullying.gov](http://stopbullying.gov); and issuing new regulatory guidance ostensibly to combat this problem.<sup>52</sup> The administrative core of the campaign has been a new federal bullying policy issued by the U.S. Department of Education's Office for Civil Rights (OCR) on October 26, 2010.<sup>53</sup> This policy, conveyed in a ten-page "Dear Colleague" guidance letter signed by Assistant Secretary of Education for Civil Rights Russlynn Ali, has been controversial: supporters have welcomed new protections for minority victims of this social problem, while critics have argued that the Obama administration has effectively created a new right unauthorized by Congress. As a substantive matter, two things must be said about OCR's new bullying policy. First, it is neither new nor a bullying policy. Rather, it is a repackaging of longstanding OCR interpretations of harassment law. In this sense, as this article will show, it is not what supporters and critics alike have assumed it to be. Nevertheless, it is an important document, because there is considerable policy significance in the Obama administration's determination as to which of OCR's prior decisions merit this form of codification, although its greatest substantive contribution may lie in an area that has received scant attention. Second, it is neither a straightforward application of federal anti-discrimination statutes, nor a faithful application of judicial

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<sup>51</sup> Kenneth L. Marcus is Executive Vice President and Director of The Anti-Semitism Initiative at the Institute for Jewish & Community Research and author of **JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA** (Cambridge University Press 2010). He previously served as Staff Director of the U.S. Commission on Civil Rights (2004-2008) and was delegated the authority of Assistant Secretary of Education for Civil Rights (2003-2004). Helpful comments from Roger Clegg are gratefully acknowledged.

<sup>52</sup> See Nia-Malika Henderson, *Obama speaks out against bullying, says, 'I wasn't immune'*, **THE WASHINGTON POST**, Mar. 11, 2011, [http://www.washingtonpost.com/blogs/44/post/obama-speaks-out-against-bullying-says-i-wasnt-immune/2011/03/10/ABTfMDQ\\_blog.html](http://www.washingtonpost.com/blogs/44/post/obama-speaks-out-against-bullying-says-i-wasnt-immune/2011/03/10/ABTfMDQ_blog.html)

<sup>53</sup> Russlynn Ali, Assistant Secretary of Education for Civil Rights, Dear Colleague Letter (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>

case law. Instead, it provides OCR's distinctive and controversial interpretation of its civil rights statutes, deviating in significant ways from the Courts' precedents.<sup>54</sup>

## I. An Harassment Policy in Disguise

Given the amount of news coverage and political buzz that have surrounded the topic of bullying, it is not surprising that the Obama administration would want to take a stand on it – or at least to be perceived as having done so. On its face, the OCR anti-bullying policy appears to be about the bullying. This may explain why supporters hailed the policy as a necessary reminder of federal laws against bullying,<sup>55</sup> and why some critics decried it for inventing a federal rights against bullying that does not really exist.<sup>56</sup> The confusion is understandable in light of the document's introductory paragraph, which begins as follows:

In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students.<sup>57</sup>

Despite these prefatory words, the ensuing policy has nothing to do with bullying. Its topic, rather, is harassment in federally funded educational programs and activities. "I am writing to remind you," Assistant Secretary Ali writes, "that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by [OCR]."<sup>58</sup> Having made this gesture towards the politically fashionable topic of bullying, Ali is then able to entirely ignore it for the remainder of her 10-page policy missive and to focus instead on the topic

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<sup>54</sup> OCR's applicable civil rights statutes include Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (sex); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (race, color or national origin); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (disability) and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* (disability).

<sup>55</sup> See Dana Rudolph, *White House Hosts Anti-Bullying Forum*, **WINDY CITY TIMES**, <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=30913> (syndicated column).

<sup>56</sup> See Hans Bader, *Washington Invents an Anti-Bullying Law*, **MINDING THE CAMPUS** (Mar. 21, 2011), [http://www.mindingthecampus.com/originals/2011/03/\\_by\\_hans\\_bader\\_theres.html](http://www.mindingthecampus.com/originals/2011/03/_by_hans_bader_theres.html) [hereinafter, "*Anti-Bullying Law*"].

<sup>57</sup> *Id.* at 1.

<sup>58</sup> *Id.*

which really concerns her, namely, harassment. The reason for this slight-of-hand is obvious: OCR has no jurisdiction over bullying, but it does have jurisdiction over certain forms of discrimination. While Ali is not wrong to say that her policy applies to those forms of bullying which also trigger antidiscrimination laws, the policy equally addresses non-bullying discrimination while saying nothing at all about non-discriminatory bullying. In other words, it is about harassment, not bullying.

## II. An Expansive Reading

As a *harassment* policy, OCR's new guidance has been widely and correctly understood as providing an "expansive reading" of the applicable statutes.<sup>59</sup> While this has been a source of praise in some circles, it has also occasioned strong criticism from at least one former OCR attorney who has characterized the policy as an "egregious display of administrative overreaching that shows disregard for the federal courts and the legal limits on its own jurisdiction."<sup>60</sup> This section will address the broad interpretation which OCR's new policy has taken with respect to the applicable legal standard, the status of "single-incident" harassment, the notice requirement, the status of sexual orientation, and the question of anti-Semitism.

### A. The Legal Standard for Establishing Harassment

The new OCR policy has been roundly criticized for announcing a liberal standard for establishing harassment under OCR's statutes which ignores or disregards the more restrictive standard previously adopted by the U.S. Supreme Court.<sup>61</sup> In fairness, it should be acknowledged that this deviation is not unique to the Obama administration's approach, since the

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<sup>59</sup> See, e.g., letter of Francisco M. Negrón, Jr., General Counsel, NSBA, to Charlie Rose, General Counsel, U.S. Department of Education (Dec. 7, 2010), <http://www.nsba.org/SchoolLaw/COSA/Updates/NSBA-letter-to-Ed-12-07-10.pdf> (commenting on "expansive" interpretation); Wendy Kaminer, *Obama Administration: Soft on Bullying, Hard on Speech*, **THE ATLANTIC**, (Mar. 23, 2011), <http://www.theatlantic.com/politics/archive/2011/03/obama-administration-soft-on-bullying-hard-on-speech/72926/> (same).

<sup>60</sup> Bader, *Anti-Bullying Law*, supra note 6. Although this article addresses several of the most important and representative policy issues raised by the new guidance it is not comprehensive in its scope. In addition to the issues addressed here, questions may arise, for example, about the notice requirement which the new OCR policy imposes on schools and colleges.

<sup>61</sup> For representative criticisms, see, e.g., Negrón, supra note 9 at 2-3 (criticizing new policy's deviation from Davis); Kaminer, supra note 9 (same); Hans Bader, *Obama Administration Undermines Free Speech and Due Process in Crusade Against Harassment and Bullying*, **OPENMARKET.ORG**, <http://www.openmarket.org/2011/03/22/obama-administration-undermines-free-speech-and-due-process-in-crusade-against-harassment-and-bullying/> (same) [hereinafter, Bader, "*Harassment and Bullying*"].

new policy merely reiterates a standard that OCR announced as early as 1994<sup>62</sup> and which OCR reiterated during the second George W. Bush administration.<sup>63</sup> Nevertheless, the conflict is a real one, which the Obama administration has only exacerbated by extending it.

The new OCR policy employs the “severe, pervasive, *or* persistent” standard.” Under this standard, “[h]arassment creates a hostile environment when the conduct is sufficiently severe, pervasive, *or* persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school...”<sup>64</sup> This deviates from the 1999 “severe, pervasive, *and* objectively offensive” standard that the Supreme Court established in *Davis v Monroe County Bd. of Educ.*<sup>65</sup> That case held that Title IX plaintiffs seeking money damages “must establish sexual harassment of students that is so severe, pervasive, *and* objectively offensive ...that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”<sup>66</sup>

The difference between OCR’s disjunctive standard and the *Davis* Court’s conjunctive standard is most apparent in cases where plaintiffs allege a single severe but (by definition) non-pervasive offense. Under OCR policy, a single incident of harassment may be sufficient to violate its regulations,<sup>67</sup> even though the *Davis* Court expressly admonished that “we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.”<sup>68</sup>

OCR’s continuing failure to conform its regulations to Supreme Court standards renders its guidance vulnerable to challenge. OCR’s response to this criticism has been to distinguish *Davis* on the ground that the Court was addressing only money damages actions, while different

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<sup>62</sup> See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (Mar. 10 1994) (announcing substantially same standard); **OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUC, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES** 6 (2001), <http://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf> (hereinafter, “**SEXUAL HARASSMENT GUIDANCE**”)(same).

<sup>63</sup> The Clinton-era policy was archived during the first George W. Bush administration but restored during the second. See Stephanie Monroe, Dear Colleague Letter (Jan. 25, 2006), <http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> (reissuing Clinton-era **SEXUAL HARASSMENT GUIDANCE** with substantially same standard).

<sup>64</sup> Ali, Dear Colleague Letter, *supra* note 3 at 2 (emphasis added).

<sup>65</sup> *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 653-54 (1999) (emphasis added).

<sup>66</sup> *Id.*

<sup>67</sup> Ali, Dear Colleague Letter, *supra* note 3 at 2; **SEXUAL HARASSMENT GUIDANCE**.

<sup>68</sup> *Davis*, 526 U.S. at 652-53.

considerations apply in OCR's administrative proceedings.<sup>69</sup> For example, an OCR spokesperson recently argued that judicial money-damages standards are favorable to schools because "[c]ourts don't want to make schools pay punitive damages or lawyers' fees."<sup>70</sup> On the other hand, this spokesperson reportedly argued,<sup>71</sup> "OCR standards are different" because of the Department's "contractual relationship with schools," which creates "an obligation to see to it that people receive equal benefits and have equal access."<sup>72</sup> In fairness to OCR, this argument is not entirely without merit. It is at least arguable that federal funding institutions' obligations to ensure that their funds are not used in a manner that violates constitutional requirements may sometimes entail standards that are more stringent than those that courts craft for damages cases. In this instance, however, OCR would face a steep challenge in defending its policy in federal court, given that the Supreme Court rejected the single-incident approach based not upon such issues as punitive damages or lawyers' fees but upon its assessment of congressional intent in drafting the relevant language.

## **B. Gender Identity and Sexual Orientation**

Equally controversial has been OCR's apparent movement towards recognizing gay, lesbian, bisexual and transgender students as a protected minority group. Both supporters and critics have received the new policy as a tool to provide enhanced protections for gay students against bullying and harassment. In fact, the new policy has little to say about sexual orientation that is either substantive or new. The policy does continue OCR's longstanding recognition of gender identity discrimination, which relates closely to sexual orientation. This aspect of OCR's harassment policy is neither new nor entirely out of line with judicial doctrine (although its consistency with the statutory text is another question altogether).

The new OCR's policy uses precise if somewhat vacuous terms to recognize that federal law does not bar sexual orientation discrimination in schools and colleges, while conveying the sense that the Education Department is sensitive to the concerns of gay students: "Although

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<sup>69</sup> See, e.g., *Education Department attorney addresses NSBA's objections to bullying letter*, **SBN CONFERENCE DAILY** (Apr. 2011), <http://schoolboardnews.nsba.org/2011/04/education-department-attorney-addresses-nsba%E2%80%99s-objections-to-bullying-letter/> (reporting on the justification which OCR Regional Counsel Paul Grossman, speaking on behalf of Assistant Secretary Ali, provided for this discrepancy).

<sup>70</sup> *Id.*

<sup>71</sup> For a similar argument, based on a constitutional decision rules analysis, see Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 **WM. & MARY B. OF RTS. J.** 886 n. 292 (Feb. 2007)

<sup>72</sup> *Id.*

Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.”<sup>73</sup> It is important in reading this key language to appreciate that it means almost nothing; specifically, it does not mean that any substantive rights are afforded to LGBT students on the basis of their sexual orientation. Instead, it means only that a lesbian student who faces sexist treatment will get the same protections as any other girl. This proposition is entirely uncontroversial. Moreover, it is entirely recycled from Clinton administration guidance, which said substantially the same thing.<sup>74</sup>

The policy continues with another provision which seems to have excited some degree of popular interest, although it is in fact similarly empty: “When students are subjected to harassment on the basis of their LGBT status, they may also ...be subjected to forms of sex discrimination prohibited under Title IX.”<sup>75</sup> This means nothing more than that gay students who face anti-gay discrimination may face other forms of discrimination as well. The guidance continues, using language that similarly means less than it seems to say: “The fact that the harassment includes anti-LGBT comments or is partly based on the target’s actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment.”<sup>76</sup> In other words, if a lesbian is harassed for being both gay and female, OCR will investigate the sexism charges and ignore the sexual orientation issue. This too is recycled from the Clinton administration and means nothing more now than it meant a decade ago.<sup>77</sup>

The closest that the new OCR policy comes to protecting GLBT students – for better or worse -- is in its discussion of gender identity. Since *Price Waterhouse*, the courts have interpreted sex discrimination to include various forms of sex-stereotyping.<sup>78</sup> The new OCR

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<sup>73</sup> Ali, *supra* note 3 at 8.

<sup>74</sup> Cf. **SEXUAL HARASSMENT GUIDANCE** at 8 (“Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance”).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 3 (“Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.”) (citations omitted).

<sup>78</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

policy recognizes this legal development, which is hardly new, and describes it in terms that are hardly radical:

Title IX ... prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.<sup>79</sup>

Here again, the new OCR policy merely recycles the Clinton administration policy.<sup>80</sup> The policy itself does not exceed the scope provided by *Price Waterhouse*, but it certainly pushes the envelope on statutory interpretation. Moreover, it is easy to imagine cases in which an aggressive agency could push the boundaries between gender identity and sexual orientation – boundaries which are quite porous to begin with – in which case attentive oversight will be necessary to ensure that *ultra vires* measures are not taken.

### C. Discrimination Against Ethno-Religious Groups

The one area in which the new OCR policy has truly changed course can be found, ironically, in a section which has received relatively little attention, namely, its treatment of anti-Semitism and related forms of ethno-religious harassment.<sup>81</sup> This has been difficult policy terrain for OCR, because Title VI prohibits discrimination on the basis of race or national origin, but no statute within OCR's jurisdiction bars discrimination on the basis of religion.<sup>82</sup> This created a policy dilemma for OCR. On the one hand, anti-Semitism is universally understood to encompass racial and ethnic as well as religious components; on the other, federal bureaucrats have been reluctant to be perceived as treating Jews as members of a separate race or nation,

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<sup>79</sup> Ali, *supra* note 3 at 7-8.

<sup>80</sup> **SEXUAL HARASSMENT GUIDANCE** at 3 (“[G]ender-based harassment ... based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond...”) (citation omitted).

<sup>81</sup> Ali, *supra* note 3 at 5-6.

<sup>82</sup> See Kenneth L. Marcus, *The Most Important Right We Think We Have But Don't: Freedom From Religious Discrimination in Education*, 7 **NEV. L. J.** 171 (Fall 2006).



given the genocidal as well as pseudo-scientific connotations which these terms have historically had.<sup>83</sup>

The new OCR policy – which reverses a position taken earlier in the Obama administration -- firmly establishes that OCR will prosecute anti-Semitism cases that are based on “actual or perceived shared ancestry or ethnic characteristics,”<sup>84</sup> siding with the position taken by the first George W. Bush administration and against the position taken by the second.<sup>85</sup>

Until 2004, OCR typically erred on the side of declining jurisdiction in cases alleging anti-Semitism on the grounds that Jewishness is exclusively a religion. This changed during the first George W. Bush administration when this author issued a new policy which established that OCR’s jurisdiction over anti-Jewish ethnic discrimination is not diminished by the fact that Judaism is also a religion.<sup>86</sup> OCR’s leadership during the second George W. Bush administration and at the outset of the Obama administration were differently inclined, and they tended to disregard the 2004 policy.<sup>87</sup> The new OCR policy is correctly characterized as a “clarification,” in the sense that it merely continues and expands upon the 2004 policy, but it is substantively important because that policy had been largely disregarded for over five years.

In contrast to other sections of the new OCR policy, the agency’s treatment of anti-Semitic harassment relies upon a relatively conservative reading of the applicable statute. The Supreme Court had previously held, in the case of *Shaare Tefila Congregation v. Cobb*, that Jews should be considered members of a distinct “race” for purposes of interpreting the Civil Rights Act of 1866.<sup>88</sup> The *Shaare Tefila* Court had applied an originalist theory for resolving this question, using legislative history and contemporaneous documents to determine that in 1866 Jews were considered to be members of a racially separate group. In a companion case to *Shaare Tefila*, the Court observed in *dicta* that “discrimination on the basis of ancestry” against

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<sup>83</sup> See KENNETH L. MARCUS, *JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA* 9-10, 23-24, 98-103 (Cambridge 2010).

<sup>84</sup> Ali, *supra* note 3 at 5.

<sup>85</sup> This abbreviated history of OCR’s treatment of anti-Semitism claims is drawn from *id.* at 26-35, 81-97, 202 and Kenneth L. Marcus, *2 The New OCR Antisemitism Policy*, *JOURNAL FOR THE STUDY OF ANTISEMITISM* \_\_ (forthcoming 2011), [http://www.jsantisemitism.org/pdf/jsa\\_2-2.pdf](http://www.jsantisemitism.org/pdf/jsa_2-2.pdf).

<sup>86</sup> Kenneth L. Marcus, Deputy Assistant Secretary for Civil Rights Enforcement, Delegated the Authority of Assistant Secretary of Education for Civil Rights, Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004) (the “2004 policy”), <http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

<sup>87</sup> Marcus, *JEWISH IDENTITY*, *supra* note 33 at 81-97.

<sup>88</sup> 481 U.S. 615 (1987).

such groups should also be considered, for the same reason, to be members of a distinct race for purposes of interpreting the Equal Protection Act.<sup>89</sup>

Intuitively, one might think the same methodology would generate the opposite result with respect to Title VI, since by 1964 Jews were no longer widely considered to be racially distinct. That intuitive position would however misunderstand the intent of Congress in passing the 1964 Civil Rights Act.<sup>90</sup> It is now long-established that congressional sponsors intended not to create new rights for racial minorities but rather to create new enforcement mechanisms to protect the rights that were established by the post-Civil War amendments.<sup>91</sup> As Senator Hubert Humphrey explained during floor debate, “the bill bestows no new rights” but instead only seeks “to protect the rights already guaranteed in the Constitution of the United States, but which have been abridged in certain areas of the country.”<sup>92</sup> For this reason, as OCR correctly determined in 2004 and again in 2010, the scope of protection afforded under Title VI must be co-extensive with that of the Equal Protection Act.<sup>93</sup> In affirming that Title VI can be used to prosecute anti-Semitic harassment, OCR merely applies *Shaare Tefila* in a manner that is compelled by the language of the 1964 Act.

Although OCR’s new policy is correct in its treatment of anti-Semitism, the viability of this policy in practice will turn on three questions.<sup>94</sup> First, to what extent will OCR apply this policy in cases involving the so-called new anti-Semitism? In recent years, anti-Semitism on American college campuses has frequently related in some fashion to animus against the State of Israel.<sup>95</sup> OCR must draw a clear line between constitutionally protected criticism of Israel and anti-Semitic harassment. Second, how will OCR investigators distinguish between unlawful ethnic or ancestral anti-Semitism and those forms of religious anti-Semitism which are outside the scope of OCR’s new policy? This will be a difficult challenge in practice. Some

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<sup>89</sup> *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613, note 5 (1987).

<sup>90</sup> See, generally, **MARCUS, JEWISH IDENTITY**, supra note 33 at 105-108.

<sup>91</sup> See, e.g., *Gratz v. Bolinger*, 539 U.S. 244, 276 n.23 (2003); *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Regents of the University of California v. Bakke*, 438 U.S. 265, 286 (1978) (Powell, J.); *Bakke* at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part); *Marcus, Anti-Zionism*, supra note 21 at 866-67, 72-74.

<sup>92</sup> 110 Cong. Rec. at 5252. This sentiment, which the Courts have treated as representative, is echoed throughout the legislative history of Title VI. See *Marcus*, supra note 21 at 866-867 and sources cited therein.

<sup>93</sup> See, generally, **MARCUS, JEWISH IDENTITY**, supra note 33.

<sup>94</sup> These three issues are discussed at greater length in *Marcus, OCR Anti-Semitism Policy*, supra note 35.

<sup>95</sup> See, generally, **GARY A. TOBIN, ARYEH K. WEINBERG & JENNA FERER, THE UNCIVIL UNIVERSITY: INTOLERANCE ON COLLEGE CAMPUSES** (2d ed. 2009).

commentators have argued, in part for this reason, that Congress should ban religious discrimination in education, or at least religious harassment, in the same way that it bans harassment of racial and ethnic minorities.<sup>96</sup> Finally, how faithfully will OCR investigators adhere to constitutional limitations on harassment investigations? This difficult question arises whenever federal agencies confront putative hostile environments, but it is a particular challenge for the new OCR policy, as the next section will address.

### **III. The First Amendment**

In some respects, the new OCR policy may be as important, as controversial and as problematic for what it omits as for what it includes. In particular, OCR has been criticized for excluding any discussion of First Amendment limitations upon its harassment policy. Wendy Kaminer, for example, has lambasted the administration's "failure to advise schools on their obligations to respect First Amendment freedoms."<sup>97</sup> This omission is conspicuous, since OCR has usually been careful in recent years to state explicitly the manner in which Free Speech concerns circumscribe its antidiscrimination policies, especially in the area of hostile environment law.<sup>98</sup>

OCR's failure to recognize First Amendment limitations is particularly conspicuous in its new policy document, given the aggressive position that it is taking on the legal standards for establishing harassment. To the extent that OCR will find harassment in single-incident cases of offensive speech which are merely "severe, pervasive, *or* persistent," First Amendment concerns will inevitably arise. Indeed, some critics have argued that this definition is so broad that it will inevitably reach speech protected by the First Amendment.<sup>99</sup> The American Bar Association has taken a middle position, endorsing the new policy but admonishing that it "should not be used to

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<sup>96</sup> See, e.g., Kenneth L. Marcus, *Privileging and Protecting Schoolhouse Religion*, 37 *JOURNAL OF LAW & EDUCATION* 505 (Oct. 2008).

<sup>97</sup> Kaminer, *supra* note 9.

<sup>98</sup> See, e.g., Gerald A. Reynolds, *First Amendment Dear Colleague Letter*, July 28, 2003, <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

<sup>99</sup> Bader, *Harassment and Bullying*, *supra* note 6.

compromise the protected First Amendment free speech rights of students.”<sup>100</sup> OCR would be wise to heed the ABA’s counsel, advising schools that the new policy should not be construed in ways that will limit speech protected under the First Amendment.

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<sup>100</sup> American Bar Ass’n Resolution 107A, adopted by the House of Delegates, Feb. 14, 2011, [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/house\\_of\\_delegates/107a\\_2011\\_my.authc heckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/house_of_delegates/107a_2011_my.authc heckdam.pdf)

## APPENDIX B

### H.R.6216 -- To amend title VI of the Civil Rights Act of 1964 to prohibit discrimination on the ground of religion in educational programs or activities. (Introduced in House - IH)

HR 6216 IH

111th CONGRESS  
2d Session  
**H. R. 6216**

To amend title VI of the Civil Rights Act of 1964 to prohibit discrimination on the ground of religion in educational programs or activities.

#### IN THE HOUSE OF REPRESENTATIVES

**September 23, 2010**

Mr. SHERMAN (for himself and Mr. ENGEL) introduced the following bill; which was referred to the Committee on the Judiciary

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#### A BILL

To amend title VI of the Civil Rights Act of 1964 to prohibit discrimination on the ground of religion in educational programs or activities.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### **SECTION 1. NONDISCRIMINATION ON THE GROUND OF RELIGION.**

Section 601 of the Civil Rights Act of 1964 (42 U.S.C. 2000d) is amended--

(1) by inserting '(a)' before 'No person'; and

(2) by adding at the end the following:

(b)(1) No person in the United States shall, on the ground of religion, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, an educational program or activity receiving Federal

financial assistance.

` (2) Paragraph (1) shall not be construed--

` (A) to limit an educational entity covered by section 606 with a religious affiliation, mission, or purpose from applying policies for the admission of students, criteria for attaining academic degrees, regulations governing student conduct and student organizations, or policies for the employment of faculty or staff, if the corresponding policies, criteria, or regulations relate to the religious affiliation, mission, or purpose;

` (B) to require an educational entity covered by section 606 to provide accommodation to any student's religious obligations (including dietary restrictions and school absences); or

` (C) with respect to an educational entity covered by section 606 that permits expressive organizations to exist by funding or otherwise recognizing the organizations, to require the entity to limit such organizations from exercising their freedom of expressive association by establishing criteria for their membership or leadership.'.

## APPENDIX C

### H.R.1048 -- Tyler Clementi Higher Education Anti-Harassment Act of 2011 (Introduced in House - IH)

HR 1048 IH

112th CONGRESS  
1st Session  
**H. R. 1048**

To prevent harassment at institutions of higher education, and for other purposes.

#### IN THE HOUSE OF REPRESENTATIVES

**March 11, 2011**

Mr. HOLT (for himself, Mr. SIRES, Mr. ROTHMAN of New Jersey, Mr. PALLONE, Mr. PASCRELL, Mr. HONDA, and Ms. LINDA T. SANCHEZ of California) introduced the following bill; which was referred to the Committee on Education and the Workforce

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#### A BILL

To prevent harassment at institutions of higher education, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### SECTION 1. SHORT TITLE.

This Act may be cited as the 'Tyler Clementi Higher Education Anti-Harassment Act of 2011'.

#### SEC. 2. INSTITUTIONAL AND FINANCIAL ASSISTANCE INFORMATION FOR STUDENTS.

Section 485(f) of the Higher Education Act of 1965 (20 U.S.C. 1092(f)) is amended--

(1) by striking the subsection heading and inserting ` Disclosure of Campus Security and Harassment Policy and Campus Crime Statistics.';

(2) in paragraph (6)(A)--

(A) by redesignating clauses (ii) and (iii) as clauses (vi) and (vii), respectively; and

(B) by inserting after clause (i) the following:

` (ii) The term `commercial mobile service' has the meaning given the term in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)).

` (iii) The term `electronic communication' means any transfer of signs, signals, writing, images, sounds, or data of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system.

` (iv) The term `electronic messaging services' has the meaning given the term in section 102 of the Communications Assistance for Law Enforcement Act (47 U.S.C. 1001).

` (v) The term `harassment' means conduct, including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility (including conduct that is undertaken in whole or in part, through the use of electronic messaging services, commercial mobile services, electronic communications, or other technology) that--

` (I) is sufficiently severe, persistent, or pervasive so as to limit a student's ability to participate in or benefit from a program or activity at an institution of higher education, or to create a hostile or abusive educational environment at an institution of higher education; and

` (II) is based on a student's actual or perceived--

` (aa) race;

` (bb) color;

` (cc) national origin;

` (dd) sex;

` (ee) disability;

` (ff) sexual orientation;

` (gg) gender identity; or

` (hh) religion.';

(3) by redesignating paragraphs (9) through (18) as paragraphs (10) through (19), respectively; and

(4) by inserting after paragraph (8) the following:

` (9)(A) Each institution of higher education participating in any program under this title, other than a foreign institution of higher education, shall develop and distribute as part of the report described in paragraph (1) a statement of policy regarding harassment, which shall include--

` (i) a prohibition of harassment of enrolled students by other students, faculty, and staff--

` (I) on campus;

` (II) in noncampus buildings or on noncampus property;

` (III) on public property;





(c) Amount of Grant Awards- The Secretary shall ensure that each grant awarded under this section is of sufficient amount to enable the grantee to meet the purpose of this section.

(d) Authorized Activities- An eligible entity that receives a grant under this section shall use the funds made available through the grant to address one or more of the types of harassment listed in section 485(f)(6)(A)(v)(II) of the Higher Education Act of 1965 (20 U.S.C. 1092(f)(6)(A)(v)(II)), as amended by section 2 of this Act, by initiating, expanding, or improving programs--

(1) to prevent the harassment of students at institutions of higher education;

(2) at institutions of higher education that provide counseling or redress services to students who have suffered such harassment or students who have been accused of subjecting other students to such harassment; or

(3) that educate or train students, faculty, or staff of institutions of higher education about ways to prevent harassment or ways to address such harassment if it occurs.

(e) Application- To be eligible to receive a grant under this section, an eligible entity shall submit an application to the Secretary at such time, in such manner, and containing such information, as the Secretary may require.

(f) Duration; Renewal- A grant under this section shall be awarded for a period of not more than 3 years. The Secretary may renew a grant under this section for one additional period of not more than 2 years.

(g) Award Considerations- In awarding a grant under this section, the Secretary shall select eligible entities that demonstrate the greatest need for a grant and the greatest potential benefit from receipt of a grant.

(h) Report and Evaluation-

(1) EVALUATION AND REPORT TO THE SECRETARY- Not later than 6 months after the end of the eligible entity's grant period, the eligible entity shall--

(A) evaluate the effectiveness of the activities carried out with the use of funds awarded pursuant to this section in decreasing harassment and improving tolerance; and

(B) prepare and submit to the Secretary a report on the results of the evaluation conducted by the entity.

(2) EVALUATION AND REPORT TO CONGRESS- Not later than 12 months after the date of receipt of the first report submitted pursuant to paragraph (1) and annually thereafter, the Secretary shall provide to Congress a report that includes the following:

(A) The number and types of eligible entities receiving assistance under this section.

(B) The anti-harassment programs being implemented with assistance under this section and the costs of such programs.

(C) Any other information determined by the Secretary to be useful in evaluating the overall effectiveness of the program

established under this section in decreasing incidents of harassment at institutions of higher education.

(3) BEST PRACTICES REPORT- The Secretary shall use the information provided under paragraph (1) to publish a report of best practices for combating harassment at institutions of higher education. The report shall be made available to all institutions of higher education and other interested parties.

(i) Authorization of Appropriations- There are authorized to be appropriated to carry out this section \$50,000,000 for each of fiscal years 2013 through 2018.

#### **SEC. 4. EFFECT ON OTHER LAWS.**

Nothing in this Act shall be construed to invalidate or limit rights, remedies, procedures, or legal standards available to victims of discrimination under any other Federal law or law of a State or political subdivision of a State, including title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 or 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794, 794a), or the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.). The obligations imposed by this Act are in addition to those imposed by title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

## APPENDIX D

### H.R. 1648 -- Safe Schools Improvement Act of 2011 (Introduced in House - IH)

HR 1648 IH

112th CONGRESS

1st Session

**H. R. 1648**

To amend the Elementary and Secondary Education Act of 1965 to address and take action to prevent bullying and harassment of students.

#### IN THE HOUSE OF REPRESENTATIVES

**April 15, 2011**

Ms. LINDA T. SANCHEZ of California (for herself, Mr. ACKERMAN, Mr. BACA, Ms. BALDWIN, Ms. BERKLEY, Mr. BERMAN, Mr. BLUMENAUER, Ms. BORDALLO, Mr. CAPUANO, Mr. CARNAHAN, Mr. CARSON of Indiana, Mr. CICILLINE, Ms. CLARKE of New York, Mr. CONNOLLY of Virginia, Mr. COSTELLO, Mr. COURTNEY, Mr. CROWLEY, Ms. DELAURO, Mr. DEUTCH, Mr. ELLISON, Mr. ENGEL, Ms. ESHOO, Mr. FILNER, Mr. AL GREEN of Texas, Mr. GRIJALVA, Ms. HANABUSA, Mr. HANNA, Mr. HASTINGS of Florida, Ms. HIRONO, Ms. NORTON, Mr. HOLT, Mr. HONDA, Mr. ISRAEL, Mr. JACKSON of Illinois, Ms. JACKSON LEE of Texas, Mr. KILDEE, Mr. KUCINICH, Ms. LEE of California, Mrs. MALONEY, Ms. MATSUI, Mrs. MCCARTHY of New York, Ms. MCCOLLUM, Mr. MCGOVERN, Mr. MEEKS, Ms. MOORE, Mr. MORAN, Mr. NADLER, Mrs. NAPOLITANO, Mr. NEAL, Mr. OLVER, Mr. PASCRELL, Mr. PAYNE, Ms. PINGREE of Maine, Mr. PLATTS, Mr. POLIS, Mr. PRICE of North Carolina, Ms. RICHARDSON, Mr. ROTHMAN of New Jersey, Ms. ROYBAL-ALLARD, Mr. SABLAN, Ms. LORETTA SANCHEZ of California, Mr. SHERMAN, Ms. SLAUGHTER, Mr. STARK, Ms. SUTTON, Mr. TONKO, Mr. TOWNS, Mr. VAN HOLLEN, Ms. WASSERMAN SCHULTZ, Mr. YARMUTH, and Mr. YOUNG of Alaska) introduced the following bill; which was referred to the Committee on Education and the Workforce

---

**A BILL**

To amend the Elementary and Secondary Education Act of 1965 to address and take action to prevent bullying and harassment of students.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## **SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Safe Schools Improvement Act of 2011'.

## **SEC. 2. FINDINGS.**

Congress finds the following:

- (1) Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.
- (2) Bullying and harassment contribute to high dropout rates, increased absenteeism, and academic underachievement.
- (3) Bullying and harassment includes a range of behaviors that negatively impact a student's ability to learn and participate in educational opportunities and activities that schools offer. Such behaviors can include hitting or punching, teasing or name-calling, intimidation through gestures or social exclusion, and sending insulting or offensive messages through electronic communications such as Internet sites, e-mail, instant messaging, mobile phones and messaging, telephone, or any other means.
- (4) Schools with enumerated anti-bullying and harassment policies have an increased level of reporting and teacher intervention in incidents of bullying and harassment, thereby reducing the overall frequency and number of such incidents.
- (5) Students have been particularly singled out for bullying and harassment on the basis of their actual or perceived race, color, national origin, sex, disability status, sexual orientation or gender identity, among other categories.
- (6) Some young people experience a form of bullying called relational aggression or psychological bullying, which harms individuals by

damaging, threatening, or manipulating their relationships with their peers, or by injuring their feelings of social acceptance.

(7) Interventions to address bullying and harassment and create a positive and safe school climate, combined with evidence-based discipline policies and practices, such as Positive Behavior Interventions and Supports (PBIS) and restorative practices, can minimize suspensions, expulsions, and other exclusionary discipline policies to ensure that students are not 'pushed-out' or diverted to the juvenile justice system.

(8) According to a recent poll, 85 percent of Americans strongly support or somewhat support a Federal law to require schools to enforce specific rules to prevent bullying.

(9) Students, parents, educators, and policymakers have come together to call for leadership and action to address the national crisis of bullying and harassment.

### **SEC. 3. SAFE SCHOOLS IMPROVEMENT.**

(a) In General- Title IV of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7101 et seq.) is amended by adding at the end the following:

#### ***PART D--SAFE SCHOOLS IMPROVEMENT***

#### **SEC. 4401. PURPOSE.**

The purpose of this part is to address the problem of bullying and harassment of students in public elementary schools and secondary schools.

#### **SEC. 4402. STATE REQUIREMENTS.**

(a) State Reporting, Needs Assessment, and Technical Assistance- Each State that receives funds under this Act shall carry out the following:

##### **(1) COLLECTION AND REPORT OF INFORMATION-**

(A) IN GENERAL- The State shall collect and report information on the incidence, prevalence, age of onset, perception of health risk, and perception of social disapproval of bullying and harassment by youth in elementary schools and secondary schools and communities in the State.

` (B) SOURCE OF INFORMATION- In collecting information described in subparagraph (A), the State shall include information collected from incident reports by school officials, anonymous student surveys, and anonymous teacher, administrator, specialized instructional support personnel, and other school personnel surveys reported to the State on a school-by-school basis but shall not identify victims of bullying or harassment or persons accused of bullying or harassment.

` (C) REPORT- The chief executive officer of the State, in cooperation with the State educational agency, shall--

` (i) submit a biennial report on the information described in this paragraph to the Secretary; and

` (ii) make such information readily available to the public.

` (2) NEEDS ASSESSMENT- The State shall conduct, and publicly report the results of, a needs assessment for bullying and harassment prevention programs, which shall be based on ongoing State evaluation activities, including data on--

` (A) the incidence and prevalence of reported incidents of bullying and harassment; and

` (B) the perception of students, parents, and communities regarding their school environment, including with respect to the prevalence and seriousness of incidents of bullying and harassment and the responsiveness of the school to those incidents.

` (3) TECHNICAL ASSISTANCE- The State shall provide technical assistance to local educational agencies and schools in their efforts to prevent and appropriately respond to incidents of bullying and harassment.

` (b) Available Funding for States- To implement the requirements described in subsection (a), the State may use--

` (1) administrative funds consolidated under section 9201; or

` (2) other funds available to the State under this Act, to the extent consistent with the authorized uses of such funds.

## **SEC. 4403. LOCAL EDUCATIONAL AGENCY REQUIREMENTS.**

(a) Local Educational Agency Discipline Policies, Performance Indicators, and Grievance Procedures- Each local educational agency that receives funds under this Act shall--

(1) include within the agency's comprehensive discipline policies clear prohibitions against bullying and harassment for the protection of all students;

(2) establish and monitor performance indicators for incidents of bullying and harassment;

(3) provide annual notice to parents, students, and educational professionals--

(A) describing the full range of bullying and harassment conduct prohibited by the agency's discipline policies; and

(B) reporting on the numbers and nature of bullying and harassment incidents for each school served by the local educational agency; and

(4) establish and provide annual notice to students, parents, and educational professionals of grievance procedures for students, parents, or educational professionals who seek to register complaints regarding bullying and harassment prohibited by the discipline policies, including--

(A) the name of the local educational agency official who is designated as responsible for receiving such complaints; and

(B) timelines that the local educational agency will follow in the resolution of such complaints.

(b) Available Funding for Local Educational Agencies- To implement the requirements described in subsection (a), the local educational agency may use--

(1) administrative funds consolidated under section 9203; or

(2) other funds available to the local educational agency under this Act, to the extent consistent with the authorized uses of such funds.

## **SEC. 4404. EVALUATION.**



` (a) Biennial Evaluation- The Secretary shall conduct an independent biennial evaluation of programs to combat bullying and harassment in elementary schools and secondary schools, including implementation of the requirements described in sections 4402 and 4403, including whether such programs have appreciably reduced the level of bullying and harassment and have conducted effective parent involvement and training programs.

` (b) Data Collection- The Commissioner for Education Statistics shall collect data, that are subject to independent review, to determine the incidence and prevalence of bullying and harassment in elementary schools and secondary schools in the United States. The collected data shall include incident reports by school officials, anonymous student surveys, anonymous parent surveys, and anonymous teacher, administrator, specialized instructional support personnel, and other school personnel surveys.

` (c) Biennial Report- Not later than January 1, 2012, and every 2 years thereafter, the Secretary shall submit to the President and Congress a report on the findings of the evaluation conducted under subsection (a) together with the data collected under subsection (b) and data submitted by the States under section 4402(a)(1)(C)(i).

## ` **SEC. 4405. DEFINITIONS.**

` In this part:

` (1) BULLYING- The term `bullying'--

` (A) means conduct, including an electronic communication, that adversely affects the ability of 1 or more students to participate in or benefit from the school's educational programs or activities by placing the student (or students) in reasonable fear of physical harm; and

` (B) includes conduct that is based on--

` (i) a student's actual or perceived--

` (I) race;

` (II) color;

` (III) national origin;

` (IV) sex;

` (V) disability;

` (VI) sexual orientation;

` (VII) gender identity; or

` (VIII) religion;

` (ii) any other distinguishing characteristics that may be defined by a State or local educational agency; or

` (iii) association with a person or group with 1 or more of the actual or perceived characteristics listed in clause (i) or (ii).

` (2) ELECTRONIC COMMUNICATION- The term `electronic communication' means a communication transmitted by means of an electronic device, such as a telephone, cellular phone, computer, or pager.

` (3) HARASSMENT- The term `harassment'--

` (A) means conduct, including an electronic communication, that adversely affects the ability of 1 or more students to participate in or benefit from the school's educational programs or activities because the conduct, as reasonably perceived by the student (or students), is so severe, persistent, or pervasive; and

` (B) includes conduct that is based on--

` (i) a student's actual or perceived--

` (I) race;

` (II) color;

` (III) national origin;

` (IV) sex;

` (V) disability;

` (VI) sexual orientation;

` (VII) gender identity; or

` (VIII) religion;

^ (ii) any other distinguishing characteristic that may be defined by a State or local educational agency; or

^ (iii) association with a person or group with 1 or more of the actual or perceived characteristics listed in clause (i) or (ii).

## ^ **SEC. 4406. EFFECT ON OTHER LAWS.**

^ (a) Federal and State Nondiscrimination Laws- Nothing in this part shall be construed to invalidate or limit rights, remedies, procedures, or legal standards available to victims of discrimination under any other Federal law or law of a State or political subdivision of a State, including title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 or 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794, 794a), or the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.). The obligations imposed by this part are in addition to those imposed by title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

^ (b) Free Speech and Expression Laws- Nothing in this part shall be construed to alter legal standards regarding, or affect the rights (including remedies and procedures) available to individuals under, other Federal laws that establish protections for freedom of speech or expression.

## ^ **SEC. 4407. RULE OF CONSTRUCTION.**

^ Nothing in this part shall be construed to prohibit a State or local entity from enacting any law with respect to the prevention of bullying or harassment of students that is not inconsistent with this part.'

(b) Table of Contents- The table of contents in section 2 of the Elementary and Secondary Education Act of 1965 is amended by inserting after the item relating to section 4304 the following:

## ^ **PART D--Safe Schools Improvement**

^ Sec. 4401. Purpose.

^ Sec. 4402. State requirements.

- ˘ Sec. 4403. Local educational agency requirements.
  - ˘ Sec. 4404. Evaluation.
  - ˘ Sec. 4405. Definitions.
  - ˘ Sec. 4406. Effect on other laws.
  - ˘ Sec. 4407. Rule of construction.'.
-